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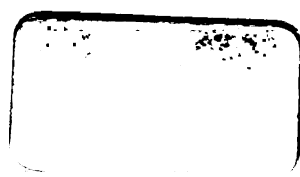
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IRISH JURIST.

VOL. XIV. (VOL. VII. NEW SERIES.)

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND COMMON
LAW, THE LANDED ESTATES COURT, COURT OF PROBATE, AND
COURT OF BANKRUPTCY AND INSOLVENCY.

With a Digest

OF THE CASES REPORTED DURING THE YEARS 1861 AND 1862 IN THE JURIST, AND
IN THE 11 IR. CHAN. AND 11 IR. C. L. REPORTS.

AND AN

Appendix of the Statutes relating to Ireland.

BY WILLIAM WOODLOCK, ESQ., BARRISTER-AT-LAW.

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Reports of Cases

DECIDED IN ALL

THE COURTS OF EQUITY AND COMMON LAW IN IRELAND, AND IN THE HOUSE OF LORDS.

House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-Law.]

ARCHBOLD v. SCULLY.—May 25.

Landlord and tenant—Nonpayment of rent for thirty years—Laches—Acquiescence—Statute of Limitations—3 & 4 Will. 4, c. 27.

D., being seised of an undivided fourth of fee simple and renewable leasehold estates, demised her one-fourth to L. for 999 years, subject to a rent. S. acquired L.'s interest and the other three-fourths. C. succeeded to D.'s interest, and S. paid rent to C. up to 1828, when C. died, devising her interest to A. S. after 1828 denied A.'s title, obtained a renewal of lease in 1835, and paid no rent from 1828 to 1857, when A., who had previously been ignorant of his precise title, filed his petition in the Court of Chancery to have the renewal declared a trust for him. Held, he was not barred by the lapse of time from 1828 or 1835 to 1857, nor by the Statute of Limitations.

If any new rights had been created in the interval, or third parties had been prejudiced by the delay, A. would have been barred by laches or acquiescence: (per Lord Campbell, L.C.)

So long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by nonpayment of rent, for however long a time. The Statute of Limitations merely cuts off the recovery of more than six years' arrears: (per Lord Cranworth.)

The statute 3 & 4 Will. 4, c. 27, s. 24, only bars equitable rights so far as they would have been barred if they had been legal rights: (per Lord Cranworth.)

THIS appeal was brought against a decree of dismissal of the Court of Chancery in Ireland, dated the 7th day of May, 1858, and the decree of the Court of Appeal in Chancery in Ireland, dated the 2nd day of

November, 1858, affirming that dismissal by which appellant's cause petition was dismissed with costs. The object of the cause petition, which was filed on the 22nd of May, 1857, against the respondents William Scully and Thomas Butler, was to establish the title of the appellant to the reversion expectant upon and the rent of £44 4s. 4½d. late Irish currency, reserved by a certain lease, dated the 14th August, 1779, for 999 years, of the one undivided fourth part of the lands of Carrickavantry and Ballykilmurry, in respect of which appellant had no sufficient remedy at law without the aid of a court of equity. The respondent William Scully was beneficially entitled to the interest, and the respondent Thomas Butler was a trustee for him. The following facts appeared upon the pleadings and by the evidence in the cause:—Pierse Power, Esq., being seised and possessed of the entire of the lands of Carrickavantry, situate in the barony of Middlethird, and county of Waterford, under a lease made to him and his heirs for lives renewable for ever, bearing date the 22nd February, 1699, from the Earl of Tyrone, and being seised in fee of the lands of Ballykilmurry, situate in the same county, died sometime in the year 1715, intestate, leaving him surviving John Power, his only son and heir-at-law, and four daughters, Mary Power, Ellen Power, Margaret Power, and Catherine Power. Upon his death his estate and interest in both denominations of lands descended upon and became vested in the said John Power, as his eldest son and heir-at-law, who entered and was seised and possessed thereof, and afterwards departed this life on the 27th March, 1750, intestate and without issue, leaving his said four sisters his co-heiresses-at-law him surviving. Upon his death the said lands became vested in them as coparceners, and they went into possession thereof. Catherine Power, one of the co-heiresses, afterwards intermarried with a person of the name of Daniel Pilkington, and there was issue of the said marriage two children, namely, Daniel Pilkington and Anne Pilkington. The said Daniel Pilkington the elder afterwards died intestate, leaving

his widow, the said Catherine, and his said two children him surviving. The said Catherine Pilkington (otherwise Power), the mother of the said Daniel and Anne Pilkington, afterwards married a person of the name of John Dermody, and there was issue of the said second marriage Piers Dermody and Mary Dermody. The said Mary Dermody afterwards married a gentleman of the name of Richard Shee, and there was issue of the said marriage one child Catherine Shee, the testatrix hereinafter named, who was therefore the granddaughter of Catherine Dermody (otherwise Power.) Margaret Power, one other of the said coheireses, married a person named Sylvester Fanning, and had issue by him one son, Richard Fanning, and two daughters, named Catherine Fanning and Anne Fanning. The said Sylvester Fanning and Margaret Fanning his wife, both died, leaving Richard Fanning their only son, who also died intestate, leaving Januarius Fanning, his eldest son and heir-at-law. Mary Power, one other of the four sisters of the said John Power, intermarried with a person of the name of James Power, her first husband, and had issue by him four daughters, to wit, Anne Power, afterwards Anne Mayne (widow), Mary, Catherine and Margaret Power; and the said Margaret Power intermarried with a person named John Lonergan, and had issue by him James Lonergan and William Lonergan. The said Margaret Lonergan, otherwise Power, afterwards died; and the said William Lonergan, the brother of the said James Lonergan, also died without issue. The said James Lonergan had issue one son, named John Lonergan, who afterwards intermarried with Mary Walsh, and had issue three daughters, namely, Margaret Lonergan, Mary Lonergan and Bridget Lonergan, after named. Ellen Power, the fourth sister of the said John Power, intermarried with a person of the name of Roger Donegan, and there was issue of the said marriage one son named John Donegan, who afterwards died intestate and without issue, but who in his lifetime had instituted the proceedings in the petition mentioned. The said Mary Power afterwards intermarried with James Carroll, her second husband, and had issue by him one daughter, afterwards Mary Murphy, and several other children. It appeared that the said John Power had in his lifetime, by indentures dated the 7th and 8th December, 1719, mortgaged the aforesaid lands to the Rev. John Clayton, to secure the repayment of £680 and the mortgagee had by ejectment got into the possession thereof, and had sometime before the year 1776 transferred the mortgaged lands and the possession to a person named Thomas Walsh. The aforesaid James Lonergan being entitled as the heir-at-law of Mary Power, one of the four copartners, to one undivided fourth part of Carrickavantry and Ballykilmurry, some time in the year 1776 got possession of the entire from the personal representatives of said Thomas Walsh, the transferee of the aforesaid mortgage. On the 15th August, 1778, the aforesaid Catherine Dermody (otherwise Power), being then a widow, filed a bill in the Court of Chancery in Ireland, against the said James Lonergan, William Lonergan, Catherine Tonney, and Anne Fanning, and other the defendants therein named, among other things, praying that the said Catherine Dermody might be decreed

entitled to the possession of the one undivided fourth part of the said lands, and to the one third of an undivided fourth, in right of the said Ellen Donegan and John Donegan, deceased. There was not any answer filed in this suit, a compromise being set on foot, which ended in the said Catherine Dermody, on the 14th Aug., 1779, executing a lease of her undivided fourth part of the said lands of Carrickavantry and Ballykilmurry to the said James Lonergan, for a term of 999 years, at the yearly rent of £4. 4s. 4½d. late currency, payable half yearly as therein mentioned. This was the lease which was the subject-matter of this appeal, and the existence, nature, or particulars of it were unknown to the appellant until the month of November, 1854. It continued in the possession of the respondent William Scully, and those under whom he derived, up to the time of its being deposited in the Incumbered Estates Court, after the order for sale, hereinafter mentioned. The rent reserved by this lease was paid to said Catherine Dermody up to her death; she died in the year 1781, leaving the said Daniel Pilkington, her eldest son by her first marriage, her heir-at-law, and the said Anne Pilkington and Catherine Shee her surviving; and upon her death all her estate and interest in the said lands became vested in the said Daniel Pilkington as her heir-at-law, and he entered into the possession and receipt of the rent reserved by the lease of the 14th Aug., 1779, and continued in the receipt thereof up to the time of his death, which happened in the year 1784, when, as he died intestate, the said Anne Pilkington, his only sister and heiress-at-law, became, as such, entitled to and entered into the possession and receipt of the said reserved rent of £44 4s. 4½d. late currency, and continued therein up to the time of her death herein-after mentioned. The said Piers Dermody, the son of Catherine Dermody by her second marriage, died without issue sometime before the year 1789. As before stated, Mary Dermody, the daughter of the said Catherine Dermody (otherwise Power), by her second marriage, had in her mother's lifetime married a gentleman of the name of Richard Shee, and there was issue of said marriage one only child, the beforenamed Catherine Shee. By indenture, bearing date the 4th April, 1789, made by and between the aforesaid Anne Pilkington of the first part, and Robert Cook, Esq., of the second part, the said Anne Pilkington, in order to make a provision for said Catherine Shee, for the considerations therein mentioned, conveyed and released unto Robert Cooke, and his heirs and assigns for ever, all the said Anne Pilkington's undivided part, share and proportion of and in all that and those, the town and lands of East and West Carrickavantry and Ballykilmurry, situate in the county of Waterford, and the reversion and reversions, remainder and remainders, and all her estate and interest therein, upon trust for said Anne Pilkington for her life, and from and after her death to the use of Catherine Shee, and her heirs for ever, and which deed was duly registered in the Registry Office of Deeds in Ireland, on the 21st April, 1789. The said Anne Pilkington died in the year 1795 unmarried and intestate. Appellant stated in his petition, and it was not denied, that there was not any heir of her upon her father's side. The respondent contended that he was her heir-at-law, and appellant

contends and submits that Catherine Shee, the granddaughter of Catherine Dermody (otherwise Power), was her heiress-at-law. Appellant submits that the question of heirship is not material, as by the aforesaid deed of 4th April, 1789, Anne Pilkington had conveyed away all her estate and interest in the lands. Upon the death of Anne Pilkington, Catherine Shee became, under the trusts contained in the said indenture of the 4th April, 1789, entitled to the reversion expectant upon, and rent reserved by said lease of 14th August, 1779, and she went into possession and receipt of the said rent of £44 4s. 4½d. reserved by said indenture of lease of the 14th August, 1779, and as admitted by the respondents, she was paid same by John Lonergan during his life, and after his death by Mary Anne Scully (otherwise Lonergan), and Wm. Scully, together with Francis Mandeville Power, afterwards, up to the time of her (Catherine Shee's) death, in March, 1828. Catherine Shee never had the said lease of the 14th August, 1779 in her possession. It did not appear that there was any counterpart of it, and the original was always in the possession of those representing the owner's interest, until it was lodged by them in the Incumbered Estates Court, as herein-after stated. Robert Cook, the trustee named in the said indenture of the 4th April, 1789, and who had been the confidential legal adviser, agent and trustee of the said Catherine Shee for many years previous to her decease, and had received her rent for her, died in Nov. 1827. The said Catherine Shee, on 31st March, 1828, duly made and published her last will and testament in writing duly executed and attested as by law required to pass real estates, and thereby devised unto the appellant, John Archbold, all her title and interest of and in the said lands demised and rents reserved by said lease of the 14th August, 1779, subject to the payment of her funeral expenses and other the pecuniary charges therein mentioned, and the said testatrix did thereby empower the appellant, the said John Archbold, to demand and recover from Mrs. Scully, of Cashell, in the county of Tipperary, the arrear due to her out of the said lands of Carrick-an-vantray, to enable him therewith to discharge the several charges therein, and constituted and named appellant her residuary legatee, and afterwards, on the 5th April, in 1828, died without altering or revoking said will, and appellant as residuary legatee duly proved said will, and obtained probate thereof forth of the Court of Prerogative in Dublin, on the 22nd April, 1828. The aforesaid James Lonergan died intestate about the year 1790, leaving John Lonergan, his eldest son and heir-at-law, and sole next of kin, him surviving. John Lonergan was entitled to the one undivided fourth part which had descended from his ancestor, Mary Power, and to the undivided fourth demised by the lease of 14th August, 1779, for 999 years, and he was also in possession of other portions of the said lands, but to what extent or under what title, and whether by lease from the other coheirresses or otherwise, was not known to appellant. He, however, admittedly paid up to his death the rent reserved by the lease of 14th August, 1779. The said John Lonergan had, some time in the year 1787, intermarried with one Mary Walsh, and there was issue of said marriage three daughters, namely, the before-named

Margaret, Mary Anne, and Bridget Lonergan. The said John Lonergan died on the 19th February, 1797, having previously made a will, under which his three daughters, Margaret, Mary Anne and Bridget, became entitled to all his estates and interest in said lands, and upon the death of said Bridget Lonergan, unmarried and intestate, in the year 1811, her one third became vested in her sisters, Margaret and Mary Anne, who thus became entitled each to an undivided moiety of said lands, including the residue of the term of 999 years, created by the said lease of 14th August, 1779, for which they and the survivor of them admittedly paid the rent of £44 4s. 4½d. to Catherine Shee up to her death. Margaret Lonergan, who was the eldest daughter of John Lonergan, married one Francis Mandeville Power, and died in the year 1821, without issue, not having by settlement, deed, or will, or otherwise disposed of her interest in said lands, leaving her husband, the said Francis Mandeville Power, her surviving, who continued in possession and receipt of the rents up to the time of his death. Mary Anne Lonergan, the second daughter of John Lonergan, in the year 1813 married William Scully, M.D.; the respondent William Scully is their son. Previous to the marriage of the said Wm. Scully and Mary Anne Lonergan, certain articles dated the 5th December, 1813, had been executed and the lands were thereby limited to the said William Scully, during the joint lives of the said William Scully and Mary Anne, his wife, with remainder to the issue of the marriage. And by a post-nuptial settlement, dated the 8th November, 1821, all the aforesaid lands and premises were conveyed to John Scully and Thomas Butler, their heirs, executors, and administrators, to the use of and upon trust for the said William Scully for life, and after his decease, to the use of Mary Anne, his wife, in case she survived him, to take thereout an annuity of £150 for her jointure, with the usual powers, and subject thereto, to the use of the said trustees, for 999 years, to raise a provision for younger children, with remainder to the first son of said William and Mary Anne Scully. The said William Scully during his life, and after his death his widow Mary Anne Scully, paid to Catherine Shee the head-rent of £44 4s. 4½d., late currency, up to or shortly previous to the time of her death. The said William Scully, M.D., continued in possession of all said lands up to his death on the 30th August, 1824, after which his widow, said Mary Anne Scully was in possession until her death on the 27th December, 1830. The respondent William Scully, then an infant, was made a ward of Chancery, and a receiver was appointed over said lands until he attained his age of twenty-one years in 1839, since which period he has been in possession. Upon the death of Catherine Shee, appellant found that her will purported to devise to him some estate or interest in the aforesaid lands, or some profit, rent, or interest payable out of them, but appellant was completely ignorant of the particulars of such estate, or interest, or rent, save that the will described it as being £42 a year, and accordingly appellant immediately after the death of Catherine Shee, applied to the said Mary Anne Scully, the said William Scully being then dead, for information as to the rights of said Catherine Shee in relation to said lands. The appellant Arch-

bold alleged in his petition that, on the death of Catherine Shee, finding that her will purported to devise to him some interest in the said lands, amounting in value to £42 a year, applied to Mary Anne Scully for information as to the particulars, which application she continually evaded, and she fraudulently suppressed the lease of 1779, and asserted that Catherine Shee had no right in the lands except an annuity, which terminated with her life. In 1854 the appellant casually heard that a petition was lodged in the Incumbered Estates Court for the sale of the said land, and was led to make further inquiry, and then became aware for the first time of the fact of the lease and the nature of it. He then entered an appearance in the Incumbered Estates Court, and entered his claim to the rent reserved by the lease of 1779, and to the reversion expectant thereupon, as also to the meane rates and future accruing rent, as the devisee and residuary legatee of Catherine Shee. The Commissioner, Mr. Hargreave, after hearing parties, ordered a further abstract of title to be lodged, and in 1855 the appellant set forth his title to one undivided fourth of the said lands demised in 1779. In 1856 the commissioner confined the order for sale of the lands to three-fourths of the lands, and in 1857 the existence of the lease of 1779 was first discovered by the appellant to be in existence. In 1858 the order for sale of the lands, including the lease of 1779, was made. In 1835 the owner of the reversion in fee of Carrickavantry demised the lands, by way of renewal of the original lease of 1699, to the respondent Scully and one Thomas Butler, as a trustee of the settlement of 1821, for three new lives, the former *cestuis que vies* having all died. This renewal was not registered, and was not discovered by the appellant until the recent proceedings in the Incumbered Estates Court. On the 22nd May, 1867, the appellant filed his petition in the Court of Chancery, praying for a declaration of his right to the reversion expectant upon rent reserved by the lease of 1779, of one undivided fourth part of the lands, and that the respondent Butler be declared as his trustee of the legal estate, and be decreed to convey accordingly, and that the respondent should pay the arrears of the yearly rent of £44 4s. 4½d., or account for the same, and that the respondent should deliver into court the original lease and renewals or if the court should be of opinion that the appellant should proceed at common law by ejectment for non-payment of rent, then that the respondents should be restrained from relying on the legal estate. The respondent Scully filed his affidavit in answer to this petition. The case came on to be heard on 7th May, 1858, when the Lord Chancellor dismissed the petition with costs, and on appeal the Lords Justices affirmed that order with costs, whereon the present appeal was brought.

I. Butt, Q.C., and *R. Palmer, Q.C.*, for the appellant, contended that the appellant acquired title under the will of Catherine Shee, and his right was not barred by the Statute of Limitations, inasmuch as the rent reserved was not paid after her death by the respondents to any person claiming the reversion; that the statute did not apply to give a tenant withholding rent an adverse title against his landlord. At common law the title would not be affected by the Statute

of Limitations; and the same rule must apply in a court of equity. The appellant never acquiesced in the respondent's title, and ever since his discovery of his rights has been engaged in prosecuting them.

Sir H. Cairns, Q.C., and *Longfield* for the respondent, contended that the respondent had, since 1828, been in adverse possession, and the appellant was barred, by acquiescence and laches, from now recovering; and there was no fraud within the meaning of the Statute of Limitations.

The following cases were referred to:—*Saunders v. Annesley* (2 Sch. & Lef., 73); *Chadwick v. Broadwood* (3 Beav., 316); *Grant v. Ellis* (9 M. & W., 113); *Hayes v. Woodley* (3 Ir. Chan. R., 142); *Fisher v. Prosser* (Cowp. 218); *Low v. Burron* (3 P. Wms., 363); *Mills v. Campbell* (2 Y. & C. 398); *Doe v. Oxenham* (7 M. & W., 131); *Cholmondeley v. Clinton* (2 J. & W., 140.) *Cur. adv. vult.*

The LORD CHANCELLOR (Campbell).—My Lords, it seems to me that the appellant is entitled to the aid of a court of equity, in respect of his interest in the reversion of one-fourth of the lands of Carrickavantry, demised by the lease of 1779. By the will of Catherine Shee he would have been entitled, at her death in 1828, to the rent of £44 4s. 4½d., if the lease of Carrickavantry had been duly renewed by the Marquis of Waterford on the death of the last *cestui que vie* under the lease of 1699, and if the Scullys, as assignees of the lease of 1779, had been in possession of all the lands thereby demised for 999 years. The lease of 1699 had not been renewed; but all the parties had acted as if it were still subsisting, the Marquis of Waterford receiving the head-rent in respect of Carrickavantry, and the Scullys paying to Catherine Shee the full rent of £44 4s. 4½d. I conceive that, although at law tenancies from year to year had been created, after the death of Catherine Dermody, between the Marquis of Waterford and the party from whom he received rent in respect of Carrickavantry and between Mrs. Scully and Catherine Shee; yet all the parties, who were acting as if there had been a renewal of the lease of 1699, would in equity be considered as having the same rights as if there had been such a renewal. In 1828, on the death of Catherine Shee, and the refusal of the Scullys to pay rent to the appellant, I cannot doubt that a court of equity would have interfered in his favour, and decreeing a renewal of the lease of 1699 would have enabled the appellant to recover the rent under the lease of 1779. Would he not have been entitled to the same relief if he had applied to a court of equity at any time before the lease was renewed in 1835? The lapse of seven years could have been no bar. The real question in the case seems to me to be whether the appellant is barred by the lapse of time between 1835 and 1857, when his bill (or cause petition) was filed. If any new rights had been created in this interval, or if any one would be prejudiced by the delay, the appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by laches or acquiescence, or whatever name may be given to his long sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays; and without imputing any fraud to the Scullys, it seems to me to be against conscience that they should seek to avail

themselves of the renewal of the lease in 1835 for their own exclusive benefit. If the lease of 1699 had been duly renewed, the lease of 1779 would in all respects be in full vigour. This lease seems to have been treated as a subsisting lease in the Incumbered Estates Court, and the appellant may still have the benefit of it. I entertain the most sincere respect for the judges who have pronounced the decrees appealed against. But I am bound to say that in my opinion they have not had sufficient regard for equitable rights after the death of the last *cestui que vie*. To the plaintiff's equitable title I think that the Statute of Limitations is no bar, and laches is no sufficient answer. I must therefore advise your Lordships that the decrees appealed against be reversed.

LORD CRANWORTH.—My Lords, when Catherine Dermody granted the lease for 999 years in 1779, she was herself the last surviving *cestui que vie* named in the lease made by the Earl of Tyrone in 1699, and looking first at the legal rights of the parties, it is clear that her lease must be deemed to have taken effect out of her legal interest. She and James Lonergan were then tenants in common for the term of her life under Lord Waterford, as representing the Earl of Tyrone, *i. e.*, she as to one-fourth, and Lonergan as to three-fourths. By the death of Catherine Dermody in 1784 the original lease of 1699 came to an end, and there was no longer the legal relation of landlord and tenant between those who succeeded to her and Lonergan, to whom she had demised for 999 years. But though the original lease expired by her death, she had by statute an equitable right to have the lease renewed; and Lonergan, and those who succeeded to him, continued to pay to her real representatives the rent reserved by the lease of 1779, as if the term of 999 years was still in existence. This was done up to the year 1828, when the appellant's title accrued; since that time no rent has been paid. The legal effect of the payment by Lonergan's representatives of the rent reserved in 1779 was to make them tenants from year to year to those deriving title under Catherine Dermody; and all claim by virtue of that legal right is clearly gone by the joint operation of the 2nd and 8th sections of the Statute of Limitations. As to the legal right there cannot, I apprehend, be a doubt. Attached to her legal tenancy under Lord Waterford of one-fourth of the lands in question, Catherine Dermody had, as I have already said, an equitable right to have, when that tenancy should expire, a renewed lease for lives granted to those deriving title under her, and so on for ever. And the lease of 1779 certainly created a good equitable charge on that equitable reversionary interest. Whenever a renewed lease should be granted to her representatives as to one-fourth, and to Lonergan or his real representatives as to three-fourths, the lease of 1779 would give to Lonergan and his personal representatives a title in equity to Catherine Dermody's one-fourth, paying the rent reserved, and would, on the other hand, give to Catherine Dermody's real representatives a right to the reserved rent. It was doubtless on the ground of this equitable right that the rent was regularly paid from 1784, when the legal title was at an end, up to 1828, when the title of the appellant first accrued. If at that time the appellant had taken the proper

measures he might have obtained a renewal of the lease to himself and the respondent's mother, who was then living, as tenants in common, which would in equity, as to his fourth part, have been subject to the lease of 1779. The question is, what has been the effect of his remaining passive from 1828 to 1857? In the first place, I think that if there had been no renewal during that period, the equitable right of the appellant would not have been effected. Suppose that immediately after the death of Catherine Dermody in 1784, her devisee Daniel Pilkington, and John Lonergan, the lessee, had concurred in obtaining a new lease from Lord Waterford for three new lives, and that a new lease for the residue of the 999 years term had been granted by Daniel Pilkington to Lonergan, which I need not say he would have been bound to grant; and suppose, further, that one of the new lives had endured, as it well might, till after 1857, those claiming under Lonergan would, in such a case, during all the period between 1828 and 1857, have been the legal tenants of the appellant, the legal reversion would have been in him, and his right to the rent in respect of that reversion would not have been lost because he had suffered it to fall into arrear for however long a time. It can make no difference in the contemplation of a court of equity that no renewal was actually obtained. The ground landlord continued to receive his head-rent from those who from time to time represented the original lessee, Pierce Power, and so the relation of ground landlord and tenant continued to subsist between them. It is true that at law those holding the land were only tenants from year to year, under the ground landlord, but they had a right in equity to what was, for the purpose of our present inquiry, equivalent to a fee-simple, *i. e.*, a right to have grants for lives for ever from the owner of the fee. If before 1784 a surrender and renewal had been made, so as to keep alive the lease for 999 years, or if, after the expiration of the old lease in 1784, a renewed lease for lives had been obtained from Lord Waterford, and a new lease for 999 years had been granted to Lonergan or his representatives, they would have been the legal tenants for years of the appellant, or of those under whom he derives title. I cannot doubt but that the equitable rights of these same parties constituted between them the equitable relation of landlord and tenant for the term of 999 years. It is now clearly established that so long as such relation subsists as a legal relation, the landlord's right to rent is not barred by nonpayment for however long a time. The right to the rent is an incident to the reversion. The Statute of Limitations does not apply, except indeed that by the 42nd section it prevents the recovery of arrears for more than six years. And the same principle must govern the case of a demand in equity. The 24th section of the 3 & 4 Will. 4, c. 27, only bars equitable rights so far as they would have been barred if they had been legal rights. I am therefore of opinion, that if no renewal had been made since 1784, the right of the appellant, except as to arrears, would have been unaffected by the Statute of Limitations. The question then is, whether the equitable right of the appellant was altered by the renewal obtained by the respondent, or by those who acted for him in 1835. On this point I have had

some fluctuation of opinion. I had a doubt whether it did not amount to an actual ouster of the appellant, as was contended at the bar, but I have arrived at the conclusion that appellant's rights remain unaffected. If I am right in saying that up to the time when this renewal was effected the appellant and respondent stood to each other, in the view of a court of equity, in the relation of landlord and tenant, it could not be in the power of the respondent by any act of his to alter that relation. He must be considered, in obtaining the renewal, to have intended to act in a manner consistent with his legal and equitable duties. He ought to have taken the renewal in the names of the appellant and of himself as tenants in common, and not, as he did, in those of himself and certain other persons having interests under him, or under those who had gone before him, but who were strangers to the appellant. He failed in his duty, probably from mere ignorance on the part of those who acted for him. But he could not, by violating his duty as trustee, and neglecting the interests which he was bound to protect, prejudice the rights of the person who stood to him in the relation of *cestui que trust*. On these grounds I have satisfied myself that the rights of the appellant are unaffected by the Statute of Limitations. With respect to the argument, that, independently of the statute, the appellant is barred by laches, I cannot think that it rests on any solid foundation. Indeed it was not much relied on in the argument at the bar. Courts of equity do not, it is true, encourage stale demands, but the right now insisted on is one which is in substance renewed as often as fresh rent is payable. The legal principle is, that the rent is incident to the reversion, and on every day on which rent becomes due, under the deed constituting the tenancy, whether it be made payable yearly, half-yearly, or oftener, a right of distress accrues. In such a case laches appears to me to be out of the question. Neglect to enforce payment of the rent deprives the lessor, by the express terms of the statute, of all arrears beyond six years; but as to all accruing payments, the legal principle is that the right is constantly renewed. In such a case I see no room for introducing the doctrine of laches. Bygone days are lost, but there can be no neglect in not enforcing what is not due. Considering the very high authority by which the cause was decided in Ireland, it is not without hesitation that I have arrived at a conclusion different from that at which the eminent judges, whose decision is now under review, had arrived; but having given to the case my best attention I feel bound to say I think they were wrong. I think the appellant is entitled to a decree declaring him entitled to have a conveyance of one undivided fourth part of the lands comprised in the renewed lease for the lives named therein, subject nevertheless to a lease to be granted by him of that fourth to the respondent, or to those entitled under him, for the residue of the term of 999 years created in 1779, at a yearly rent of £40 16s. 4d. An account must be taken of what is due to the appellant for arrears of the rent for six years previous to the filing of the cause petition, against which must be set off one-fourth part of the fines and costs of renewal; and it must be declared that the appellant has a valid charge on the one-fourth

demised, for whatever shall be found due to him on taking the account. This is the decree which ought, I think, to have been pronounced by the court below; but, considering for how long a time the appellant remained passive without enforcing his rights, I think the decree ought to have been made without costs.

Lord WENSLEYDALE concurred.

Decree reversed.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister at Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL].

FITZGERALD v. O'CONNELL—May 27.

Annuity charged on yearly income of land—Arrears of, are not a charge on future rents.

A testatrix, having devised several annuities, directed that they should be a lien only upon the yearly income of her lands, real, freehold, and chattel real, but not upon any other personal estate in money. She also directed that if the yearly income of her lands should fall short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon her personal estate. After satisfying the above annuities, she devised the residue of her property, real and personal, to the residuary legatee. The rents of the lands were not sufficient to discharge the annuities in full. Held, that the annuities were satisfied by the payment of proportionate shares, and that the arrears were not charged on the future rents.

THIS was an appeal from a decretal order made by the Master of the Rolls under the following circumstances:—Margaret White, by her will, dated the 22nd November, 1814, devised and bequeathed all her estates, real and personal, to Daniel O'Connell, Esq., John Hartigan, Esq., and the Rev. Patrick Hogan, upon trust for the purposes therein mentioned; the testatrix thereby bequeathed several annuities to various persons, and several pecuniary legacies charged on her estates; and the testatrix directed her trustees to pay out of the rest of her property the following yearly sums for the following purposes—that is to say: "And upon this further trust and confidence, that my said trustees, and the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall pay out of the rest, residue, and remainder of my said property the following yearly sums, for the following purposes, namely, the sum of £20 a-year for ever to the Female Roman Catholic Charity School in Denmark-street, in the county of the city of Limerick, for the maintenance and use of the girls there admitted, as the overseers or directors shall think best to apply it; and also the sum of £20 a-year for ever, for the like purpose, to the Charity Female School at the Convent near Petercell, in the city of Limerick, being a Roman Catholic Charity School; and also the sum of £20 a-year for ever, for the like purpose, to the Roman Catholic Male Charity School of the parish of St. John; and

also the sum of £20 a-year, for ever, for the like purpose, to the Roman Catholic Male Charity School of St. Mary's, both said parishes being in Limerick, or county of the city thereof; and my will is, that if any of said charity schools are discontinued, the annuity so payable to such school shall be applied towards the benefit of the remaining schools, in manner aforesaid: and upon this further trust and confidence, that my said trustees, and the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall also pay out of my said property, towards the support of the Fever Hospital of St. John's in the city of Limerick, the sum of £50 a-year for fifty years from the day of my decease; and also the sum of £10 a-year toward the support of the Lying-in-Hospital at Boherboy, in the suburbs of Limerick, for fifty years from the day of my decease; and also the sum of £40 a year to the House of Industry, on the North Strand, Limerick, for twenty-one years from the day of my decease; and also the sum of £5 a-year to the Physician's Dispensary, for twenty years from the day of my decease; and also do pay to my domestic Honora Grady the sum of £22 15s. a-year for the term of her natural life; hereby giving power and authority unto her, the said Honora Grady, by will or deed, to continue such annuity of twenty guineas per annum for the term of twenty years from the day of the decease of the said Honora Grady, in favour of such person or persons as, by will or deed, she may direct and appoint; and also to pay towards the support of the poor of the parishes of St. Michael, St. Mary, St. John, and St. Minchin's, Limerick, unto each parish the yearly sum of £30, for twenty years from the day of my decease, to be disposed of amongst the said poor, at the discretion of my said trustees; and also the sum of £50 a-year for thirty-three years from the day of my decease, unto the said Rev. Patrick Hogan, to be applied by him, his executors, administrators, or assigns for the payment of the rent and other expenses connected with the preservation of the chapel of St. Michael's parish, Limerick. And after giving several other legacies, the testatrix went on to say:—"And further, I do, by this my will, declare my intention and meaning to be, that the foregoing several annuities or rentcharges (charitable or otherwise), and all and every annuity or rentcharge granted by this my last will and testament, are only to be a lien upon, and charged and chargeable on, my yearly income by lands and tenements, real, freehold, and chattel real, but not upon any other personal estate in money, securities for money, or other personal effects and property; and further, my will is, that if my yearly income by lands and tenements, real, freehold, and chattel real, shall fall short of paying the several annuities, yearly sums, or rentcharges aforesaid, and any other granted by this my will, that such deficiency shall equally and proportionably be upon all such annuities or yearly sums, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested [*sic*] upon my personal estate in money, securities, or effects." Then the will contained the following residuary clause:—"And as to the rest, residue, and remainder of my property, real, freehold, and personal, and of every other kind

and nature whatsoever, so as aforesaid vested in my said trustees, after satisfying and discharging said several annuities, legacies, and charges, both charitable and otherwise, my will is, that such residue and remainder shall go unto, and I hereby devise and bequeath the same unto, said Francis Fitzgerald, of Adelphi, in the county of Clare, his heirs, executors, and administrators, according to the true intent and meaning of this my will." On the 16th of May, 1823, the original bill in this cause was filed by Francis John Fitzgerald, the residuary devisee in the will, against the trustees and executors thereof, praying that the trusts of the will might be carried into execution, and a receiver was appointed by order, dated the 25th June, 1823. Successive receivers have ever since continued in receipt of the rents of the lands; and Francis Fitzgerald having died, William Fitzgerald, his son and heir-at-law revived the cause by petition. For a considerable time the rents of the lands were insufficient to discharge the entire of the annuities; but the lands have been lately let at a greatly increased rent, and much more than sufficient to pay the entire of the said annuities. An application was made to the Master of the Rolls, on the 8th of June, 1859, on behalf of William Fitzgerald, the owner of the estate, "that the receiver should be discharged, and do proceed forthwith to pass a final account, and on payment of the balance, if any found due by him, that the recognizance of the receiver and his sureties might be vacated, and that petitioner, William Fitzgerald, might be at liberty to go into receipt of the rents and profits of the lands, subject to the payment of the subsisting annuities charged thereon by the will of Margaret White, the said William Fitzgerald thereby undertaking to pay in full one half year within the other, the future gales of the said several annuities." The appellants, the Governors and Directors of the Hospital and Schools above-mentioned, opposed that application, on the ground that no provision was made for the arrears due on foot of the several annuities, whereupon the Master of the Rolls made an order, whereby it was referred to the Master "to inquire and report whether there is any, and what sum, due and in arrear on foot of the said several annuities therein mentioned. The Master by his report found that there was no sum due or in arrear on foot of the annuities up to the 1st of November, 1859. The appellants applied to vary that report upon the ground that the Master should have found that certain sums stated in a schedule were due to the respective charitable institutions. On the 21st of January, the Master of the Rolls affirmed the Master's report with costs;* from his decretal order this appeal was brought, upon the grounds that these annuities should be paid in full out of the rents of the lands devised in priority to any claim of the residuary legatee.

Lawless, Q.C. (with him *Pilkington*), for the appellant.—The arrears of these annuities must be paid before the residuary legatee receives anything. The courts will even direct the corpus to be sold to discharge the arrears of an annuity, regardless of the subsequent trusts.—*Picard v. Mitchell* (14 Beav.

* *Fitzgerald v. O'Connell* (11 Ir. Chan. R., 437).

108). These annuities are charged, by the language of the will, on the real estate itself, and not merely on the annual rents and profits.—*Torre v. Browne* (5 Ho. of L. 555); *Baker v. Baker* (6 Ho. of L. 515); *Wilkinson v. The London, Brighton, and South Coast Railway Company* (3 De G. & S. 633); *In re Browne* (6 Ir. Chan. R., 393), affirmed under the title of *Greville v. Browne* (7 House of L. 689).

The *Solicitor-General* (with him *Thomas Graydon*) *contra*.—These annuities, upon a deficit in the produce of the lands, should suffer a proportional abatement. The arrears did not become a charge upon the land.—*Farmer v. Mills* (4 Russ. 86); *Darbois v. Richards* (14 Sim. 585); *Scott v. Salmond* (1 Myl. & K. 363; & 3 Hare, 555).

THE LORD CHANCELLOR.—In my opinion this is a very plain case. It is not necessary to go through the cases which have been cited; for I think that it is sufficient to read the clause of the will which creates the annuities in question. There might, perhaps, be some doubt or question if the residuary clause stood alone; but the testatrix says distinctly, when giving these annuities, that they are to come out of her "yearly income by lands and tenements, but not upon any other personal estate in money." Well, the yearly income of landed property ordinarily means the annual receipts of the rents and profits; and looking to the abating clause, it is plain that she meant that if the yearly rents fell short of paying the annuities in full, the balance was not to come out of any other source. If the testatrix intended that the arrears were to be satisfied out of the accruing rents, she would have said so. The annuities, in case of a deficiency, must be paid rateably, according to the schedule.

THE LORD JUSTICE OF APPEAL.—I concur in the view taken by the Lord Chancellor of this case. I do not think any other form of words could have expressed the testatrix's meaning more clearly.

Order below affirmed.

Court of Chancery.

Reported by Charles H. Foot, Esq., Barrister at Law.

BALFOUR v. MACNEILL—April 29-30.

Specific performance—Objection to title—Underlease—23 & 24 Vict. c. 154, s. 21.

A purchaser who has agreed to take an assignment of premises held under a lease for a term of years, cannot object to the title upon the grounds of the discovery that such lease is an underlease, as the sub-tenant is now placed in privity with the head landlord by 23 & 24 Vict. c. 154, s. 21, (The Landlord and Tenant Law Amendment Act, Ireland, 1860).

By deeds of lease and re-lease, dated the 23rd and 24th of April, 1764, under the leasing powers given by an Act passed by the Parliament of Ireland in the second year of George the Third's reign (1761), Charles Mosse, with the consent of his guardians, demised to William Deane, his heirs and assigns, a plot of ground at the corner of Palace-row, in the city of

Dublin, to hold the same for the three lives named therein, with a covenant for perpetual renewal, at the yearly rent of £7 12s. 6d. By deeds of lease and re-lease, dated the 15th of August, 1816, Stewart King, the representative of Deane's interest, assigned the above corner-plot of ground and dwelling house thereon to Robert Smyth, his heirs and assigns, subject as before, and demised to him the adjoining plot of ground and the house thereon for the term of 999 years. By similar deeds, of equal date, executed in pursuance of a covenant in the last-mentioned deeds, Smyth re-demised the corner plot of ground to King for the term of 999 years, at the yearly rent of £113 15s. In the year 1844, an agreement was entered into between Blayney Townley Balfour, the representative of Smyth's interest, and Sir John Macneill, whereby the latter agreed to purchase Balfour's interest in the premises for £1,250 fine, and at a yearly rent of £105, subject to the head-rent. A suit for specific performance of the agreement having been filed by the petitioner, and reference having been made to the Master to inquire as to the title of the house in question, the Master reported that a good title could be made. Several objections were taken to this report, and ultimately a supplemental report to the same effect was made in June, 1869, to which the same objections were taken; amongst which were the following:—That the premises in question were held under a lease for lives, which it was not obligatory upon the head-landlord to renew, instead of the residue of a term for 999 years, and also that the premises were subject to the head-rent of £7 12s. 6d. The case now came before the court on report, exceptions, and merits.

J. E. Walsh, Q.C. (with him *Lawless, Q.C.*, and *A. Vance*), in support of the exceptions. There is such a misrepresentation as to the title of these premises, that this court will not decree specific performance. It has refused to do so where an alleged term of 99 years proved to be an underlease less by only three days than that term. *Madely v. Booth* (2 De G. & S., 718). This title being a sub-lease cannot be enforced.—*Mulholland v. the Mayor of Belfast* (9 Ir. Chan. R., 204; and *ib.* 292); *Blake v. Phinn* (3 Com. B., 976).

A. Brewster, Q.C. (with him *R. R. Warren, Q.C.*, and *P. Barlow*), for the petitioner.—The objection that the title in question is a sub-lease, and liable to forfeiture by the default of the immediate lessor, is removed by the 23 & 24 Vict. c. 154 (The Landlord and Tenant Law Amendment Act, Ireland, 1860), section 55; which enacts, that in an action of ejectment for nonpayment by any landlord for rent, it shall not be necessary to serve with the summons and plaint any person save the person in the actual possession of the lands as tenant or under-tenant; and the twentieth and twenty-first sections of that statute enables the sub-tenant to protect himself by paying to the head landlord the rent due to him by the sub-letting tenant. The purchaser can compel the head landlord to grant a fee-farm grant of these premises under the Renewable Leasehold Conversion Act.

Lawless, in reply, cited *Fildes v. Hooker* (3 Madd. 93), and *Leatham v. Allen* (1 Ir. Chan. R., 585).

The LORD CHANCELLOR (having overruled all the other objections to the title)—The fact of the lease being an underlease is no objection as the 21st section of the Landlord and Tenant Law Amendment Act, 23 and 24 Vict. c. 154, puts the undertenant in privity with the head landlord, so that there is no danger of his interest being forfeited by nonpayment of rent by the intermediate lessor. The objections must be overruled.

FITZGERALD v. FITZGERALD.—Nov. 5.

Will—Construction—Meaning of the words "then to their next eldest brother, and so on to the youngest."

A testator died leaving seven sons surviving him. By both his will and the first codicil thereto he directed that certain sums should be divided equally amongst his five younger sons, exclusive of his two eldest sons, who were otherwise provided for. By a second codicil, the testator directed his executors to lodge the amount of certain debts due to him, "to the use of my five younger sons, beginning at E., my third son, and down to H., my youngest son, in such proportions as I have appointed by my will and former codicil; but they are only to receive the interest of said legacies during their mutual lives; and in case those who die do not leave any wife or children at their death, then the said proportions they were entitled to during their life to go to their next elder brother, and so on to the youngest." The fifth son died unmarried. Held, that the share of the deceased passed to the sixth son as his next elder brother.

THE will of Mr. Edward Fitzgerald, made in April, 1814, contained the following clause:—"And as to any overplus of my personal fortune that may remain after payment of such proportions as I have mentioned, my will is, that such overplus may be equally divided amongst all my younger children by my present wife (his second), exclusive of the two elder of them, William Fitzgerald and Thomas Burton Fitzgerald, who are sufficiently provided for." By a codicil, made in 1813, the testator confirmed his will, and further directed that a sum of £6,750 should be equally divided between his five younger sons. Another codicil, dated the 23rd of December, 1813, was in the words following: "Whereas, I have several sums of money both in Government securities in the Irish funds, and also several bond debts and other debts due to me, arrears of rent, &c., I request of my executors to lodge all those debts due to me, that are now out of the funds, in the funds for the use of my younger sons by my present wife, beginning with Edward, my third son, and down to Henry, my youngest son, in such proportions as I have appointed in my last will or former codicil; but they are only to receive the interest of said legacies during their mutual lives; and after their respective deaths, the interest of their legacies only to be applied for the use of their wives and children, should they leave any, until the youngest of said children shall arrive to twenty-one years of age, and then the principal to be divided equally among the survivors; and in case those who die do not leave any wife or children at their death, then the said proportions they were entitled to during their life

to go to their next elder brother, and so on to the youngest." The testator died in 1814, leaving seven sons by his second wife—viz., William, Thomas Burton, Edward, John Forster, Charles, Crofton, and Henry. In December, 1814, a bill was filed to have the trusts of the will declared, and it was ordered that it be referred to one of the Masters of the Court of Chancery to take the accounts, and it was declared that the respective legatees in the second codicil mentioned were entitled thereto in equal proportions. In the year 1859, Charles Fitzgerald died unmarried. The construction of the will of the testator as to who was the next eldest son to Charles was now sought.

A. Brewster, Q.C. (with him *R. R. Warren, Q.C.*, and *Franks*), for Edward Fitzgerald.—By the words "to their next eldest brother, and so on to the youngest" the testator meant, that upon the death of any of his five younger sons, not leaving any wife or children, the share of the son so dying should go to the eldest of this particular class—i.e., Edward. "Next" here means next in point of time—i.e., the eldest of the class next after the death of any of that class, under certain circumstances.

The Solicitor-General (with him *J. F. Walker*), for Crofton Fitzgerald.—"Next eldest" means the next eldest in age, in a descending series, from the son who may die.

J. T. Ball, Q.C. (with him *H. P. Jellott*), for John Foster Fitzgerald.—"Next eldest" means the next eldest, in an ascending series, from the deceased son.

W. Brereton, Q.C. (with him *T. P. Law*), appeared for the children of John Foster Fitzgerald.

A. Norman, Q.C. (with him *E. Levinge*), for the children of Edward Fitzgerald.

THE LORD CHANCELLOR.—The only rational construction I can give to the words of this will is to give the share of Charles Fitzgerald to Crofton Fitzgerald, as his "next eldest brother." Charles Fitzgerald was the elder brother in relation to Crofton and Henry. On the death of Charles, Crofton became the next elder in regard to Henry. Most probably the testator, like many other persons, thought that his sons would die in the order of their seniority, the youngest last. The costs of all parties to come out of the share in question, as it has been separated from the fund.

Rolls Court.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

JACK v. TEAZE.—May 25.

Administration—Colonial judgment—Validity of.

The court held a colonial judgment good notwithstanding an error in the pleading, where time for appealing to the Privy Council had long elapsed, and the declaration disclosed a cause of action.

THIS was an appeal from an order made by Master Brooke, and bearing date the 23rd February, 1861. The petition, which was under the 15th section of the Chancery Regulation Act, was filed for the purpose of having an administration of the assets of Samuel Teaze. It was referred in the usual way to Master

Brooke, and in the course of the proceedings in the office, a claim for £1,452 11s. was made on behalf of a Mr. Eugene Kenny, on foot of a judgment obtained by him against the deceased in the Supreme Court of New South Wales, on the 2nd of October, 1854, for the sum of £2,256 11s., £2,000 of which were for damages, and the remainder for costs. Of this the claimant had been paid, under an execution, the sum of £804, which reduced his demand to the amount above stated. The following is a copy of the exemplification of the judgment which was in proof before the Master, and which it is necessary to give for the right understanding of the decision in this case: "In the Supreme Court of New South Wales, the 2nd day of Oct. in the year of our Lord, 1854, and as yet of the 2nd term of that year. The 26th day of August, in the year of our Lord 1854, Sydney to wit, Eugene Kenny, by John Ryan Brennan, his attorney, sues Samuel Teaze, for that on the 19th day of November, in the year of our Lord 1852, in consideration that the plaintiff, for hire and reward in that behalf to be paid by him to the defendant, had employed the defendant to purchase for him a large quantity, to wit, 1,000L. worth of good sound marketable wheat, at market price, and to grind the same for him into flour, at the current price for such grinding; the defendant promised the plaintiff so to purchase for him the said wheat, and to grind the same into flour, and to take due and proper care of said wheat, and to grind the same for the plaintiff with due care, and to deliver the said flour, when so ground, to the plaintiff; yet, the defendant did not perform his said promise, but although he did buy, as aforesaid for the plaintiff, a large quantity of the said wheat, to wit, of the value of 900L., yet he did not deliver the said flour when ground to the plaintiff, but failed to do so, and delivered, in lieu thereof, other bad and inferior flour of much less value, whereby the plaintiff lost great gains and profits, which he would have acquired from the performance of the said contract, and the resale of the said flour; and also large sums, amounting to the sum of 1,000L., paid by him in exporting and carrying the said flour so delivered to Melbourne and Sydney, and storing the said flour when, by reason of its bad quality, it was unsaleable; and also lost divers moneys paid by him under the said contract. Second count—And also that the defendant, on the day and year aforesaid, had and received divers, to wit, 20,000 bushels of good sound marketable wheat of the plaintiff, to be ground into flour by the defendant, with reasonable care for the plaintiff, for hire and reward, and to be delivered to the plaintiff when ground in a proper state; yet, the defendant did not deliver to the plaintiff the said wheat when so ground in manner aforesaid; but, on the contrary, refused and neglected to deliver the same, although a reasonable time for such delivery had elapsed before the beginning of this suit, whereby the plaintiff lost the value of the said wheat, and the profits he might have had from the resale thereof. And for that also the defendant afterwards, to wit, on the 1st day of July, in the year of our Lord 1854, was indebted to the plaintiff in 2,000L. for goods then sold and delivered by the plaintiff to the defendant, at his request; and in 2,000L. for money then lent by the plaintiff to the defendant at his request; and in 2,000L. for money then paid by the plaintiff

for the use of the defendant at his request; and in 2,000L. for money then received by the defendant for the use of the plaintiff; and in 2,000L. for interest upon and for the forbearance by the plaintiff to the defendant of moneys due and owing from the defendant to the plaintiff; and in 2,000L. for money found to be due and owing from the defendant to the plaintiff on accounts stated between them, and the plaintiff claims 2,000L. John Ryan Brennan, plaintiff's attorney. The 23rd day of September, in the year of our Lord 1854, the defendant, by Richard Henry Way, his attorney, as to the first count says, that he did grind the said wheat into flour, and did take due care and proper care of the said wheat, and ground the same for the plaintiff with due care, and delivered the said flour when so ground to the plaintiff. And as to the second count, the defendant says that he did deliver to the plaintiff the said wheat ground in a proper state within a reasonable time before the commencement of this suit. And as to the residue of the declaration, the defendant says he never was indebted as alleged. Richard Henry Way, defendant's attorney. The 25th day of September, in the year of our Lord 1854, the plaintiff joins issue upon the defendant's 1st, 2nd, and 3rd pleas herein. John Ryan Brennan, plaintiff's attorney. Afterwards on the 25th day of Sept., in the year of our Lord 1854, at Sydney, in the colony of New South Wales, before the Honourable Sir Alfred Stephen, Knight, Chief Justice of our Supreme Court, comes the within named plaintiff, by his attorney within mentioned, and the within named defendant, by his attorney within mentioned, having withdrawn his said pleas, by him above pleaded, although solemnly required, comes not. Therefore, let the jurors of the jury within mentioned be taken against him by his default, and a jury being duly summoned also came, who being sworn to try the matters in question between the parties, upon their oaths say that the defendant did not perform the promises and undertakings in the said declaration above-mentioned, but therein failed and made default; and also that the said defendant was indebted to the plaintiff as within in the said declaration is alleged; and the said jury assess the damages of the plaintiff, on occasion of the premises within complained of, to 2,000L. over and above his costs of suit. Therefore, it is considered that the plaintiff do recover against the defendant the said damages, by the jurors aforesaid in form aforesaid assessed; and also 256L. 11s. for his costs of suit, by the court here adjudged of increase to the plaintiff, which said damages and costs amount in the whole to 2,256L. 11s." It was contended in the office, that the claim of Mr. Kenny, upon foot of this judgment, should be disallowed upon the grounds that the judgment was bad upon the face of it; and also that it was, in fact, a judgment by default, and that it lay upon the claimant to show that the defendant's attorney had been properly constituted. It was also suggested, but not proved or pleaded, that the defendant was, at the date of the judgment, out of the jurisdiction of the Colonial Court. Upon this second point there was a conflict of evidence.* The Master

* The law of New South Wales respecting pleadings since the 1st January, 1854, was proved to be as hereafter stated. The several statements set forth form, in fact, portions of the Act of the New South Wales Legislature, 17th Victoria, No.

disallowed the claims upon the grounds stated in his

XXL, "An Act to amend the Process, Practice, and Mode of Pleading at Law in the Supreme Court" (assented to 19th September, 1853):—

"All statements which need not be proved, such as the statement of time, quality, and value, where they are immaterial, the statement of losing and finding and bailment in actions for goods or their value, the statement of acts of trespass having been committed with force and arms, and against the peace of our Lady the Queen, the statement of promises which need not be proved, as promises in *indebitatus* counts, and mutual promises to perform agreements, and all statements of a like kind may be omitted.

"Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be, and while issue is joined on such demurrer, the court shall proceed and give judgment as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form.

"No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

"If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or judge shall make such order respecting the same, and also respecting the costs of the application as such court or judge shall see fit.

"It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest."

The following was proved to be the law in New South Wales since the 1st September, 1850, relating to actions against persons absent from the colony:—"If after any final judgment obtained, an affidavit shall be made by the defendant against whom a process of foreign attachment may have been issued, that such defendant had at the time of the obtaining of the said judgment, and then hath a substantial ground of defence (either wholly or in part) to the plaintiff's action on the merits, and such affidavit sworn in the manner pointed out by a certain Act passed by the Governor and Legislative Council of New South Wales, intituled "An Act to consolidate and amend the law relating to actions against persons absent from the colony, and against persons such as joint contractors," shall at any time before the expiration of three years next after such judgment be filed in the Supreme Court, then, upon motion thereupon for that purpose made to the said court, and after due notice given thereof to the said plaintiff (and security being entered into for the payment to him of all costs by him at any time thereby sustained), it shall be lawful for the said court to cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form, either by feigned issue between the parties or otherwise, and at such time, and under such terms and conditions for the purpose of securing the substantial ends of justice, as to the said court shall seem meet.

"And the said court, after such inquiry and determination had, shall thereupon give such judgment in the matter for the reversal of the judgment in the original action, either in the whole or in part, or shall or lawfully may from time to time make such order or orders in the premises between the parties as the justice of the case shall appear to require, and every such judgment and order may at any time (if the party succeeding shall think fit) be suggested upon or added to the record of the original action in which such final judgment shall have been so obtained as aforesaid."

Order in Council making provision for appeals from the decisions of the Supreme Court of New South Wales, 18th September, 1850. After reciting the establishment of the Supreme Court, and the Act 9th Geo. 4, by which an appeal was given from that Court to the Privy Council in such manner as his Majesty by any order in Council should appoint and prescribe, the order goes on to state, that in case any final

judgment, which is given below,* and from this order the claimant now appealed, and sought by his notice that the said order might be set aside, or varied in respect of the said allowance, and that it might be de-

judgment shall be given by the Supreme Court in respect of any sum above the amount of £500, any person aggrieved by the judgment may, within fourteen days after the same shall have been given, apply to the court by petition for leave to appeal to her Majesty in Council, and then upon security (if required) being given within three months from the date of the petition, the court shall allow the appeal, and the party appellant shall be allowed to prosecute his appeal to her Majesty in her Privy Council in such manner and subject to the rules observed in appeals to her Majesty from her plantations and colonies.

* Master Brooke's judgment is as follows:—"I will begin with the second point, for it is the easiest; in fact, it is the express point decided, and, I think, most properly, by Lord Ellenborough in *Moloney v. Gibbons* (2nd Campb. 502). It was an action on a Jamaica judgment, in which it was alleged, 'and the said J. Gibbons, by J. F., his attorney, comes and defends the wrongs, &c., and says nothing in bar of the said action, wherefore, &c.' Garrow, for defendant, insisted that as this was a judgment by default, the plaintiff was bound to prove that defendant himself, pending the action, was living within the jurisdiction of the Colonial Court. Lord Ellenborough said, 'I will look to these foreign judgments with great jealousy, but I must give them credit for the facts which they specifically allege, and I must presume in the present case that the court saw J. F. properly constituted attorney for the defendant.' The case of *Ferguson v. Mahon* (11 Ad. & Ell., 179), cited by Mr. McCausland, would be applicable if those who oppose this claim had pleaded that the attorney named in the record was not Mr. Tease's attorney in fact, and had proceeded to prove such a case. This would have established that the judgment was obtained by fraud, and no one ever doubted that the proof of fraud would vitiate any judgment; but no such case had been made, and on the reason and authority of *Moloney v. Gibbons*, I must consider that the testator was properly represented by an attorney in the court at Sydney. The important question is, Whether the respondent may insist on error apparent on the face of this judgment? Mr. Sherlock relied on the *The Bank of Australasia v. Nias* (16 Q. B., 717) as an authority which forbids my giving any weight to this objection. But though Lord Campbell does not in that case mention such an objection as being a ground for impeaching a judgment, neither does he negative it. If we compare his judgment with the substance of the pleas he was deciding upon, it will be found that his reasons apply only to objections of matters *in pais*, which would involve, if allowed, a trying of the case over again in this country. The same observation was made upon that judgment of Lord Campbell by Sir John Romilly, Master of the Rolls, in *Reimers v. Druce* (23 Beav. 145), and he says, at p. 154, 'Upon the whole I am of opinion that a foreign judgment, sought to be enforced in this country, is, in addition to the cases referred to by the Chief Justice in the *Bank of Australasia v. Nias*, impeachable for error apparent on the face of it sufficient to show that such judgment ought not to have been pronounced. But this leaves open the nature and extent of the error apparent upon the face of the judgment which is sufficient to invalidate the judgment. Upon that my opinion is that it must be such error as, without any extrinsic evidence, shows that the judges have come to an erroneous conclusion of law or fact.' In a case cited by Mr. Sherlock, *Becket v. McCarthy* (2 Barn. & Ad., 951), Lord Tenterden acted on the principle so laid down in *Reimers v. Druce*, for he fully discusses the question whether the judgment in question (one of a court in Mauritius) was justly warranted by the article of the 'Code Napoleon' which was cited to support it, and decided in the affirmative. A similar principle is involved in *Alvon v. Furnival* (1 Cr. M. & Ros., 277). The next case cited was *Henderson v. Henderson* (6 Q. B. 288); but it does not touch the point. The objection made to the judgment as an error apparent was, that plaintiff was therein described as the widow of Henderson; but that was clearly a question of practice, of which the court below was the best judge. It is entirely a matter of practice to ascertain by what forms any one may become entitled to

clared that the demand of the said Eugene Kenny, on foot of the judgment, had been duly proved as a debt affecting the personal estate and effects of the said Samuel Teaze, and that it might be declared that there was

assert the rights of a deceased person. The Queen's Bench considered the Colonial Court the best judges of the question, just as Lord Ellenborough, in *Moloney v. Gibbons*, considered it decisive authority as to who should represent the defendant as his attorney. Mr. Sherlock's next case was *Tarleton v. Tarleton* (4 M. & S. 20); but it was not a case of error apparent. The judgment in question was a decree of the Chancery of Granada for payment of the balance of an account, and the defendant offered to show that the account had been incorrectly taken, and the Court of King's Bench refused to rehear the cause. *Hamilton v. Haughton* (2 Bl. 169) decided that a Court of Equity ought to refuse to carry into execution an erroneous decree. The errors were two—first, apparent, viz., that the decree provided for the plaintiff's debt alone, and not for the other *cæsi que trust*, though the suit was to execute the trusts of a creditor's deed; second, proved by evidence, that the defendant, who was brought before the court as heir of the surviving trustee, had no interest, there being still a surviving trustee not a party. In *O'Connor v. Macnamara* (3 Dr. & War. 411), Sir Edward Sugden refused to carry into execution a decree which gave interest on a consolidated sum. He cited *Hamilton v. Haughton* as deciding the principle, and said, 'It is true I cannot order this decree to be amended; but as I am not bound to perpetuate error, I will not give the plaintiff the benefit of the former decree, unless he consents to the proper decree.' The subject is fully discussed in Story's Conflict of Laws (4th edition, 1852), section 603, *et seq.* In section 607, he sums up what he considers both consonant to the authorities, and to the abstract principles of justice, and he lays it down, 'that a foreign judgment may be impeached by showing that upon the face of it, it is founded in mistake. *Obicini v. Bligh* (8 Bingh. 835) is an express authority for that position. The court (Tindal, C.J., Park, Gaselee, and Alderson) nonsuited the plaintiff after a verdict in his favour, because the record detailing the proceedings and judgment of a Maltese Court did not show the plaintiff's rights, or that the defendant had been properly represented in the Maltese Court, or that the judgment was final. So *Novelli v. Rossi* (2 B. & Ad. 757), *in assumptis*, the defendant showed the decision of a French Court between the parties and others in his favour, but the court held it of no avail, because the French judge had on the face of the judgment professed to ground it on English law as to bills of Exchange, and had mistaken that law; and yet the effect was to shut the defendant out from his remedy over against other parties to the bills, who were discharged by the French judgment, and lived in France. The result of all these authorities is, that the House of Lords in *Hamilton v. Haughton*, Lord St. Leonards in *O'Connor v. Macnamara*, the three English courts of law in *Obicini v. Bligh*, *Novelli v. Rossi*, *Becket v. McCarthy*, and *Alison v. Farnival*, all concur; and so does Mr. Justice Story, in his book, in establishing Sir John Romilly's rule. I am, therefore, bound to examine this judgment, to see if there is any such error apparent on the face of it as shows that the judge has come to an erroneous conclusion either of law or fact. The law by which it is to be judged is the law of England as it existed at the passing of the 9th G. 4, c. 83 (25th July, 1828), according to the 24th section of that Act. Now, judging by that law, and looking to the authorities cited by Mr. McCausland, *Morton v. Lamb* (7 T. R. 125), 1st Wms. Saunders, 320, 2 Wms. Saunders, 352, and 2 Smith's Leading Cases, 9, it is quite clear that this judgment is, as regards the first and second counts, unsustainable. The cases are quite in point. It is not a matter of technicality; it is an objection which affects the justice of the plaintiff's claim. He states a conditional compact, and insists on the benefit of it without performing, or offering to perform, his own part. I may add, that even if he had paid the stipulated price, both damages and costs appear excessive; but that is not a ground on which I have any right to rely. Two counts, then, being bad, and the damages general, the whole judgment is bad. The authorities are all collected in *O'Connell's Case* (11 Cl. & Fin. 238), where Chief Justice Tindal says that the whole judgment is to be reversed on writ of error, and a *cessante de novo* awarded; and the reason of the

now due to the said Eugene Kenny, on foot of the said judgment, the sum of 1,452*l.* 1*l.* sterling, for debt and cost, together with his costs of proving his demand, and that same was payable out of the personal estate and effects of the said Samuel Teaze.

Brewster, Q.C., and *Sherlock, Q.C.*, appeared for the appellant.

The Solicitor-General and McCausland, Q.C., for the petitioner.

The MASTER of the ROLLS delivered a written judgment in which he stated that the suit was instituted for the purpose of administering the assets of Samuel Teaze; the cause petition had been referred to Master Brooke, and the appellant Kenny had in the office filed a charge on foot of a judgment obtained by him against Samuel Teaze, in the Supreme Court of New South Wales, on the 2nd of October, 1854, for 2,000*l.* The charge stated that Eugene Kenny had issued execution for 800*l.* The Master having declared the amount of the assets of Samuel Teaze, had further declared that Kenny's claim should be disallowed, and from this declaration Kenny had appealed. A copy of the judgment, signed by Sir Alfred Stephens, had been proved. The declaration contained two special counts, and also one for goods bargained and sold, and one for goods sold and delivered. Samuel Teaze appeared to have pleaded to this declaration, and afterwards to have withdrawn his plea. A jury was empanelled to assess damages, and a verdict was had, and judgment signed for 2,000*l.* The ground on which the Master had decided the case was, that he considered the first and second counts bad on general demurrer, and that, as the damages had been assessed generally on all the counts, the judgment was erroneous. How far a foreign or colonial judgment was examinable in England or Ireland had frequently been the subject of consideration. The latest case on the subject was *Reimers v. Druce* (23rd Beav. 145). That case did not appear to be applicable here, as in it the reasons for the judgment were attached to it, and so might be considered to form part of it. His Honor then referred to the observations of Sir John Romilly, at pages 150 and 151 of the report. It was sufficient to refer to the result of the cases, and also to the case of *The Bank of Australasia v. Nias* (16th Q. B. 717). There was no case in which it had been held that a mere defect in the pleading would render a judgment null and void, where a cause of action was apparent on the account. In order to determine whether the Master was right, it was necessary to examine the first and second counts of the declaration. It was right, before adverting to the declaration, to say that by the Common Law Procedure Act of New South Wales, special demurrers were abolished, and his Honor then referred to the provisions of the Australian law, which have been already given in a note. The first count then of the declaration was framed

rule is explained, *inter alia*, by Williams, J., p. 281, and by Alderson, B., at p. 288. I must, therefore, disallow the charge of Mr. Kenny, but without prejudice to his renewing his claim, if he can bring forward his evidence before me. For that purpose I will keep £2,000 in court till the first day of next Hilary Term, and I will include in my order permission to him to file a further charge on or before that day. On the other hand, the opposing parties, in the event of any such charge being filed, may apply for security against costs."

in assumpsit. [His Honor read the first count] The second was framed in case, not in assumpsit. [His Honor then read the second count, and the pleas to both the counts.] The ground upon which it had been decided by the Master, that the first and second counts were bad was that there was no statement in them by the plaintiff; that he had performed, or that he was willing to perform, his own part of the contract. Now, so far as the second count was concerned, it was not necessary that such averments should be made; and as to the first count, his Honor thought the objection should have been made by demurrer. The authorities were collected in 2nd Sm. L. C. p. 9, in the note to *Cutter v. Powell*. His Honor was unwilling to decide that a mere defect in the pleading was to defeat a plaintiff, where a true cause of action appeared, when the time for bringing error had elapsed. The Master had, in fact, decided that though the Privy Council of England could not now entertain an appeal, yet the Master could do so. With respect to the omission of consideration, the distinction was between an action of assumpsit and an action on the case, and also between an action on the case for non-feasance, and one for malfeasance—*Elsee v. Gatward* (5 T. R. 143). He also referred to *Brown v. Boorman* (11 Cl. & Fin. 1), and to the judgment of Lord Campbell in that case. The declaration in that case did not contain any averment of readiness to pay the consideration, and according to Lord Campbell's opinion, judgment could not be arrested after verdict on that ground. He did not consider it necessary to decide that question as if he was sitting in a court of law on a demurrer. The question was, whether such an objection could be raised to a colonial judgment after verdict, and whether an error in pleading was such a matter as would render a judgment void, although there was a good cause of action. The order in council making provision for appeals from the Supreme Court of New South Wales had been proved, and there was no pretence that any liberty to appeal had been given. The time for appealing had elapsed more than six years ago. If the petitioner desired time to make an application for liberty to appeal, his Honor said he would suspend his order. If he did not, the result was that the Master had reversed the decision of the Court in New South Wales, when the Judicial Committee of the Privy Council could not do it. He was, therefore, of opinion that the Master's order could not be sustained. The Solicitor-General had, however, relied upon this, that the judgment had been obtained in the absence of Samuel Tease. There were circumstances which led his Honor to believe that that was not founded in fact; but he would give leave to bring an action on the judgment, and put the petitioner under terms to plead such a plea only as would raise the issue, whether Samuel Tease was absent when the judgment had been obtained. Unless the petitioner desired to put in such a plea, or to apply to the Judicial Committee of the Privy Council, the Master's order must be reversed. The time for bringing Writs of Error by the English Common Law Procedure Act, was six years; if the Master was right, an English judgment conclusively binding on a defendant in England might be held to be null and void in Ireland. His Honor would not decide that.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ANDREWS v. BALL.—Nov. 4.

Practice—"24 & 25 Vict. c. 23—Bills of Exchange Act, 1861."

Application for leave to defend an action brought on a bill of exchange under this Act should be moved before a judge in Chamber.

Sidney moved, on behalf of the defendant, for leave to file a defence to the summons and plaint in this action. The defendant had made an affidavit of the kind required by the "Summary Procedure on Bills of Exchange Act," 24 & 25 Vict. c. 23.

The Court refused the motion, on the ground that the Act referred to directed the application to be made to a judge, and did not make use of an alternative expression, as "the court or judge." The motion must, therefore, be made to a judge in chamber.

MANFIELD v. M'KAY.—Nov. 6.

Landlord and Tenant Act, 1860—Meaning of the expression "held at rack-rent."

This was an ejectment on the title. By a settlement bearing date in the year 1808, a power had been given to make leases which should not exceed thirty years. In 1817 a lease was made under this power, but for a longer period than thirty years. The lessor died in 1860, and the defendant in whom the interest in the lease had vested, contended that it was a good lease for the life of the lessor, and that under the 23 & 24 Vict. c. 154, s. 34, he was entitled to remain in possession until the expiration of the current year of his tenancy. By the evidence given at the trial, it appeared that the rent paid in 1817 was a rack-rent, but that the premises were considerably above the value of this rent at the period of the lessor's death. A verdict was had for the plaintiff, with liberty reserved to apply to have it changed into one for the defendant, or for a new trial.

Henderson, Q. C., now moved, in accordance with the liberty reserved, for a conditional order.

The Court refused the motion, entertaining no doubt that the expression "held at rack-rent" meant held at rack-rent at the period of the ceasing of the landlord's estate.

Rule refused.

M'GUINNESS v. MEKHAU.—Nov. 8.

Pleading—Endorsement of Particulars.

In an action for work and labour, to which the ordinary money counts are added in the summons and plaint, it is not necessary, when there is an endorsement of particulars, to specify to which of the counts the particulars refer.

This was an action for work and labour, money lent, money paid, money had and received, and money found due on an account stated. An endorsement of particulars on the summons and plaint set out, as part

of the demand, the profits of a farm of which the plaintiff claimed half. The amount of stock and farm produce was stated, as agreed upon and settled between the plaintiff and defendant. The items were given, and the deductions. The endorsement alleged the balance of the plaintiff's demand to consist of cash advanced to the defendant from time to time.

Frazer moved that the summons and plaint and particulars be set aside, or be amended in the particulars furnished by the plaintiff, on the ground that same were embarrassing, being unintelligible and inconsistent with the causes of action contained in the plaint. The plaintiff did not state to which of the counts the endorsement of particulars applied, and there was no means of knowing.

Phillips, in support of the summons and plaint.—The effect of the endorsement is rather to tie up the plaintiff when he comes to prove his case, than to embarrass the defendant.

Motion refused with costs.

Court of Exchequer.

[Reported by I. S. Heazle, Esq., Barrister-at-Law.]

TOTTENHAM v. BYRNE.

Statute of Limitations, 3 & 4 Wm. 4, c. 27, ss. 3, 27—Right of Way—Acquiescence.

In an action to recover the soil and freehold of a road leading from the public highway to a well, where there was a lease made by one B. B. E. to one T. J., bearing date 31st of May, 1805, and reserving the road for ever. Held, that there must be not only a cessation, but an acquiescence to make the Statute of Limitations apply.

Also, per Pigot, C. B., that where a person ceases to enjoy for 20 years, by the Statute of Limitations, he ceases to have title, and the party who gets possession gets what is equivalent to an estate in fee.

Also, that where there was a user under a grant of a road as such, there was a user under the grantor that prevented the operations of the Statute of Limitations.

A carriage-way includes a horse-way, and a horse-way a foot-way.

THIS was a motion for a new trial. The action was brought for obstructing the road to Tubbernacoolah Well, on the lands of Mount Elliott, in the county of Wexford, by building a wall across it, and for a lane leading to the well, from the public highway, which leads from New Ross to Mount Garrett. The first count stated that one B. B. Elliott was seised in his own demesne as of fee, of the premises with the appurtenances. In the second count, there was an averment that he was seised as of fee of and in, the new road leading from the public road to the well; that he made a lease to one Thomas Jones, on the 31st of May, 1805, reserving the road to the well for ever. The third count contained a statement that there ought to be one public highway from another to the well, for persons to go on foot with horses and cattle. The fourth count alleged the grant by

indenture, bearing date the 31st of May, from B. B. Elliott to Thomas Jones, of a way from a certain point, over a public highway, leading from said lands to Tubbernacoolah Well; and averred the vesting of his interest in the grantee, and the obstruction by the defendant. The fifth count was a count in trespass. The defence to the first count was, "That the road leading to the well was not plaintiff's soil or freehold;" to the second count, "that plaintiff was not entitled to the right of way;" to the third count, "that there ought not to have been such common of public highway;" to the fourth count, "a traverse of the execution of the deed by Thomas Jones," and for a further defence, "that all the property or interest of Bartholomew Boyd Elliott was not vested in the plaintiff as alleged." Six issues were sent to the jury: First, whether at the time of the committing of the grievance, in the first count mentioned, the land therein described as the road leading from, &c., to the well therein mentioned, or any part thereof was the land, soil, or freehold of the plaintiff, as therein alleged;" secondly, "whether the plaintiff was entitled to the right of way in the second count alleged;" thirdly, "whether there ought to have been such common or public highway, as in the third count alleged to the well therein mentioned;" fourthly, "whether Thomas Jones executed the deed of the 31st of May, 1805, in the fourth count mentioned;" fifthly, "whether all the estate and title of B. B. Elliott, in the way in the fourth count mentioned, was at the time of the committing of any of the grievances or trespasses, as therein mentioned, vested in the plaintiff as therein alleged;" and sixthly, "was the land in the sixth count, or any part thereof, the land of the plaintiff. The jury found that the plaintiff's tenants and the public, by plaintiff's dedication and that of his predecessors had always enjoyed the passage to the well. As to the obstruction, viz., building a wall, they were discharged without any finding, and thereupon the judge directed them to find for plaintiff on all the issues except the second.

Serjeant Sullivan, Q.C., (with him Rolleston, Q.C., and Murphy), in support of the order.—There was no reservation of soil and freehold, therefore the judge's charge was wrong in respect of that; secondly, the public right of way was not proved to have been reserved in 1805, and by Co. Rep. part 10, 106 b., a reservation to support that case must be strictly proved. Sheppard's Touchstone, p. 80. *Doce on the dem. of Douglas v. Lock* (2nd Ad. & E. p. 705) at page 744 draws a distinction between reservations and exceptions. Counsel referred to Woolrych, on Ways, pp. 196 & 381. *Trustees of the Dundee Harbour v. Dougall* (1st Macqueen's Rep., p. 321); *Doce on the dem. of Robinson v. Hinde* (2 Moo. & Robinson, p. 441); *Duncan v. Louch* (14 L. J. N. S., p. 185); and *Brownlow v. Tomlinson* (1st M. & Gr. p. 484).

J. E. Walsh, Q. C., (with him Hemphill, Q. C., and E. Johnstone,) for plaintiff.

DEASY, B., enumerated the several facts of the case, referred to the 3 & 4 Wm. 4, c. 27, and stated that there must be not only a cessation, but an acquiescence, to make the Statute of Limitations apply. There was here a user, which indicated an

assumption by the defendant, as well as an acquiescence by the plaintiff, who did not bring his ejectment for twenty years, the case provided for by the Statute of Limitations.

PIGOT, C. R., I concur with my brother Deasy in everything he has said, except in respect of the point whether the title was lost by the plaintiff, and acquired by the defendant, by virtue of the Statute of Limitations. I have not been able to overcome the feeling that I entertained during the argument, that the statute had worked a transfer of the title, that is, when a person ceases to enjoy for twenty years, he ceases to have title, then the party who gets possession gets what is equivalent to an estate in fee. This is, I think, the meaning of the decision of Sir Edward Sugden. The two cases referred to by my brother Deasy, stated that there must be dispossession by one party, and acquiescence by the other. Now, has such been the case? Has there been such dispossession? We must here consider the thing which the party is to be dispossessed of. "The road," that is, the soil of the road was excepted and retained in the grantor, not for the ordinary use of the land, but for a road, and to other purposes, as far as related to his enjoyment. The evidence is clear that there was (and here we are unanimous) a dedication previous to the execution of the lease. The well was used by the public, or by the inhabitants of the vicinage, and this was undoubtedly clear on the evidence. Now, what was contemplated by the grantor of the soil at each side of the road? The grant was the use of the road as such, and I think that so long as the road was used by the public, or the inhabitants, there was a user under the grantor, that prevented the operation of the statute, although the jury found that within twenty years the road was used by others, as well as the tenants of the plaintiff. The question therefore is, was that enjoyment contemplated by the deed of 1805? Exclusive possession was destroyed by the erection of the wall; the proof was that the wall was used for some of the purposes of the highway. A carriage-way includes a horse-way, and a horse-way a footway, and the enjoyment of the road by the public is inconsistent with that exclusive possession which, under the statute, confers title. Now, how was that highway used? The passengers passed the wall, therefore, if the soil was the soil of the defendant, the passengers committed a trespass. *Cujus est solum, ejus est usque ad cælum*; therefore, in going over that wall the passengers went either by right or by wrong. If that was by right, the passengers did so in the enjoyment of a right, and consequently there was an exclusive enjoyment of the soil, notwithstanding the wall was there; but there is a dearth of authority for such a position; and the presumption, that the owners of the adjoining freeholds were the owners of the road, is rebutted by the deed of 1805. I do not think that even if the plaintiff himself did not walk over the road, he would have lost the possession of the road, and, as was rightly put by my brother Deasy, there must be acquiescence on the other side. Will the placing of a large stone, which is not removed for twenty years, give the party putting it there the ownership of the soil, or the placing of three or four stones?—or are we not to apply to this the prin-

ciple applicable to "wastes," that if there be not a user, such possession is the possession of the whole? I confess, the conclusion I am disposed to come to is, that so long as there was a use of this road, according to the deed of 1805, the soil then retained continued in the plaintiff, and those under whom he derived, and it was not displaced by the Statute of Limitations. There must, therefore, be a new trial, as Judge Christian left it to the jury to say how long the wall was built, about which the jury disagreed, unless the defendant is satisfied with the right of way. (*To Walsh, Q.C.*)—The proper course for you to adopt would be, to enter a *nolle prosequi*, with respect to the trespass, and then the cause shown must be allowed. [*Rolleston, Q.C.*—They are satisfied to lay their verdict on the issue respecting the public right of way, and leave the soil in my client.] The agreement is, take a new trial, or a verdict on the above terms.

Cause was allowed.

LLOYD v. SADLER.

New Trial motion—Misdirection—Excessive damages—Executrix of attorney—Bailee of deeds—Liabilities of defendant in detinue—Judgment in detinue.

In an action to recover damages for the loss by the defendant, executrix of an attorney, of a certain deed of settlement, a direction by the judge, "That the jury might give ample damages where a party is out of possession of his property; but that such was not the case here, for the party is in possession of part of the property." It appeared that one construction of the lost deed was, that the plaintiff took an absolute interest subject to the life estates of three other persons. Held, that this was a misdirection, that question not having been submitted to the jury in estimating the damages.

"Also, where a plaintiff has all the rights which he could get by the deed of settlement, he ought not to get heavy damages for its loss."

If an executrix of an attorney set up a lien for costs on deeds entrusted to her husband, she makes herself bailee of the deeds, and liable for their conversion. In detinue, but not in trover, the defendant may release himself from liability by giving up the chattel.

The judgment in detinue, must be for the ascertained value of each article, and for separate damages for the conversion.

If a remittitur is entered for the plaintiff he may elect between his goods or their value, and his damages for their detention.

THIS was a motion for a new trial. This was an action in trover for certain documents alleged to have been in the possession of defendant's late husband, who was a solicitor, and a verdict was returned for the plaintiff for 500*l.* damages, the full amount laid in the summons and plaint, leave being reserved to the defendant to apply to the court above to set aside the verdict for the plaintiff, and enter one for defendant; or to grant a new trial, on the grounds that the verdict was against evidence, that it was got

by surprise, &c. The summons and plaint contained two counts—one for the conversion, the other for the detention of six documents. These documents were, first, a marriage settlement, dated 1811; second, a lease of part of the lands of Ballyhane, dated 1841; third, a release also bearing date 1841; fourth, an agreement, dated 1845; fifth, a copy of a bill of costs in the case of *Toppen v. Lloyd*, and another document. The defences were a simple traverse. In 1840 it appeared Hugh Lloyd, the father of the present plaintiff made a lease for his own life, and subsequently died in 1844. Hugh Lloyd left four children, him surviving, and on the 9th of May in that year, one of them, the plaintiff, was attacked by a fit of epilepsy, during which he fell into the fire. In consequence of the injuries resulting from this, the plaintiff became bedridden, and whilst so confined to bed in 1844, he was obliged, by his relatives, to give each of the other children the 200*l.* secured to them by Hugh Lloyd's deed, and to divide the lands in four parts—one to be retained by himself, and the remaining three to be given as security for the payment of the portions of 200*l.* Subsequently, his brother and sisters got a renewal lease from the head-landlord and retained possession, therefore they have long since been paid the 200*l.* Edward Lloyd, Mary Lloyd, and Charlotte Lloyd, were the children to whom the property was secured, no provision having been made for Jane Lloyd, who married a man named Toppen. Jane and her husband filed a bill to raise her portion, and get an account. The documents relating to this action were portion of the papers sought to be recovered. This suit was compromised by Jane and her husband getting 20*l.* a-year for Jane's life, charged on the whole property (71 acres); and a deed to that effect was executed on the 2nd March, 1846. The value of the land was 2*l.* per acre, but 8*l.* an acre, it appeared, could be got from con-acre tenants. In 1845, plaintiff gave the deed of 1811 to Mr. Sadlier, and after the suit in 1857, he applied to get it back, but was told the documents were all in Dublin. In February, 1858, the late N. Sadlier got ill, and died in August following, leaving his wife as executrix, along with a person named Wm. Whyte and another, as co-executors. Plaintiff then asked Mrs. Sadlier for the documents, and she said she would look for them. Not having got them, however, on the 21st September, 1859, plaintiff caused his attorney Bradshaw, to apply to Mrs. Sadlier, and, at the same time, he himself wrote authorising her and her co-executors to hand them over to his attorney. On the 28th, their attorney Dwyer, sent an answer, saying he would give up the papers, producing, at the same time, a bill of 52*l.* 17*s.* 5*d.*, for costs on the documents. This bill of costs was endorsed in pencil, by the late Mr. Sadlier, to the effect that he got 10*l.* as part of the costs due to him. This bill contained charges for making the copies of the marriage settlement, and for a copy of the renewal lease of December, 1845; and on the 19th of December, 1845, for attendance to compare the copies with the original, and also in February, charges the usual costs in the case of *Toppen v. Lloyd*. An offer was then made to give up the bill of costs for 8*l.*, and plaintiff offered 5*l.*, but this was then refused. Two days afterwards,

however, a strange clerk called and offered a bundle of documents consenting to take the 5*l.* This bundle only contained the renewal lease of the 30th March 1844, and the annuity deed of 1846, in consequence of which plaintiff only gave his I. O. U. for the money till the other documents were surrendered. On the 1st of August following, plaintiff again called on defendant for the remaining papers, offering, at the same time, to pay the money. James Gearan, a witness at the trial, swore that Sadlier kept his papers very carelessly; that he made a search, and recognised some papers as belonging to Lloyd, in consequence of his having called for them.

Sergeant Armstrong, Q.C. (with him *Curtis*, for the plaintiff, now showed cause)—The objection that the direction to the jury "to find for the plaintiff, if they believed that the defendant had had the documents in her possession, or procurement at the time of the demand, and had not lost them carelessly before demand," was one which could only be given in trover and not in *detinue*. As to the possession being in the defendant, the following were cited—*Gledstane v. Hewitt*, (1st Crompt. & Jer. 565); *Jones v. Dowle* (9 M. & W. 19). As to there being no evidence of conversion—*Watkins v. Woolley*, (Gow, p. 69) In trover it need not be express—*McKewen v. Catching* (27 L. J. N. S. Exchq. 41.) The fourth objection to the plaintiff allowing only nominal damages; the rule is, that the court is to state the measure of damages—*Williams v. Currie*, (1 Com. Bench. 841); *Sharpe v. Brice*, (2 W. Black, 942); *Loosemore v. Radford* (9 M. & W. 657). The action of trover was that applicable to the conversion by the defendant—*Wilbraham v. Snow* (2 W. Saund, p. 47); defendant liable as an executrix by way of tort—*Saund* 216. [*Fitzgerald, B.*—The possession was in testator, and in such case *detinue* will lie against the executrix. *Mason v. Dixon*, (W. Jon. 173.)] In *detinue* as well as in trover, and conversion non-joinder of plaintiffs is only a ground for a plea of abatement; that is, admitting that Jones had the legal estate. As to plaintiff's interest there is no conflict between *Barron v. Barron*, and *McClintock v. Irvine*.

Rolleston, Q.C. (with him *Hemphill, Q.C.*), as to the form of action it ought to be against the defendant as executrix. As to the plaintiff's title to the deed, Hugh Lloyd was, in 1811, seised in *quasi fee* of lands which were put in settlement on his marriage, giving a jointure of 50*l.* a-year to his wife, and containing a covenant to settle the whole estate, prior to his death, to the uses of his children, according to the case of *Barron v. Barron* (8 Ir. Chan. Rep. 366, and 10 Ir. Chan. 120). This case would, at first sight, appear to be overruled by *McClintock v. Irvine* (10 Ir. Chan. 480); but can be distinguished on the ground that the words "for ever," are not so comprehensive as the words, "for the lives of the *cestuis que vie*." The general rule is, that either an actual refusal to restore a chattel, when within one's procurement, or the creating one's own disability to do so is essential to support trover—*Edwards v. Hooper* (11 M. & W. 363); *Fouldes v. Willoughby* (8 M. & W. 540). This should be an action on the case, and not in trover—*Heald v. Carey* (11th Man & Gran. 977); *Ross*

v. Johnson (5 Burr, 2825); *Canot v. Hughes* (2 Scott, 663); *Towne v. Lewis* (7 Man. & Gran. 608); *Verrall v. Robinson* (2 Crompt. & Ros. 495). *Detinue* does not lie if there is not a demand of the bailment before there is a loss of it—*Hunter v. Rice* (15 Term. Reports, 100); Bro., Ab. *detinue*, fol. 228, s. 41; 1 Saunders, 94 and 97, n. 1; *Devereux v. Barclay* (2 Barn & Alder. 702). In *detinue* and *trover* the forms of judgment are different—*Anderson v. Passman* (7 Carr & P. 193); *Chitty's Archbold* Ed. 58, 436; *Harrington v. Price* (3 Bar. & Ad. 171). The plaintiff is not entitled to the deeds here, Jones is the person entitled, as they go with the legal estate—*Lord v. Wardle* (3 Bingh. N. Rep. 618). [*Pigot, C. B.*—As to damages, that does not strengthen his title, but absolutely weakens it—as to *Williams v. Currie* (1 Man. & Gran., 841), the court expressly laid down the rule, that in actions for *trover* they would interfere with excessive damages.] As to the conversion, they cited *Broadhead v. Marshall*, (in 2nd W. Blackston, 955); *Reeve v. Palmer* (27 Law. J., N. S. C. P. 327). The defendant has not been guilty of legal negligence; it must be “well defined,” and “clearly proved”—*Cotton v. Wood* (29 Law. J., N. S. C. P. 333); *Burroughes v. Bayne* (29 Law. J., N. S. Ex. 185). *Reeve v. Palmer* (27 Law. J., N. S. C. P. 327), the doctrine of how far an attorney was liable in *detinue* for lost deeds is discussed. [*Fitzgerald, B.*, referred to Rolles' Abridgment, that *detinue* will lie against an executor where the conversion has been by the testator, and that the matter converted continue in specie in hands of the executor.] *Ross v. Johnson* (5 Bur. 2825); *Mulgrave v. Ogden* (2 Cro. El. 219); *Fouldes v. Willoughby* (8 M. & W. 519); *Edwards v. Hooper* (11 M. & W. 363); *Wilde v. Waters* (16 Man. & Gran., 637); *Bushel v. Miller* (1 Strange, 128), and *Simmons v. Lillystone*, (8 Ex. 431); *Finucan v. Small* (1 Esp. 315); *Roux v. Wiseman* (Fost and Finl. 45). Baron Martin traces the history of *trover*, in his judgment in *Burroughes v. Bayne* (29 Law. J., N. S. Ex. 188). In *detinue*, the verdict here is erroneous, as it should distinguish damages and value—*Phillips v. Jones* (15 Ad. & El. 869); 1 Archbold, 436; Bro. Ab. *Detinue* Plac. 1, 43-44; Fitzherbert, 239, A. B.; *Gledstane v. Hewitt* (1 Crompt. & Jer. 565); *Clements v. Flight* (16 M. & W. 42); Story on Bailments, sec. 107, 6th ed; *Roux v. Wiseman* (Fost and Finl. 145); Year Book, 27 Hen. 8, fol. 13, p. 35, quoted in *Reeve v. Palmer*. As to the objection there was no evidence to support the charge of negligence, the following decisions were referred to—*Cushill v. Wright*, (6 Ellis & Black. 891); *Toomey v. London & Bright. Railway Co.* (3 Com. Bench, R., N. S. 146); *Cornman v. Eastern Counties Railway Company* (4 Hurl. & N. 781); *Cotton v. Wood* (29 Law. J., N. S. C. P. 333). As to damages the verdict here is plainly erroneous, as it should ascertain the value of each parcel, and price of each document—*Anderson v. Passman* (7 Car. & Payne, 193); *Pawly v. Holly* (2 W. Blackstone, 853); *Clunnes v. Pezzey* (1 Campb. 8); *Pleydell v. Dorchester* (7 Term. R. 529); *Ducker v. Wood* (1 Term. R. 277).

FITZGERALD, B.—This case comes before us now on

a conditional order to set aside the verdict, on the ground that there was no evidence of conversion, or else to obtain a new trial because the damages were excessive, and likewise on the ground of newly-discovered evidence. It appeared that Hugh Lloyd died in 1844. Plaintiff, on his examination at the trial, swore that he had given six documents into the possession of defendant's husband. According to the statement of the plaintiff, Hugh Lloyd made a lease in 1840, charging the lands in pursuance of a power reserved to him. A renewal lease was executed in 1844. It appeared also that the plaintiff and the other children were possessed of one-fourth of the lands, and his allegation was, that they must be more than paid. Nicholas Sadleir made the deed of 1846, and had the document in 1847. In August, 1857, Sadleir died, leaving his wife his executrix. One of the witnesses, named Guerin, proved that he made the search for the documents, and swore that he saw certain papers belonging to Nicholas Sadleir. After his (Sadleir's) death, the plaintiff applied for these papers, and shortly afterwards received a letter stating that the papers were found. Some of the papers were accordingly given back, but three documents were not forthcoming. It was proved that search had been made for them, and that defendant never saw the three missing instruments; and at the close of the case, counsel for the defendant called for a nonsuit, which, however, was refused. The case of the plaintiff was, that the deed of settlement, which was a conveyance for 500 years in trust for Hugh Lloyd for life, secondly, to secure a jointure for his wife, and subject to these limitations for all the children, gave only a life estate, subject to which the plaintiff was entitled to the absolute right in the estate undisposed of. The judge was called upon to tell the jury if they believed that defendant had not then the documents in her possession, they should find for her, which was refused. As to the question of damages, it is altogether a question for the jury. They might give ample damages where a party had been out of possession of his property; but that was not the case here, for here the plaintiff is in possession of part of the property. On this point also it was submitted by defendant's counsel, that the jury should receive a direction to find only nominal damages. Now, with respect to the ground put forward for a nonsuit—viz., that there was no evidence of conversion, I think the Chief Baron rightly refused so to direct, because there was evidence given that the documents had come into the defendant's possession. If the defendant had the deeds at the time of the death of plaintiff's husband, the verdict must be given for the plaintiff. As to the other ground, that of conversion, it is not so clear; but for this motion it is not necessary to dwell upon it, for the jury did not find that the documents were taken away by any person. In estimating the damages, two constructions of the deed of 1841 were given to them; the second of which was, that Lloyd took an absolute interest himself subject to the estates of the other children. I think the effect of that settlement would be to have given an absolute interest to the brother and to the other children. I am of opinion, therefore, that the conditional order for a new trial should be made absolute.

DEAST, B.—It is proved that the settlement of 1811 was in existence. There was no evidence respecting the deed of 1841. The jury awarded £500 for these. It is not very material to say whether these damages were given wholly for the settlement of 1811 or for the deed of 1841, or partly for one and partly for the other. Now, as to the contents of the deed being as recited, I have no doubt, as they were prepared by Sadlier, that he did not mistake them. The plaintiff, consequently, has all the rights which he got by that settlement, therefore he ought not for that settlement get heavy damages; therefore the jury had not an opportunity of estimating that view of the right of the parties, so I think this case should be submitted to a new jury.

PIGOT, C.B.—In every part of the judgment of my learned brothers I concur. I think it is important to apply all the rules applicable to estates in fee to estates in *quasi fee*. I am, therefore, of opinion that the construction of the settlement suggested is the correct one.

Rule absolute—no costs given.

Court of Bankruptcy.

[Reported by John Levey, Esq., Barrister-at-law.]

RE J. M'COOTE—November, 1861.

Final examination of a bankrupt, his conduct and demeanor in court—alleged loss of money—difference between the principle, that will lead the court to doubt the truth and fulness of the discovery of a bankrupt; and the evidence that would warrant a criminal prosecution.

Although the demeanor and deportment of a bankrupt in court when under examination, is calculated to make a favourable impression as to the truth of his statements when accounting for money alleged to have been lost by him out of his portmanteau, still when the facts connected with that loss are of a suspicious character, and that the statement is not corroborated, the court will not pass the final examination. There is a vast difference between the grounds on which the court may see reason to doubt the truth and fulness of the discovery of a bankrupt, and the evidence that would warrant a criminal prosecution.

THE facts appear in the able judgment of Judge Lynch.

Heron, Q.C., Kernan, Q.C., and Doctor Seeds appeared for the bankrupt.

Sergt. Armstrong and Jackson for the assignees.

LYNCH J. delivered judgment. He said—This case is now before me on the final examination of the bankrupt; and the question I have now to decide is, whether I shall pass that examination. I perfectly agree with the counsel on both sides that the case is one of great importance, casting upon me a grave responsibility, as regards the bankrupt upon the one side, and the mercantile community upon the other. I feel this responsibility, and I have anxiously considered the case, and I have given due weight to the able arguments of counsel before me; and I feel deeply the

double duty demanded of me—to consider mercifully the case of a man in the position of the bankrupt, and, also, to consider what is demanded of me, as a judge of this court, in administering the law, for the protection of the traders of this country. I know and feel my whole responsibility, and I assumed the case fully impressed with its deep and grave importance. The case is one very peculiar in its facts and circumstances, and hardly ranges within any precedents in this court. At the outset, I may say that the schedule is fully vouched, if the account of the loss taken credit for can be believed, the trading disclosed generally is fair and legitimate; accounts have been fairly shown to vouch the transactions of the trade. A minor point was raised as to vouching the travelling expenses. No weight was attached to it in argument, no weight is attached to it by me; and I have no hesitation in saying that it stands not in the least degree in my way in considering the question as to passing the final examination. During the progress of the case, Mr. Coote was frequently examined in this court. It is justice to him to say that, in my opinion, his manner and demeanour were such as to win confidence for his statements. I fully bear testimony to the propriety of his manner and demeanour in this court, and he would be greatly a loser in any court that only had his written testimony, without the opportunity of having his evidence giving as it was given here. So far, then, as vouching is concerned—so far as the conduct and demeanour of the bankrupt since he came within my jurisdiction are concerned—I should feel no difficulty in dealing with the case. But these things being so—the question, the real question, the only question in the case arises—as to the alleged loss of the sum of £1,390 by the bankrupt, for which he takes credit. This is a cardinal question as to his accounts: it is now the question which arises with me in determining whether his final examination shall pass. Mr. Coote was a trader carrying on a respectable trade in Belfast—his dealings were extensive, and his credit stood reasonably well in the mercantile world; he was undoubtedly not in very prosperous circumstances; he had to depend on renewals to meet his engagements; he had to deal with a relative for securities to procure bank accommodation; however, I think I may say on the whole that he stood in trade in a fair position—a fair credit in the mercantile world. He had in June last engagements in London to meet to the extent of 1,900*l.*; he left Belfast on the 22nd of June to provide for them. His account is that he got 1,390*l.* in gold, and 110*l.* in notes, to bring with him to London to provide for these engagements, and that on the journey between Dublin and London this sum of 1,390*l.* in gold was abstracted from a portmanteau carried by him. This he states—this he swears to. If it is true, it is asked what proof can he bring: how can he substantiate it otherwise than by telling it and verifying it under sanction of an oath? There is much force in this question; and I admit, that if his statement is true, it is incapable of being otherwise verified. But, then, am I to be satisfied with its simple verification, or does not the circumstance, so verified, demand at my hands an inquiry into the transaction to enable me to say that it is a case fairly vouched by such verification? That it requires at my hands such inquiries I think is not

denied by those acting for Mr. Coote; no objection was ever hinted at as lying to a full investigation into the circumstances of the alleged loss. It is so manifestly necessary to use every means in our power to test the truth of such a story, that the bankrupt himself and his able advisers have freely offered their aid in carrying out most fully this investigation. To allow the mere statement of the loss to be a sufficient vouching would be so plainly absurd, as opening so easy a door to gross fraud, that no one could venture in this court to insist upon it. If Mr. Coote's statement of this loss be true, a great misfortune has befallen him: a case arises against him, not to be decided by his testimony, but enforcing me to investigate that statement, to weigh its probabilities, and to see if it is satisfactory, having regard to all the attending circumstances, and to see if, on good reason and common sense, I am justified in telling the mercantile world that I am satisfied with the account given by Mr. Coote, of the loss of this large sum. It is then my enforced duty to weigh the circumstances of this case, not in nice scales as regards Mr. Coote, not on any refinement, but on broad, clear grounds of reason and common sense, giving to him every benefit arising from the impossibility on his part (if his case be true) to verify it by independent testimony. Let me first take the case of Mr. Coote, on his own showing simply: he has a large amount to pay in London, 1,900*l.*; towards its discharge he starts with 1,500*l.*, made up by gold to the amount of 1,390*l.*, and bank notes to 110*l.*—I cannot avoid saying a strange mode of conveying so large a sum by bringing it in so cumbrous and dangerous a manner—and he selects for his journey an unusual route, going by Dublin and Holyhead, instead of adopting his usual and more direct route by Fleetwood. These two points so patent must, of course, be explained, and how are they explained? He selected gold because he could not get notes, and because to get a bank order would cost him some small per centage, and he selected his route by Dublin, because for some reasons to which I will have occasion more fully to allude—he had fear for the safety of his property on the journey. Now I certainly feel great dissatisfaction as to both these reasons as accounting for his bringing this large sum in gold. Whether or not he could have obtained notes rests on his evidence alone; but why any man who had reason to fear for the safety of his property should select the very easiest mode of making the robbery effective startles me. Then, starting thus, with this large sum in a portmanteau, to be placed by porters in trains and in the steam vessel, his route to London is not direct. He stops at Drogheda—so near to Dublin—because he has a temporary illness, of apparently no moment, and instead of going in two hours on his route to Dublin, he goes by railway to Kells, thence to drive nine miles to his father's place. He thus loses time on the road, afterwards increased by his being late for the packet on Monday in Dublin, and he is not on his way to Holyhead till Tuesday evening. Some point was made as to his having being out in the garden at his father's place, and on which large comments were made in reply. To my mind it is impossible to put this case for the bankrupt, on the ground that he had not opportunity to make away with this money, if the case rested on any such ques-

tion. The purchase of the gun-case in Dublin is a curious incident worthy of mention in passing as part of his conduct, even though it may not stand as any strong feature in the case. Well, he goes on Thursday to Holyhead; he knows he had then the gold on board the packet. A thing occurs, in my mind, of some importance. He has a large sum in his portmanteau, a small one, and he has it in the cabin, and he suffers it easily, and without remonstrance, to be carried off by a boy, under direction of the steward. In no part of the journey does he seem to me to have exercised the care and caution reasonably to be expected from a person carrying with him so large a sum of money, in a shape so easily to be taken, and so unprotected. In no part of the journey has he done any act to lead him to say he had it at any particular place, but, on his evidence, the whole way from Dublin to London was unmarked by any single act of caution, such as might be expected from a person carrying so large a sum. In London, on arrival, he says he mislaid the money for the first time. On the carriage of the portmanteau his attention is attracted to it, and he then discovers the loss. This is now, on his showing, the most important period of the whole proceeding. He has lost a large sum—a sum which is destructive to him in his trade. His acts now are, perhaps, the most important of all to investigate. I have here to investigate has he done all acts reasonably to be expected from a man losing, as he says, this large sum? I am forced to say that his acts seem to me to have been as few as were possible to take, without his conduct presenting the appearance of plainly culpable negligence. A visit to the railway, the statement made to them, seems the entire, except the advertisement in the *Times*. He went, indeed, to Scotland-yard—being told to go there; but, finding that there the matter was not within their jurisdiction, he takes no further steps to bring to his aid the police authorities in discovering his property; but he advertises in the *Times*. And what is his advertisement? That he lost 2,200*l.* He gives no manner of explanation for this statement. The whole amount due by him in London was 1,900*l.* He brought a sum less than that, how came he to over-estimate the amount so largely? If he stated 1,900*l.*, there would be something to be said of a sum occurring to his mind in the confusion of the moment; but the sum of 2,200*l.* stated seems to me most extraordinary and unaccountable. Mr. Jackson has suggested a meaning for this sum in the 1,500*l.*, 200*l.*, and 500*l.*, to which he referred, and which might be just covered by the statement, but without adopting this reason contended for by Mr. Jackson, as accounting for the statement, I say, at all events, that this misstatement is not explained to me on any rational grounds. I have thus before me, on his own statement, an account of this alleged loss and its attendant circumstances, which necessarily fills me with suspicion; and did it stand thus simply, there would be a heavy responsibility cast on me, as the judge of this mercantile court, in considering whether I could accept as satisfactory such a vouching of so large a loss. It is easy to allege such a loss, it is impossible to disprove the statement of it. It was contended that if the man were deemed to be guilty of concealment he might be prosecuted criminally, and that by refusing to pass the examination would have the effect

of a verdict of a jury finding him guilty; but there is a vast difference between the principle upon which the court might see reason to doubt the truth and fullness of the discovery made by a bankrupt, and the evidence that would warrant a criminal prosecution. It may be a great misfortune to a man to stand in such a position; but as long as we are merely human, and can only judge of the heart by the outward actions, we must be compelled to judge of these things according to our reason, as a trader, here he must be exposed to the risk of having his conduct judged by the ordinary rules of life, and by fair and rational inferences. I have, up to this, considered the case on his statements alone—on the reasonable inferences from the matters disclosed by him; but the case does not rest there;—the evidence of Armstrong, the witness, I cannot disregard. The only evidence against the bankrupt was that of Armstrong, and I would not allow it to weigh against him, as he (Armstrong) was, in some degree, a discredited witness, being now in gaol; having been remanded as an insolvent for misconduct. But the discredit attaching to Armstrong reflected on the bankrupt. Up to the last, they were on terms of intimacy, and the bankrupt gave Armstrong a bill of exchange, with the intention that it should be used, not as a mercantile instrument, but as a fictitious document, for the false pretence of inducing a family to accept him as the husband of a daughter of that family, by making it appear that Armstrong was possessed of property. Armstrong swore that Coote suggested to him that he should pretend to lose the money. Coote deposed that the suggestion came from Armstrong; but it was an admitted fact that, previous to the alleged loss, a conversation on the subject took place between them, and afterwards the curious coincidence arose that the money was lost exactly as it was foretold. He (Judge Lynch) could not, in justice to the commercial community, say that large item had been satisfactorily accounted for—and he would introduce a dangerous laxity in such investigations as had taken place in this case, if he affirmed the reasonableness and satisfactory nature of the very refined chapter of accidental circumstances and strange coincidences insisted on for Mr. Coote. He should try the case on rational grounds, and by rules of ordinary transactions in trade, and so judging it, he felt bound to adjourn the examination *sine die*. If hereafter, any new light could be thrown on the case, the bankrupt could apply to have it re-heard.

IN RE JOHN PAUL.

Bail—Hearing before Assistant Barrister—Application for liberty to apply for a habeas corpus with a view to have an insolvent heard in Dublin.

Where the case of an insolvent was partly heard before an Assistant Barrister, or chairman of a county, after ascertaining the merits of the case, he adjourned it to the next quarter session, and directs the protection to be withdrawn, the court will not entertain either an application for a bail rule, or for liberty to apply to the Queen's Bench for a habeas corpus to have the insolvent brought up to be heard in Dublin. The 202nd section of the Act does not apply to such a case.

THE insolvent had applied at the last Quarter Session of Lifford, before Dr. Andrews, to be discharged

upon his petition and schedule. He had been out on bail, and was opposed by his detaining creditors, on the ground of having disposed of his property shortly before his insolvency. Upon the hearing of the case Dr. Andrews adjourned it until the next quarter sessions, directing that the protection should be withdrawn, and that in the meantime certain amendments should be made in the balance-sheet.

Kernan, Q.C., and Hamilton applied that the insolvent should either be admitted to bail, or that liberty should be given to apply to the Queen's Bench for a writ of *habeas corpus*, to have him brought up to be heard in Dublin, and his case dealt with by the court there. An application had already been made to the Queen's Bench for a *habeas corpus*, but the court declined to grant it until the matter was first brought before the Insolvent Court. They relied on the 202nd section of the Act, as a ground for making the application. That section provided, that nothing therein contained shall extend to, or be construed to deprive the court of the power of discharging such prisoner upon recognizance of sureties for the due appearance of the prisoner, at the time and place appointed or which shall thereafter be appointed for the hearing of such prisoner, before such Assistant Barrister as aforesaid, or of the power of doing prior to such hearing before such Assistant Barrister, or pending the adjournment of such hearing, any matter or thing relative to such prisoner, his petition and schedule, estate and effects, creditors or assignees." There the power given to the court, pending a hearing before the Assistant Barrister, was of the most unlimited character, and it could neither sanction the application for a *habeas corpus*, with a view to have the person brought up and heard in Dublin, or grant a rule of bail, and allow him out until the next quarter sessions. It was sworn by him that imprisonment would endanger his life.

Harrison, for the detaining creditor, opposed the application. He was not called on by the court.

JUDGE LYNCH said he thought the application wholly untenable. The first branch of it, namely, to admit the prisoner to bail might be right enough, if he had not been out on bail before, and his protection withdrawn. His case had been partly heard before a very able and judicious judge, evidence had been gone into, and all the facts disclosed, and after that believing, of course, that it was proper, and for the benefit of creditors, to have his protection withdrawn, and the prisoner sent back to prison, he made an order to that effect, and for the court above to grant a bail-rule after that, would be taking the case out of the hands of the judge, who had already partly heard it, and who knew all the facts connected with it. Such an application to the court in Dublin could not be listened to; if it were, it might result in very injurious consequences to the administration of this branch of the commercial law. With regard to the second branch of the application, it was still more untenable—it asked the court to permit an insolvent to be brought up to be heard, pending an adjournment of his case to a particular day, and to take it out of the hands of the judge who had partly heard it, and who, under such circumstances, was alone competent to conclude that hearing at the time appointed. He thought the 202nd section did apply to the present case. He should refuse the motion with costs.

Court of Chancery.

Reported by Charles H. Foot, Esq., Barrister at Law.

CORRY v. LORD CREMORNE AND OTHERS.—June 10-13.

Dower—Purchaser for valuable consideration without notice—Term, assignment of—5 & 6 Vict. c. 113—Purchase under the authority of a court.

*A being seized in fee of the lands of R, was privately married to B, in the year 1823, by a degraded Presbyterian minister. The guardians of C, a minor, and ward of Chancery, presented a petition praying that it might be referred to a Master to inquire whether the purchase of the R. estate would benefit the minor. The Master reported in the affirmative, and, under the Lord Chancellor's directions, a private Act of Parliament was obtained to enable the guardians of C to carry out an agreement for the sale of R, entered into with A. The conveyance of R to C was subsequently executed by those persons, who were found by the Master's report to be the proper and necessary parties thereto. A having died, B claimed dower out of the lands of R. Held, that the marriage of A and B, which was void in its inception, was validated by the 5 & 6 Vict. c. 113.**

That the purchase of the lands of R by C was "an act done under the authority of a court," within the meaning of section 3 of the 5 & 6 Vict. c. 113, and consequently B's claim to dower was barred.

That a purchaser for valuable consideration without notice is protected by an assignment of a term upon specific trusts, but is not protected by the assignment of a general term to attend the inheritance.

That a purchaser for valuable consideration without notice, is protected against equitable, but not against legal estates.

This was a cause petition filed by Mary Stewart Corry, widow of Thomas Charles Stewart Corry, the elder, against the Rt. Hon. Richard Lord Cremorne, the Rt. Hon. Henry Arthur Herbert, John Dawson Rawson, the Hon. Vesey Dawson, an infant eldest son of Lord Cremorne, and Henry Theophilus Clements. The petitioner prayed that she might be declared entitled to her dower, and six years' arrears thereof, out of the Rockcorry estate, situated in the County of Monaghan. The following were the facts of the case:—The petitioner charged that Charles Stewart Corry, the elder, when seised in fee in possession of the Rockcorry estate, had been married to the petitioner, then Mary Britnall, on the 2nd of April, 1823, in a room in Rockcorry Castle, by the Rev. John Caldwell, of Ballybay, a Presbyterian or Protestant Dissenting minister, according to the rites of the Church of Scotland, the petitioner and Mr. Corry being both members of the Established Church of England and Ireland; that the witnesses to the marriage were all dead, but that the certificate of the marriage given by the Rev. Mr. Caldwell was in existence; that no settlement had been executed at the time of

the marriage; that the petitioner had lived with Mr. Corry as his wife, and had been publicly acknowledged by him and others as such; and that the trustees of Lord Cremorne, when purchasing the Rockcorry estate, had notice that Mr. Corry was married; that Thomas C. S. Corry, the elder, died on the 17th of January, 1844, leaving the petitioner, his widow, and Thomas C. S. Corry, the younger, his eldest son, surviving him; and that in consequence of certain deeds being in the possession of the respondent, the petitioner was compelled to resort to equity to enforce her claim. The respondent, Lord Cremorne, contended that the late Mr. Corry was not seised in fee of the lands in question at or after the date of the alleged marriage, they being subject to several mortgages, and also to a term of 200 years, limited, in the year 1762, to trustees, to attend the inheritance when the trusts thereof should be performed; and that as that term was assigned to him in the year 1840, he was entitled to its protection. He further stated that upon his father's death, in 1827, being a minor, he had been made a ward of the Court of Chancery in Ireland, and T. Ellis, one of the Masters of that court, had been appointed guardian of his fortune; that Mr. Corry (the elder) having, in the year 1828, proposed that the Rockcorry estate should be purchased from him for the benefit of Lord Cremorne, upon Master Ellis's petition, it was referred to Master Connor to report as to whether the proposed purchase would be for the benefit of the minor. That the Master reported in the affirmative; but the Lord Chancellor declined to make any order sanctioning the purchase, upon the ground of the absence of jurisdiction over future rents, but he gave liberty for the minor's solicitor to obtain a private Act of Parliament for the purpose of carrying out the purchase. Accordingly by a deed dated the 28th of November, 1831, which purported to be made in pursuance of a private Act of Parliament (11 G. 4, and 1 Will. 4, c. 42), intitled "An Act to enable the Guardian of the Right Honourable Richard Lord Cremorne, an infant, to carry into effect a contract entered into for the purchase of Rockcorry Castle and adjoining lands, in the County of Monaghan in Ireland," Thomas C. S. Corry, the elder, conveyed the lands in question to Lord Blayney and Henry J. Clements (under the direction of the court), as trustees for the respondent, in fee simple, and further covenanted against all dowers created by him. It was also charged that the alleged marriage of the petitioner with Mr. Thomas Corry, the elder, was null and void, in consequence of the ceremony having been performed by a Presbyterian minister, who, further, had been degraded by the Armagh Presbytery from the office of minister in 1806; that for a long time previous to the date of the alleged marriage, and down to the time of his death, Mr. Corry, the elder, was reputed to be a widower, cohabiting with a woman who always resided with him (and by whom he had fourteen children), who acted as mistress of Mr. Corry's household, and who had hired the petitioner as housemaid, and had dismissed her a short time after the date of the alleged marriage; that the respondent's trustees were purchasers for valuable consideration without notice; and that the petitioner had been guilty of laches. It also appeared that

* An Act for the confirmation of certain marriages in Ireland.

when Lord Cremorne, in the year 1840, was purchasing other estates from Mr. Corry, having heard a rumour that Mr. Corry was married, he insisted upon the petitioner being made a party to the conveyance, which she subsequently executed.

J. Whiteside, Q.C., (with him *J. Berkeley, Q.C.*, *F. Brady, Q.C.*, and *J. M. Thompson*) for the petitioner—It is no objection to the validity of the marriage between Thomas Corry, the elder, and the petitioner that it was celebrated by a Presbyterian minister, the parties being members of the Established Church, or that at the time of its celebration he was degraded, as the 5 & 6 Vict. c. 113, s. 1, validated such marriages retrospectively.* That statute was passed in consequence of the decisions in *Reg. v. Millis* and *Reg. v. Carroll* (Dix's Marriage Cas. and Smythe & Bourke's ditto). The petitioner is entitled to have an issue sent to a court of law to try the fact of the marriage with Mr. Corry—*Lewis v. Thomas* (3 Hare, 26). It is true that an issue was refused in *Malone v. O'Connor* (9 Ir. Chan. 459), but on grounds peculiar to that case. The plea of purchase for valuable consideration without notice is no defence in equity to a claim of dower.—*Williams v. Lambe* (3 Br. C. C. 264); *Collins v. Archer* (1 Rus. & Myl. 284); *Medlicott v. O'Donnel* (1 B. & Beat. 171). The petitioner does not seek any discovery hereto which the above plea would be an answer; therefore this case must be carefully distinguished from that of *Gomm v. Parrott* (3 Scot. C.B., N.S., 47), and that class of cases. There is no proof that Lord Cremorne, or his trustees, used reasonable diligence to discover whether Mr. Corry was married or not; so that assuming, in the conflicts of authorities, that *Williams v. Lambe* (sup.) is shaken, "it seems doubtful whether a person purchasing of one seized in fee, without inquiring whether the vendor be married, can avail himself of want of notice of that fact."—*Bright on Husb. and W.* 423. It was known to

* 5 & 6 Vict. c. 113—"An Act for the confirmation of certain Marriages in Ireland, 1842," enacts that—

Section 1. Whereas marriages have in divers instances been had and celebrated in Ireland by Presbyterian and other Protestant Dissenting Ministers or Teachers, or those who at the time of such marriages had been such, between persons being of the same or different religious persuasions, and it is expedient to confirm such marriages, be it therefore enacted, that all marriages heretofore had and celebrated in Ireland by the Presbyterian or other Protestant Dissenting Ministers or Teachers, or those who at the time of such marriages had been such, shall be, and shall be adjudged and taken to have been and to be, of the same force and effect in law as if such marriages had been had and solemnised by clergymen of the said United Church of England and Ireland, and of no other force nor effect whatsoever.

2. Provided always, and be it enacted, that nothing in this Act contained shall extend or be construed to extend to or affect any marriage declared invalid by any court of competent jurisdiction before the passing of this Act, nor any marriage when either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person, nor any marriage respecting which any criminal prosecution shall be depending at the time of the passing of this Act.

3. Provided further, and be it enacted, that nothing in this Act contained shall extend or be construed to extend to or affect any act done before the passing of this Act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust.

every person in the neighbourhood of Rockcorry Castle that Mr. Corry had several children, and that circumstance alone should have led Lord Cremorne's trustees to make inquiries. "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained."—Per Alderson, B., *Whitbread v. Jordan* (1 Y. & C., Exch., 328); *Jackson v. Rowe* (2 S. & S. 472). As to the effect of the term for 200 years created by the deed of 1762, and relied on by the respondents as a bar to the claim of dower, a satisfied term cannot protect Lord Cremorne. *Swannock v. Lyford* (1 Amb. 6), which at first sight appeared favourable to him, is explained by Lord Eldon in *Maundrell v. Maundrell* (10 Ves. 260; see also same case, 7 Ves. 578), whence it would appear that the purchaser from a husband, whose wife is not a party to the conveyance, stands in the husband's place.—*Mole v. Smith* (1 Jac. & W. 665); *Gurney v. Lord Oranmore* (4 Ir. Chan. 470).

The Solicitor-General (with him *Serjeant Sullivan, A. Brewster, Q.C.*, and *Tudor*), for the respondent. Neither Lord Cremorne nor his trustees had notice of the petitioner's marriage with Mr. Corry. Want of extreme caution is not to be treated as constructive notice to a bona fide purchaser for valuable consideration.—*Jones v. Smith* (1 Hare, 43). Lord Eldon, in *Maundrell v. Maundrell*, throws strong doubts upon the authority of *Williams v. Lambe* (sup.). The opinions of the highest authorities are now in favour of Lord Rosslyn's decision in *Parker v. Blythmore* (2 Eq. Cas. Ab. 79), that the above plea is good even against a legal estate.—*Lord St. Leonard's Vend. & Purch.*, 644; *Collyer v. Finch* (5 Ho. of Lds., 905); *Gomm v. Parrott* (3 Scot. C.B., 47); *Lane v. Jackson* (20 Beav. 535). The term of 200 years was duly assigned to Lord Cremorne before the 31st of December, 1845, therefore he is entitled to its full protection, under the saving clause in the 8 & 9 Vict. c. 112 (an Act to render the assignment of satisfied terms unnecessary). The deed creating the term was in the possession of Lord Cremorne, therefore he is entitled to the protection of it.—*Willoughby v. Willoughby* (1 Term. 763). The marriage of the petitioner with Mr. Corry was null and void, as the Rev. Mr. Caldwell had been degraded long before the date of the alleged ceremony. [*The Lord Chancellor*—The words of the first section of the 5 & 6 Vict. c. 113, "or who at the time of the marriage had been such," must have been intended to meet such cases as this. That Act was intended to prevent parties from being entrapped into mock marriages]. All the proceedings in relation to the purchase of the Rockcorry estate by the trustees of Lord Cremorne took place under the sanction and direction of this court, of which Lord Cremorne was a ward. If an issue to try the validity of the marriage be granted, this court will be undoing its own work.

F. Brady, Q.C., in reply.

The Lord CHANCELLOR.—In this case, which has been fully opened to the court, on all the evidence

which has been brought forward, I have come to a clear conclusion that the marriage between the petitioner and the late Mr. Corry did take place. The circumstances attending that marriage were strange and extraordinary, but if we give any credit to the numerous affidavits made in this cause, there are clear, unequivocal, and solemn acts done by Mr. Corry himself which remove all doubt as to the fact of the marriage; consequently it is unnecessary to send any issue upon this point to a jury, or to have any further inquiry. I have also come to the conclusion that the marriage was a legal one; for I am bound to put a grammatical construction on the words of the 5 & 6 Vict. cap. 113. If I do so, it is plain that the marriage was a valid one, as that Act purports to validate marriages performed by two classes of Protestant Dissenting ministers, viz., those who at the time of the performance of the ceremony were filling the office of ministers, and those who previous to the marriage had filled that office. Were the law otherwise, it would come to this, that parties would marry at the hazard of finding out whether the person who celebrated the marriage filled the office of minister or not. This being so, on the next portion of the case I have come to an equally clear decision, viz., that the late Mr. Corry was seized of the Rockcorry estate in fee simple during the petitioner's coverture. So far that would seem a very plain case for the petitioner. However, it is encountered by the peculiar nature of the possession of those estates acquired by Lord Cremorne, whose position, if now deprived of them, would be a very hard one indeed. Lord Cremorne, through his guardian or his trustees, became the purchaser of the Rockcorry estate for full and valuable consideration, without notice, either actual or constructive, of Mr. Corry's marriage. Even if there had been notice, it would have been notice of a marriage which at that time was an illegal one. I question very much whether the 5 & 6 Vict. cap. 113 goes so far as to declare, that if a purchaser be affected with notice of an illegal marriage, that notice should afterwards affect his property when the marriage is legalised. I do not think that any such consequence followed that statute. I then find Lord Cremorne a purchaser for valuable consideration, without notice, of Mrs. Corry's title. That fact would be no protection to him against her claim in a court of law, and may or may not protect him here, according to the circumstances of the case. Is Lord Cremorne, then, entitled to the protection of this court? The necessary results of the Act abolishing outstanding terms reduces the defence of the term of 200 years to the same question; for if Lord Cremorne is not entitled to its protection, it is gone. The case being thus freed from many of the difficulties which were suggested, I do not think it necessary to go very fully into the question of what is the effect of a purchase for valuable consideration without notice. The case of *Williams v. Lambe* (3 Bro. C. C. 264) did not turn on the point alleged by the petitioner. That was a Bill for Discovery and Relief in Dower, and the court then held, that the plea of purchase for valuable consideration without notice was bad as against the discovery, but good as against the relief. That was the view taken of *Williams v. Lambe* by the House of

Lords, in *Collyer v. Finch* (5 Ho. of Lds. 905), and by Mr. Roper also, with whom I concur—viz., that that plea is an answer, in a court of equity, to a suit to enforce an equitable remedy, but that, to a suit merely to enforce a legal remedy in a court of equity that plea is no answer. This case is very like that of *Collins v. Archer* (1 Rus. & Myl. 284); and then I find Sir John Romilly saying, in *Finch v. Shaw* (19 Beav. 509), when commenting upon *Williams v. Lambe* and *Collins v. Archer*, "The distinction I apprehend to be this: If the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law. If, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy or an equitable right, which can only be enforced in this court, I have not found any case, nor am I aware of any, where this court will refuse to enforce the equitable remedy which is incidental to the legal right." That, then, clears this case of difficulty, and reduces it to the question suggested by Sir John Romilly; for supposing the term of 200 years to be extinguished, the defence set up fails, and there is nothing more to be done but to send the case into the office, to have the usual inquiry taken by the Master. No relief is sought by the petitioner against that term, nor was relief necessary, if it be gone at law. Is Lord Cremorne, then, entitled to the protection of that term? It has been laid down that a purchaser without notice may protect himself by an assignment of a term. Great stress has been laid upon the case of *Willoughby v. Willoughby* (1 Term, 769); but Lord Eldon dissents from any argument being drawn from that case, that anything will protect a purchaser from dower but an assignment of the term to be attendant upon the inheritance in *that very transaction*, though the term has, in a prior transaction, been declared attendant upon the inheritance. I also find it laid down in one of the latest and most authentic text-books (I allude to Lord St. Leonard's work on Vendors and Purchasers), that a purchaser must get an assignment of the term to himself, or to a trustee for himself, if he wishes to protect himself against the dower of the vendor's wife. It is true that the deed creating the term of 200 years was assigned to a trustee; but for whom is he trustee? Has anything been done to change the original trusts of that term? No; the trustee has not executed any deed of declaration of trust for Lord Cremorne. The trustee may have said he would not act on either side. Therefore I cannot hold that the term has been assigned in such manner to Lord Cremorne so as to bar the petitioner's dower, for there was no assignment of the term here to Lord Cremorne, or to a trustee for him. The term was outstanding in the lands, in trust for other parties. For whom were Lord Blayney and Mr. Clements trustees? Not for Lord Cremorne alone. Did they execute any deed of trust of that term in favour of Lord Cremorne? No; therefore there is nothing in the dealing with this term which would justify me in holding that it protected Lord Cremorne from the petitioner's dower. It is true that he has got the title-deed of

the Rockcorry estate, but certainly it is not conclusive as to this term. That was the title-deed of the whole estate, over part of which only the term was created, and it cannot be treated as an assignment of the term to a trustee for Lord Cremorne so as to protect him. The reconveyance from the mortgagee must be regarded in the same light. I do not, therefore, feel justified in overruling the doctrine laid down in *Williams v. Lambe*, and many other cases, or in adopting the doctrine of Lord Hardwicke, encountered as it is by all the text-books, when there has been no assignment of this term capable of protecting Lord Cremorne. But the saving clause of the 5 & 6 Vict. c. 113, s. 3, gives a very different complexion to these transactions. That section enacts, "that nothing in this Act contained shall extend or be construed to extend to or affect any Act done before the passing of this Act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust." Now, the facts of this case are these:—Lord Cremorne was a minor, and was made a ward of this court in all proper form. Mr. Corry was the owner of the Rockcorry estate, which adjoined the minor's property, and his guardians, with Mr. Corry's concurrence, thought it would be advisable to purchase the Rockcorry estate out of the accumulations of the rents of the minor's property, and accordingly Lord Cremorne's guardians actually entered into a contract with Mr. Corry for the purchase of his estate, provided that it could be carried out with the concurrence of this court. Lord Cremorne's guardians then presented a petition, praying that it might be referred to the Master to inquire whether the proposed purchase would be for the minor's benefit, and the Master duly reported in favour of the purchase; and thereupon an agreement between the guardians of Lord Cremorne and Mr. Corry was entered into for the purchase of the latter's estate for the sum of £27,000, of accumulated rents and of money borrowed on mortgage, [which was to be made,] provided this court would sanction the arrangement. When the matter came before this court, counsel was heard in support of the proposed agreement; but the Lord Chancellor refused to make any order sanctioning it, upon the ground that he was doubtful whether he had power to anticipate the rents of the minor's property. I think, this court has jurisdiction to apply the rents of both real and personal estate in making purchases for the benefit of minor wards of this court, and I have frequently acted upon that principle. The Lord Chancellor, however, gave the guardians of Lord Cremorne liberty to apply for a private Act of Parliament to carry out the proposed purchase. The Act was obtained; and let us consider what was to be done under it. It recited all the proceedings in this court relative to the proposed purchase, and that Mr. Corry had submitted to the jurisdiction of the Master, and had covenanted to make a good title free from all incumbrances, save certain ones mentioned in a schedule: so that, on Mr. Corry's part, there was a clear contract to convey free from all incumbrances; that, of course, means discharged of dower. The Act then goes on to provide for the application of the accumulations of the rents of Lord Cremorne's

estates towards the purchase, and enables this court to raise money to complete the purchase. It has been contended, that that Act did not authorise the Rockcorry estate to be conveyed, and that it only authorised the rents of the minor's property to be laid out. In the purchase of what? Lands free from all incumbrances, save certain charges specified. Every subsequent step in the proceedings was done under the direction of this court. It was referred to the Master to report who were the proper parties to execute the purchase deeds, and those deeds were executed accordingly. Mr. Corry was bound to complete the purchase under the direction of this court. He could not have rescinded the agreement. Had he done so, he would have been liable to an attachment. Therefore I am of opinion that that Act authorised both the application of the rents in the purchase of these lands, under the sanction of this court, as also the conveyance of them to the trustees. This purchase, then, was made under the sanction of this court; and, consequently on this ground, and on this ground alone, I must hold the respondent protected from the claim of dower, and I must dismiss the petition, with costs.

GUILLAMORE v. PEACOCKE.—Nov. 8.

Specific performance—Reservation of game—Abandonment of contract—Constructive notice of.

A went into possession of a house and land immediately adjoining the house and land of the lessor, under an agreement for a lease. The lessor insisting upon a reservation of game in the lease, as to which the agreement was silent, A abandoned the agreement, but did not give notice in writing of his having done so for some months after he had left the premises. Held, that the lessor, by reason of A's movements being known to him and his servants, had notice of A's abandonment of the agreement when A quitted the premises.

THIS was a cause petition praying that the respondent might be declared bound to accept from the petitioners a lease in a certain form, pursuant to an agreement, under the following circumstances:—Standish Viscount Guillamore died on the 10th of April, 1860, possessed (amongst other property) of the demesnes of Rockbarton and Caher-Guillamore, with the mansion-houses thereon. His widow, Adelaide Viscountess Guillamore, and one daughter, the Honourable Cecilia O'Grady, an infant, survived him. By his will, dated the 8th of August, 1857, he devised the above demesnes with other lands, to William D. Roche, his heirs, executors, and assigns, in trust, as to the demesne of Caher-Guillamore, for the Hon. Cecilia O'Grady, her heirs, executors, administrators, and assigns. He also appointed the Viscountess Guillamore and David W. Roche guardians of his daughter, and executrix and executor of his will, which they duly proved. Upon the death of Viscount Guillamore, his widow took up her residence in Rockbarton Demesne, and the guardians of the minor determined to let the adjoining demesne of Caher-Guillamore. Mr. Peacocke, the respondent, having visited the lands,

made the following proposal to the agent of the estate, to become tenant thereof, in the following words: "6th June, 1860. Dear Sir,—Referring to my late visit, I propose to become tenant to Caher-Guillamore for the minority of the Hon. Miss O'Grady, on the following conditions:—The letting to consist of the house, offices, pleasure-grounds, the gardens, with graperies, &c., supposed in all to contain twenty-nine Irish acres, together with the field said to be $8\frac{1}{2}$ acres of similar measurement. The rent for the entire to be £200 per annum, and (as the place cannot be ready for occupation for some months) to commence on the first day of November next. The lease to be as above, for the minority, *alias* sixteen years, and to contain the usual clause of surrender; immediate possession to be given. In making this proposal, my outlay, to make the place habitable, must be at least £300, which I consider a large fine to give for so short a tenure. G. T. PEACOCKE." The petitioners asserted, but the respondent denied, that that proposal was accepted in writing, but a few days after that proposal was made, the respondent was let into possession of Caher-Guillamore, and commenced extensive repairs. Upon the 12th of July, 1860, Mr. Peacocke's solicitor forwarded to the petitioner's solicitor a draft lease. On the 25th of July the petitioner's solicitor forwarded to Mr. Peacocke's solicitor a draft lease containing several additional covenants, and a reservation of game to the petitioners, and an exclusive right of sporting over Caher-Guillamore. This draft was returned by Mr. Peacocke's solicitor, with the clause reserving the game and right of sporting struck out as not being warranted by the terms of the agreement. A long correspondence between the parties ensued, Mr. Peacocke professing his willingness to accept the draft lease as settled by the petitioner's solicitor provided that the clauses relating to the game and right of entry to shoot were omitted; but the petitioner's solicitor continued to insist upon their insertion up to the 29th of December, 1860. The petition charged that on the 9th of March, 1861, in answer to a letter from the petitioner's solicitor agreeing to waive the reservation of game and right of entry to kill it, the respondent's solicitor stated "that Mr. Peacocke had long previously made other arrangements, and would not now have the place on any terms;" and he immediately afterwards served a notice, stating that as the petitioners had refused to carry out their agreement, Mr. Peacocke would deliver up possession of Caher-Guillamore on the 1st of April then ensuing. The respondent, in his answering affidavit, charged that upon the receipt of the above letter of the 29th of December, 1860, refusing to omit the clauses relative to game, he considered the agreement at an end, and sold off his cattle, and commenced preparations for removing; and about the 26th of January, 1861, dismissed his workmen, and stopped the improvements which he had been making; and as these acts must have been known to Lady Guillamore, residing in the adjoining demesne, she had notice of the abandonment of the agreement by the respondent. As further evidence to the same effect, and as showing a mutual abandonment of the agreement, it was charged by the respondent that, on the 16th of March, 1861, Lady Guillamore's solicitor wrote to say, that,

understanding Mr. Peacocke was removing, certain chimney-pieces which he had erected, she would purchase them at a valuation, as had been originally agreed upon between the parties; and on the 20th of March, 1861, the agent of the Guillamore estates paid the full price of the new chimney-pieces and grates; also that sooner than some manure which Mr. Peacocke had sold should be removed from out of Caher-Guillamore, Lady Guillamore's agent bought it of Mr. Peacocke.

Serjeant Sullivan (with him *R. R. Warren, Q.C.*, and *Finch White*) for the petitioners.—Lady Guillamore and W. D. Roche, as the guardians of the minor, had full power to make a lease of Caher-Guillamore during her minority. *Fowler v. Lightburne* (11 Ir. Chan. 495), although not decided upon this point, establishes the principle.—*Bec. Abr. tit. Guardian*.

The Solicitor-General (with him *A. Brewster, Q.C.*, and *T. Graydon*), for the respondent.—"Where one party has absolutely refused to perform, or has rendered himself incapable of performing his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done."—*Per Alderson, B., De Bernardy v. Harding* (8 Exch. 824); so also in this court (1 Mad. Chan. Prac. 529-30), and the cases there cited.

The respondent's counsel were stopped by the court.

Finch White, in reply.

The LORD CHANCELLOR.—I am of opinion that I cannot enforce a lease under this agreement upon the respondent without doing great injustice. Mr. Peacocke was put into possession under an agreement which manifestly was accepted merely as the basis of a future lease, with power to either party to revoke it. The lessors then insisted upon the insertion in the lease of what amounted to a grant to them of a right of shooting over the demised premises. Mr. Fitzgerald, as agent for Mr. Peacocke, objected to the insertion of any such reservation of the right to game, and on the 28th of December, 1860, wrote to the agent of the petitioners, that if that reservation was omitted, Mr. Peacocke would submit to the insertion of several other covenants. That offer was refused by a letter of the 29th of December. The conduct of the petitioners, therefore, gave Mr. Peacocke the option of remaining in Caher-Guillamore under the agreement for the lease as before, or of coming to this court to enforce the granting of a lease in the terms of the agreement, or of rescinding his agreement. Mr. Peacocke determined upon the latter course. When Mr. Peacocke swore that he was determined not to take the lease if it contained a reservation of game to the petitioners, and when they asserted that they would not give a lease without that reservation, both parties must have concluded that the whole contract for the lease was abandoned. Mr. Peacocke gave all possible intimation, short of a formal notice, that he would give up the place, for all his acts subsequently to the 29th of December were known to the lessors. It cannot be contended but that in ordinary cases a written notice of rescission of the agreement must be given; but I am not sure that actual notice of the

rescinding of an agreement cannot be made out by the acts of the parties. It does not appear that Mr. Fitzgerald ever showed Mr. Peacocke the letter written by the former on the 28th of December, so that I pass by the effect of that letter, which, however, only amounted to an assertion, that for peace' sake Mr. Peacocke would take the lease, but without the reservation of game, which was at once refused. If I were to grant the prayer of the petition here, and give a decree, it would be open to the parties to dispute before the Master what should be the terms of the lease; for it is not disputed but that only the "usual clauses" are to be contained in the lease. Under all these circumstances, I will dismiss the petition with costs.

Kells Court.

[Reported by William Woodlock, Esq., Barrister at-Law.]

TAYLOR v. BUNN—July—Nov. 6, 1861.

Will—Construction.

Where, after a lease of a house which gave the lessee the option of purchasing the lessor's interest, the testator made a will, which contained a bequest of the purchase-money in case the tenant should exercise his option. Held, that the house passed by the will.

The will contained a bequest of "all cash" which might be after paying testator's legacies and debts. Held, that this bequest included the surplus rents of the house which would accrue after testator's death, after payment of head-rent and an annuity created by the will, and that those surplus rents should be held on the trusts of the will.

THIS was an appeal from an order made by Master Brooke, in a suit for the administration of the real and personal estate of Eyre Massey Eagle, deceased. The facts of the case were as follows:—The testator, Eyre Massey Eagle, was possessed, as assignee, of a house in Grafton-street, in the City of Dublin, held under a lease for a term of years at a rent of £100 a-year, with a covenant for renewal. Being so possessed, he, by indenture bearing date the 23rd March, 1820, sub-demised the said house, with the appurtenances, to Michael Kelly and Thomas Kelly, their executors, administrators, and assigns, to hold the same to the said Michael Kelly and Thomas Kelly, their executors, administrators, and assigns, from the 28th March then instant, for and during and until the full end and term of 94 years from thenceforth next ensuing, at the yearly rent of £140 sterling. This indenture contained a covenant by the said Eyre Massey Eagle, that in case the said Michael Kelly and Thomas Kelly, their executors, administrators, or assigns, should at any time during the continuance of the demise be disposed to reduce or fine down the said thereby reserved rent of £140 sterling to the yearly rent or sum of £100 sterling, that he, the said Eyre Eagle, his executors, administrators, and assigns, should agree thereto, and should allow them, the said Michael Kelly and Thomas Kelly, their executors,

administrators, or assigns, after the rate of £10 sterling for every £100 sterling, which they should pay to the said Eyre Eagle, his executors, administrators, or assigns, towards fineing down or reducing the said rent of £140 sterling to the said sum of £100 sterling a-year, such payment or payments to be made on the 25th day of March, so that the reduced rent should commence payable on that day; and that no less sum than £100 sterling should be received by the said Eyre Eagle, his executors, administrators, or assigns, on account of such reduction of rent; and that as soon as they, the said Michael Kelly and Thomas Kelly, their executors, administrators, or assigns, should have reduced or fined down the said rent of £140 to the said rent of £100 sterling per annum, after the rate and in manner aforesaid, he, the said Eyre Eagle, would forthwith convey his full and entire title and interest in the premises to the said Michael Kelly and Thomas Kelly, their executors, administrators, or assigns. On the 18th September, 1842, Eyre Eagle made his will, of which the following parts are material to the question at issue on this appeal—"I give, devise, and bequeath unto my nephew, the Rev. George Edward Eagle, now of Rathgar-road, in the County Dublin, and to my son George Eagle, of Burnett-place, Drumcondra, all my real and personal property, of what nature and kind soever, upon the trusts following, that is to say, I give and bequeath to my wife the sum of twenty-five pounds yearly, to be paid to her during her lifetime out of the profit rent which I have from the house No. 14 Grafton-street in the City of Dublin; but in case Mr. Thomas Kelly, who now occupies same, should hereafter pay the sum of £400, Irish currency (agreeable to the covenants in his lease) for my interest in said house, my will is, that my executors hereinafter appointed do place said sum, together with whatever sum or sums of money that may be in the Bank of Ireland to my credit, and also together with whatever sum or sums that may appear either in my name or my grandchildren's names in the Savings' Bank, and together with whatever cash may be had, after paying my just debts, funeral expenses, and legacies herein-after mentioned, at interest on good security, and to pay the said interest to my said wife during her lifetime; and at her decease, the said principal sum is to be disposed of as follows: one-half thereof to be given to the eldest daughter of my daughter Matilda Bunn, and the other half to be given to the eldest daughter of my son George, if he should have one before the eldest daughter of my said daughter Matilda comes of age, or day of her marriage; and in case he should not have one, the said last-mentioned half is to go to the second eldest daughter of my said daughter Matilda, said sums to be respectively paid them on their attaining their respective ages of twenty-one years, or on the days of their marriage, whichever shall first happen." The will gave several legacies, and continued: "My will is that my executors do, shortly after my decease, call an auction, and sell all my furniture, house linen, and wearing apparel, with the exception of such articles as I have already [*sic in orig.*] hereby bequeath and place the fund, after payment of such legacies as before mentioned, together with all other sums mentioned for

that purpose, at interest as aforesaid for the benefit of my said wife and grandchildren; and I hereby nominate, constitute, and appoint my said nephew, the Rev. George E. Eagle, and my son George, executors of this my last will and testament." The testator died without having revoked this will. After his decease, the interest of the Messrs Kelly in the house, No. 14 Grafton-street, was evicted for nonpayment of the rent reserved in the sublease of the 23rd March, 1820, and a lease of the said house was made to Peter Tharel. Upon the petition coming before the Master, a question arose upon the construction of the will of Eyre Massy Eagle, the petitioners, who were the daughter of the testator's son George and her husband, contending that the house in Grafton-street was included in the said will, and that the female petitioner was entitled to one moiety of the said bequest; and the respondents, who represented the personal estate of the testator, contending that the testator had died intestate as to said house. The Master, by his decretal order, declared the petitioner entitled to one moiety of the said bequest, and the respondent, Marian Eagle, entitled to the other moiety of same, and declared the same to be a residuary bequest, which included the interest of the house in Grafton-street. He also declared the respondent, Matilda Bunn, chargeable with a sum of £400 paid to her by Peter Tharel as a fine for said house, subject, however, to credits to be allowed her out of the same, and gave the petitioners their costs as costs in the matter. Against this order the respondents, Matilda Bunn and Charles Meredyth Bunn, appealed, and sought by their notice that the said order should be reversed, and that instead of the declaration therein contained, the respondents should be declared entitled, in equal shares, to the said house and premises in Grafton-street; and that the matter should be referred back to the Master with a declaration to that effect, and that the respondents' costs of the present application should be part of respondents' costs in the matter.

Brewster, Q.C. (with him *J. F. Townsend*), for the appellants, contended that, on the terms of the will, it could not be held that the testator intended that the house should pass. All that he contemplated was, that his widow should have £25 a-year until the Kellys exercised their option of purchasing the lease. The following cases show what will or will not pass by the word "money," or "cash," which is that used in the present will:—*Rogers v. Thomas* (2 Keen, 8); *Kendall v. Kendall* (4 Russ. 360); *May v. Grave* (3 De G. & Sm. 462); *Lowe v. Thomas* (5 De G. M. & N. & Gord. 315); *Manning v. Purcell* (2 Sm. & Gif. 294). The testator had provided for his wife in case the option to purchase was not exercised, and he had not intended to do any more.

Warren, Q.C. (with him *Blackham*), for the petitioners, argued that by the bequest of the £400 in case the option to purchase was exercised, the house itself passed if the option was not so exercised.—*Dowson v. Gaschoin* (2 Keen, 14); *Boys v. Morgan* (3 M. & Cr. 661); *Waite v. Combes* (5 De G. & Sm. 678); *Wheeler v. Thomas* (7 Jur. N.S. 599).

Chatterton, Q.C., for Marian Eagle, one of the respondents.

Nov. 6th.—The Master of the Rolls delivered a written judgment, in which, having stated the facts of the case, and the question between the parties, he said that the introductory part of the will showed an intention on the part of the testator to dispose of the property upon trust, and that there was no doubt that it was intended by the testator that the trust should be co-extensive with the devise. George Eagle was not intended to take beneficially. As the testator had devised and bequeathed all his property, George Eagle could not have claimed as next of kin.—*Gray v. Gray* (11 Ir. Ch. 219). The first question which arose was, whether, as neither of the Kellys exercised the option given to them, the bequest of the £400 could be considered as a bequest of the house, or whether the testator was to be considered as having died intestate as to the house? If a testator made a lease with a clause giving to the tenant the option of purchasing the interest of the lessor, and then devised his reversion, and after the testator's death, the tenant exercised the option, the devise was entitled to the purchase-money. It was otherwise if a person made a will devising a particular estate, and afterwards entered into a contract giving an option of purchase of the estate, which option is exercised after the testator's death. In the latter case the devisee would not be entitled to the purchase-money.—*Weeding v. Weeding* (1st Johns. & Hem. 124). The principle was, that when by a will made after a contract giving a person the option to purchase the testator's interest, the testator devised the subject matter of the contract without referring to the contract, there was considered to be a sufficient indication of an intention to pass the property. In one of the cases referred to, the contract was before the will; in the other, after. In the present case, his Honour was of opinion, although the question was not free from doubt, that the testator intended to dispose of all his property, and that the house should pass. There was another ground upon which the decision of the Master was right. The trustees had received the rent. After paying the £25 a-year and the head rent, the small surplus received would come within the words of the will, "whatever cash may be had after paying my just debts, funeral expenses, and legacies hereinafter mentioned." If so, that surplus should be invested on the trusts of the will. There was nothing to show that the term "cash" was to be restricted to rent received in the testator's lifetime. If the testator had used the word "money" instead of "cash," there could be no doubt upon the matter. The cases on the subject were collected in 1st Jarm. on Wills, 736. He was of opinion, then, that either the house passed by the bequest of the £400, or that the surplus rents and profits were subject to be invested on the trusts of the will. On either ground, he affirmed the Master's decision; and as the appellants had no right to sustain the motion, he should refuse it with costs.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

JOHNSTONE V. SLOANE.—Nov. 12.

Pleading—Embarrassing defence—Infancy—Affidavit—Costs.

Where, to a count for work and labour, the defendant pleaded that the work and labour were done in consequence of a contract with a third person, and not at the request of the defendant, and that at the time the work and labour were done the defendant was an infant, the court set the defence aside as embarrassing, but allowed the defendant to amend upon payment of costs of the motion.

Plaintiff had made for the purpose of the motion an affidavit as to the merits of the case. Held, that the costs of this affidavit should be excepted from the costs of the motion which were to be paid by the defendant.

This was a motion to set aside defences as embarrassing. The action was brought by schoolmistresses against their former pupil to recover expenses of teaching. The defect in the pleadings complained of is sufficiently illustrated by the second defence to the second paragraph of the summons and plaint. This paragraph was for work and labour, and the second defence to it stated that the work and labour mentioned in the second paragraph of the summons and plaint were performed in consequence of a contract entered into by the plaintiffs with George Sloane, the acting trustee of the defendant's father's will, and at his instance and request, and not at the request of the plaintiff, and that at the time of the performing of the work and labour, the said defendant was, and still was an infant, under the age of twenty-one years.

Falkiner for the plaintiffs.—This is at once a traverse of the contract, and also a special plea of infancy. To every plea of infancy there is a replication of necessities, and here if we were to put in a replication traversing the want of request there would be nothing on the record to raise the point of necessities. The plea here is double. We have an affidavit as to the merits of the case. This is to show that our application is not merely formal. There is also an affidavit in reply to this by the defendant.

J. Thompson for the defendant.—The law as to infancy is given in Chitty on Contracts, 137, last edition.—*Duncomb v. Tickridge* (AL 94). The defence shows that the defendant was an infant at the time of the contract. If necessary, the averment of infancy may be rejected. The traverse of the contract is the substantial defence. At all events the court will give leave to amend.—*Clarke v. Scully* (5th Ir. Jur. N. S. 96).

Falkiner replied.

LEFROY, C.J.—This defence is a violation of one of the fundamental rules of pleading. It is at once a traverse, and a plea in confession and avoidance. The plaintiff, therefore, must succeed in his application, but we will allow the other party to amend as he may be advised, paying the costs of the motion, excepting the

costs of the affidavit, which was unnecessary for the motion.

Rule accordingly.

BANKS V. JORDAN.—Nov. 12, 1861.

Practice—Setting aside a sham defence.

The court set aside a defence which was shown by affidavit, and by the admissions of the defendant made after action brought, to be a sham, and which was irregular by reason of no notice or copy of the defence having been served on the plaintiff's attorney, as required by section 45 of the Common Law Procedure Act (Ireland), 1853.

Dames moved to set aside the defence in this case, and for liberty to mark judgment, on the ground that the defence had been irregularly filed, and that a copy of it had not been served as required by the practice of the court, and also upon the ground that it was a sham defence. The action was brought upon a bill of exchange by drawer against acceptor. The summons and plaint had been served in September; and subsequently to its service, the defendant had written to the plaintiff's attorney, admitting the debt, and asking for time. The plaintiff's attorney, on the day after that on which he was entitled to mark judgment, had gone to the office for the purpose of doing so, but had then discovered that on the previous day a defence had been filed, of which, however, no copy had been served on the day of filing. The defence was simply non-acceptance of the bill. The plaintiff's attorney at once served notice of the present motion; and subsequently to the service of that notice on the defendant's attorney, notice of defence and copy were served. Counsel now relied on section 45 of the Common Law Procedure Act of 1853 to show that the defence, no copy having been served in time, was irregular, and also upon the defendant's admission of the debt, as stated above, which appeared by the affidavit of plaintiff's attorney.—*Stokes v. Hartnett* (10 Ir. C. L. Rep., App. xx.)

Bond Coxe, for the defendant, contended that the defence had been regularly filed, although not served; that notwithstanding the defence, the plaintiff was not delayed, inasmuch as he was still in time for trial at the sittings after this term; that as to the falsity of the defence, that was a matter which the court would not try upon affidavit, and that the present motion was, in fact, an attempt to give a retrospective operation to the recent Bills of Exchange Act, 24 & 25 Vict. c. 43.

LEFROY, C.J.—The result of the argument is this, that the defendant has regularly filed a sham plea; that is what it comes to, supposing the argument to be well founded. Now, as to the right to file such a plea, I do not apprehend that the statute was intended to give any right of the sort; and at the common law there was no such right; for as long as I can remember the court has always exercised the jurisdiction of setting aside what was called a "horse-plea," that is, a sham plea filed merely for the purpose of delay, and not for the purpose of trying a right, or of getting a trial to ascertain what the just rights of the

plaintiff were. Under these circumstances, I do not hesitate, in the present case, to exercise this jurisdiction, which was not taken away by the statute. That statute certainly does not give a right to the defendant to file such a sham plea, however formally it may be done. We, therefore are of opinion that the motion should be granted, with costs.

O'BRIEN, J., concurred.—The documents here, the defendant's letters, show that the plea is a sham one.

HAYES, J.—I agree with what has fallen from the other members of the court; but I think that the question ought also to be decided on the ground of the defendant's irregularity in point of practice; and on that latter point I should like to say a word, lest it should be supposed that our silence goes to approve of the practice which has been adopted in this case. It has been said for the defendant, that the defendant may file a defence until judgment is marked; and another principle has also been stated, namely, that the defence is only to be taken as filed from the moment that notice of its filing and a copy of it have been served. Those are very good principles, but then from them the defendant derives another principle, and he says, "I will take care that the plaintiff shall not mark judgment, by putting a plea upon the file; and further, I will not give the plaintiff any notice of that defence, so as to prevent him from marking judgment." Now that is not the correct practice; and from the moment the plaintiff went to the office to mark judgment, no notice of a defence having been given to him, from that moment he had a right to come here to call on the court to give him authority to mark judgment notwithstanding the defence which he found upon the file. I am of opinion that the defence should be set aside, with costs.

FITZGERALD, J., concurred.

O'LEARY v. HOPPER.—Nov. 25.

Practice—Setting aside defence as a sham.

Defence set aside as a sham.

M. B. Smith moved that the defence filed to the summons and plaint should be set aside as irregular, and as being a sham, and that the plaintiff should be at liberty to mark judgment. The summons and plaint consisted of two counts—one for rent upon a demise; the other for use and occupation. To the first paragraph the defendant had pleaded that the defendant had not let the premises as alleged; to the second, that the occupation was not by the plaintiff's permission. The plaintiff's attorney had gone to mark judgment, but had found that the defences stated above had that day been put upon the file. He then on the same day had served notice of the present application, and after the service of that notice, but still on the same day, notice of the filing of the defence and a copy had been served. A letter of the defendant's was read, written before action brought, admitting the debt, and asking for time.

There was no appearance for the defendant.

PER CURIAM.—Grant the motion.

O'BRIEN v. TAGGART.—Nov. 25.

Practice—Setting aside defence as a sham.

Where the defence put in was a simple traverse of a material allegation in the summons and plaint, and did not introduce any new matter, and was regular in all respects, the Court refused to set it aside as a sham defence.

Principles on which the Court acts in setting aside or refusing to set aside defences as shams.

Brady Q.C., moved that the defence filed in this case should be set aside as being false and a sham, and that the plaintiff should be at liberty to mark judgment. The action was for rent on a demise. The defence, which was perfectly regular, was that the plaintiff did not let the lands as alleged. There was an affidavit, on the part of the plaintiff, stating that the rent was due, and showing that the defendant had, by notice before action brought, offered to surrender the lands of the plaintiff, the notice stating that the defendant held the lands of the plaintiff under the demise, and at the rent stated in the summons and plaint. Counsel cited *Stokes v. Hartnett*, (10th Ir. Com. Law Rep. App. xx.), and *Banks v. Jordan*, (*supra*).

Beytagh, for the defendant, *contra*.—This defence cannot be set aside. The distinction is, that when you simply traverse matter alleged in the summons and plaint, that is a right which defendant has to put the plaintiff upon proof of his case; but if you introduce new matter, you run the risk of having the defence set aside, if the new matter is false. In the cases cited on the other side there was an irregularity in the defence, and the court laid hold of that irregularity. The law on the subject is fully stated in *O'Donnell v. Reilly* (11th Ir. C. L. Rep. 329). He also cited 2nd Ferg. Pr. 268; *Nutt v. Rush* (4th Exch. Rep. 491); and *La Forest v. Langan* (4th Dowl. Pr. Cas. 642).

Brady, Q.C., replied.

LEFROY, C. J.—To grant this motion would be to stretch the rule which has been long and widely acted upon by the superior courts. It would be stretching that rule to make it applicable to a case of a very different character, and for a very different purpose from that for which it has been introduced and acted upon. That rule is, that the defendant shall not, by setting up a mere sham defence of the insufficiency and falsehood of which there can be no doubt, obstruct the plaintiff in the trial of his right, or delay him in the prosecution of it. It is now sought to carry this rule to this length, that the court is to try the issue between the parties upon affidavits. Now, the court will do no such thing. If matters of fact are in dispute between the parties, then those matters are to be tried upon a traverse by a judge and jury; or if there is any matter of defence which can avoid the statements in the summons and plaint, the defendant confesses and avoids, by an allegation of the new matter so brought forward, and if that matter is so false as that it deserves the name of a sham plea, the court will then deal with it as such; as, for instance, if the party says that there is in the same court a judgment recovered upon the same subject matter between the same parties, and if he pleads that in avoidance of a second action, and in fact no such judgment exists,

that would be a sham plea upon which the court could act; it has within itself the means of ascertaining that it is a sham plea. So, if a defence is so pleaded in point of law that, on the face of it, it is a sham plea, an absurdity, one that could not bear argument for a moment, the court will set it aside; for a legal sham is just as objectionable as a matter-of-fact sham, and they will both be treated by the court, when the court finds one or the other, as shams. But to do so is not to interfere with the right which the party has to traverse a substantive allegation made by the plaintiff. That is to be tried by a jury, not on affidavit, nor has the plaintiff a right to compel the defendant to support his allegation by an affidavit. He cannot come in and by his motion compel the defendant to make an affidavit. Here the defendant has made no affidavit verifying his plea, nor is he bound to do so. To hold that he was so bound would be to throw upon him a burden which the Legislature has not thrown upon him. This is a principle which has been acted upon in many modern cases, and this court has not decided anything conflicting with it, nor does it claim any jurisdiction of trying the rights of parties upon affidavits, or of requiring a party to make an affidavit to sustain his pleading, where the Legislature has not required it; but the court did in the case before it, of *Stokes v. Hartnett*, see that the defence there was a mere sham plea, and it made a conditional order to give the party an opportunity of setting the court right; but our decision has been very much mistaken if it is supposed that it carried this question beyond what the authorities allow, and beyond that I, for one, will certainly not go.

●BRIEN, J.—Without again going over the ground stated by my Lord Chief Justice, I may say that the present motion appears to be something like one before the passing of the Common Law Procedure Act, to take a plea of *non est factum* off the file. No instance has been shown in which the court has done so. The distinction is manifest between the case where there is a traverse of a material averment in the plaintiff's declaration, and the case of setting up some substantive averment of new matter as a defence. The defendant has a right to put the plaintiff on proof of his case, and that is all that has been done in the present instance. It may, perhaps, be right to extend the provisions of the Act of last session, relating to bills of exchange to other cases, but until that is done we cannot interfere.

FITZGERALD, J.—All the courts have refused to try cases upon affidavits, because to do so would be to usurp the province of a jury in deciding matters of fact. There are cases in which the courts have no doubt set aside defences as false, but in all those cases it will be found that the courts have required something more than mere abstract falsity in the defences which they were asked to set aside. If my memory does not deceive me, when the Common Law Procedure Act was before the House of Lords, it was proposed that the plaintiff's matter of declaration should be required to be verified by affidavit, and that the defendant's defence should also be verified in the same manner. Both propositions were lost, subject to an exception in the case of defences to which I shall refer. The plaintiff's case may be completely false, and I

have yet to learn that we can set aside a declaration merely upon a suggestion of its falsehood. The defendant is in the same way left at liberty, except in this one particular, that if he wants to plead several matters, the Legislature has obliged him to make a general affidavit, that the defences he seeks to put in are true in substance and fact, and if the court give the leave, and the defences afterwards appear to be manifestly false, perhaps then the court may discharge the rule it has previously made. That, however, is a matter into which I need not go; but where there is only one defence to be put in, the court has no power to require that one defence to be verified by affidavit. It is often the case that the defendant has no other means of raising a serious question of law, but by traversing a material averment in the summons and plaint. Then, too, under the 83rd section of the Common Law Procedure Act, if a pleading is so framed as to prejudice, embarrass, or delay the fair trial of the action, the court may, upon motion, set it aside. If it had been intended that the court should try a case upon affidavits, why does not the section go on to add the case in which it should manifestly appear that the defence was false? By confining the power of the court to the three cases enumerated in the section, it appears to me that the Act adopts the old rule. For these reasons I concur in the decision at which the Court of Exchequer arrived, in the case cited by Mr. Beytagh, and in the reasons given by the Chief Baron. I think, too, that the same question has been discussed, and decided in the same way, in the Court of Common Pleas, and it is desirable that there should be an uniformity of decision in all the courts.

HAYES, J., concurred

Motion refused with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MONTGOMERY v. MIDDLETON.—Nov. 13.

Pleading several defences.

When one of the pleas in the defence is applicable to more than one of the counts in the summons and plaint, it is desirable that it should be inserted only once, and the counts to which it is an answer be specified, and not that the plea should be repeated severally as many times as there are counts to which it is an answer.

THIS was an action for the price of a cargo of grain. The contract contained a condition, that if the vessel containing the cargo did not reach Sligo by the 20th of June, the contract should be void. The substantial question was the meaning of "arriving at Sligo." The summons and plaint contained ten counts.

Purcell, for the defendant, obtained leave to plead a traverse of all the counts in the summons and plaint—to the first nine, a plea that the contract was subject to a condition, and that the condition was not performed; and to the third and fifth counts, a traverse of the allegation that the plaintiffs were ready and willing to deliver.

Per CHRISTIAN, J.—It is desirable that when one of the pleas in the defence is applicable to more than one of the counts in the summons and plaint, it should be inserted only once, and the counts to which it is an answer be specified, and not that the plea should be repeated severally as many times as there are counts to which it is an answer.

CREAN v. GAMBLE.—Nov. 13.

Slander of title—Embarrassing plea.

In an action for slander of title, a defence, which contains a short abstract of title on the face of it, will not be set aside as embarrassing.

THE first count of the summons and plaint set out that on the 14th of March, 1854, Andrew Gamble demised the lands in question for a term of years to one Pilles; that the lease contained a clause that Pilles should lodge £100 as security for performance of the covenants in it; that £100 was so lodged by Pilles; that Pilles afterwards assigned his interest in the said lease to Jones, who assigned to the plaintiff; that the plaintiff being about to sell his interest to one Robinson, the defendant wrote to Robinson, and stated that he would do well to inquire into the plaintiff's title. The second count complained that when the plaintiff was in treaty with Thomas Todd for the sale of his interest in the said lease, the defendant said to Todd that defendant's father, the said Andrew Gamble, was only tenant for life of the lands he had leased to Pilles; that the said Todd must take out a new lease; that defendant would be content with the said Todd as a tenant, but that the title which the said Todd was about to purchase from the plaintiff was worth nothing. To both the counts in the summons and plaint the defendant pleaded, with other pleas, that prior to the year 1854, one Nicholas Gamble was seized or possessed of the lands in the summons and plaint mentioned, under a lease bearing date 1780, for three lives, with a covenant for perpetual renewal, and being so seized or possessed, the said Nicholas Gamble conveyed the said lands to trustees, in trust for himself for life, and from and after the decease of the said Nicholas Gamble, in trust for the children of the said Nicholas Gamble for life, in manner and priority thereby specified, that Andrew Gamble, in the summons and plaint mentioned, was tenant for life of the said lands, under and by virtue of the said conveyance, and being so possessed, died subsequently to the year 1854, and subsequently to the execution of the said lease to Pilles, leaving the defendant and four other children him surviving, that the term so granted to the said Pilles in the year 1854 had expired, and that since the decease of the said Andrew Gamble, the defendant had been in receipt of the rents of the said lands.

O'Reardon for the plaintiff moved that this defence be set aside as argumentative and embarrassing, and containing inferences of law.

Kelly, contra.

No rule on the motion.

BEATTY v. PORTER.—Nov. 15.

New trial—Unsatisfactory verdict—Bill of Sale.

Where a defendant having been sued as executor de son tort, pleaded plene administravit, and in support of his plea put in evidence a bill of sale, by which the deceased had in his lifetime conveyed to him his household furniture in discharge of a debt due by him to the defendant, and the jury found that the bill was executed bona fide, but that possession was not given bona fide, the court granted a new trial.

THE plaintiff sued the defendant as executor de son tort of one Walsh, deceased, and obtained a verdict for £71. The defendant pleaded *plene administravit*, and at the trial he relied on a bill of sale, by which, in consideration of an antecedent debt of £154 10s., owing by Walsh to the defendant, Walsh conveyed to the defendant his household furniture, plate, horses, cattle, &c. There was evidence given by the plaintiff to show that the possession was not transferred concurrently with the execution of the bill of sale, which contained no condition on the face of it, but purported to be absolute. The issues left to the jury were these—first, whether the bill of sale was executed *bona fide*?—Secondly, whether the possession was transferred *bona fide*?—The jury found the first issue in the affirmative, and the second in the negative. Hughes B., held that these findings amounted to a verdict for the plaintiff.

Joy, Q.C.—having obtained a conditional order for a new trial at the beginning of the present term,

M'Blain showed cause, and relied on *Edwards v. Hasben* (2 Term Reports, 587), as governing the present case.

Joy, Q.C. (with him Vance) in support of the order, quoted *Burling v. Paterson* (9 Carrington and Payne, 570); *Gale v. Burnell*, (7 Q. B., 850); *Cook v. Walker* (25 Law Times, 51).

THE COURT.—There must be a new trial in this case, on the ground that the verdict is unsatisfactory. It is unintelligible.

Rule absolute.

WHITESTONE v. SMITH.—Nov. 20.

Summary jurisdiction—Justices' Warrant to distrain.

*Where a warrant to distrain, made by justices acting under the 9 and 10 Vic., c. 292, s. 45, and 14 and 15 Vic., c. 93, s. 32, had been anticipated by an executive creditor of a defaulting officer of the Waterford Harbour Commissioners, and an application was made to the summary jurisdiction of the court to set aside the execution, and direct the sheriff to pay over the proceeds to the secretary of the Harbour Commissioners, on the ground that the justices' warrant amounted to a writ of *Levavi facias*, and, therefore, at common law bound the goods of the defendant from the time of its delivery to the constable, and also on the ground of fraud and collusion by the defendant, in permitting his goods to be seized by the execution creditor after the warrant had been issued by the justices. The court refused the application.*

Such a warrant to distrain is not a writ of levavi facias.

THE facts of this case were as follows:—The defendant, Smith, had been an officer in the employment of the Waterford Harbour Commissioners, and being a defaulter to a considerable amount, he was summoned before the justices on the 25th of October, 1861. The same day a warrant to distrain his goods and furniture, was signed by the mayor, acting under the 9 and 10 Vic., c. 292, s. 45; but on the following day a second warrant was made out and signed by two of the justices, and given to a sub-inspector of constabulary to execute. On the 22nd of October, a summons and plaint was served on the defendant by the plaintiffs, Whitestone and Thornton, who were the executors of the defendant's deceased brother, and on the 25th of October, a consent for judgment was signed by the defendant's attorney, acting on his behalf. The constables who had custody of the warrant were unable to obtain entrance into the defendant's house, until the bailiffs of the execution creditor, by pretending to attempt an entrance through the window with a ladder, decoyed them away from the door, which was then opened by those inside, and the goods seized by the execution creditor.

Solicitor-General (Lawson, Q.C.) under these circumstances applied to the summary jurisdiction of the court, on behalf of the secretary of the Harbour Commissioners, to have the execution set aside, and the sheriff directed to pay over the proceeds to him. The justices' warrant is a writ of *levavi facias*, and whether governed by the Statute of Frauds or not, bound the goods of the defendant from the time of its delivery to the sub-inspector. The property did not pass in such a manner as to sustain an action at law, but the goods were bound from the delivery of the warrant.—*Hutchins v. Chambers* (1 Burrow, 579); *Reg. v. Nash* (1 Salkeld, 147); *Payne v. Drew* (4 East, 523); *Burdett v. Rocket* (1 Vernon, 58); *Sturgis v. Bishop of London* (3 Jurist N. S. 864). I also impeach the proceedings in executing the plaintiff's judgment as fraudulent.

Walsh, Q.C. for the plaintiff.—This warrant does not amount to a writ of *levavi facias*. The earliest statutes giving power to magistrates to distrain are to be found in the reigns of Henry VIII and Elizabeth, and it is remarkable that in every one of them the words "distrain and distrain" are expressly and exclusively used. This shows the limited effect intended to be given to these warrants, 2 *Bac. Abridgm.* title *Distrain*, "Distrain, *distractio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed." *Bla. Com.* vol. 3, p. 6.

Application refused.

Court of Exchequer.

[Reported by I. S. Buzale, Esq., Barrister-at-Law.]

THE ATTORNEY GENERAL v. CHARLES BAGOT AND CHARLES LEECH.

Information—Legacy duty—Charitable bequest. A bequest of £2000 to certain specified purposes, or

to such other purposes of promoting industry and art, as my executors in their discretion may think fit. Held, a charitable bequest, and therefore free from legacy duty.

THIS was an information as to legacy duty payable on certain legacies given by the will of Captain George Archbold Taylor, viz.:—on a sum of £2000 and certain pictures. In the month of October, 1854, it appeared, the testator died leaving the above sum after discharging all other legacies, and also his pictures. On the 26th of June, 1856, a cause petition was filed in the Court of Chancery making the Attorney-General and others defendants. An order was then made by Master Littor, declaring the £2000 and the pictures good charitable bequests, as disposed of by testator's will, and, as such, not liable to legacy duty. On the 1st of March, 1858, the present defendants were called on to pass the residuary account, and then a demand of 10 per cent. was made by the officers of Inland Revenue. No notice was served on the commissioner to attend the hearing before the Master, and the Crown now contended that the defendants appropriated the £2000 to non-charitable purposes viz.:—to the endowment of prizes and scholarships for students in the fine arts. The defendants admitted the will, and replied that a cause petition was filed to carry out the testator's intention; that on the 5th of June, 1856, an order was made by the Master, and that on the 15th of February, 1858, he pronounced the bequests to be good and valid charitable bequests, which decision he confirmed in his final order of the 19th February, 1858; that accordingly a scheme was directed to be prepared by the Master, which was done and approved of by him. The nature of this scheme was explained by defendant's solicitor to Gernan, the principal of the legacy duty office. It appeared further that in March, 1860, C. E. Brunner, defendant's solicitor, attended at the legacy duty office, and the Order of the Master was explained to a Mr. Hynes, when the officials, expressing themselves dissatisfied with the Master's decision, suggested a rehearing, which took place in April. On the 18th of that month, the matter came before the Master again, who affirmed his former decision, and a copy of the order was served on the officer of the legacy duty department. From that order there was no appeal. The scheme was submitted to the Royal Dublin Society, after the Master's approval, and, in March, 1860, the prizes were distributed, no objection being made by the officers of inland revenue, the question now arose whether the £2000 was a charitable bequest, and defendant's disposition of it a charitable disposition, collateral to which was a second question, viz.:—is the Crown estopped by the Order of the Master from saying "that the bequest was not a charitable bequest?"

The Attorney General, with him *The Solicitor General*, *Brooke, Q.C.*, *Macdonagh, Q.C.*, and *Jebb* for the Crown.—As to the first question, whether on the construction of the Act of Parliament, 5 & 6 Vic. c. 82, s. 38, this is a charitable bequest, the words in the sections read in connection with similar words in other statutes, and *in pari materia*, or by themselves, are to be read in their ordinary acceptation. The disposition of the money for the encouragement of art

and industry is not a charitable bequest. The word "charitable" has reference to the poor—*Lord Salton v. The Advocate General* (3 Macqueen's R. 671). The exemptions in this Act are to be interpreted according to the ordinary signification of the words. Under the 16 & 17 Vict., c. 51, s. 16, where property is made subject to a trust for *charitable or public* purposes, which, if made in favor of an individual, would confer on him a succession, it is chargeable with 10 per cent. duty. This Act is in *pari materia*, and distinguishes between public charities and charitable bequests. The language of the will itself sustains the view, that the word is to be construed in its ordinary signification, authorizing the executors to dispose of the money to certain specified purposes, "or such other purpose of promoting industry and art as my executors in their discretion may think fit." As to the remaining question, "that the crown is estopped from arguing that the bequest is not charitable by the proceeding in the Court of Chancery," that suit concerned the administration of assets, and the question of legacy duty was not raised at all. The notice served on the Attorney General only required him to represent the Crown there, so far as the question was, whether a certain bequest was valid or not, but not for this collateral purpose; on that account, therefore, the estoppel should not apply. [*Fitzgerald, B.*—You must contend that the Master had no jurisdiction upon this point at all]. The exemption from legacy duty as to charities does not apply to England, and the duty is paid on all; but the 43 Eliz., c. 14, s. 1, and the 5 & 6 Vic., c. 82, s. 38, are to be applied in a different way altogether. The former Act enumerates several charitable uses, such as "the relief of aged, impotent, and poor people," "the maintenance of sick and maimed soldiers and mariners," "schools of learning," "free schools and scholars in universities," "repair of bridges, ports, havens, causeways, sea banks, and highways," "the education and preferment of orphans," "the relief, stock, or maintenance of houses of correction," "marriages of poor maids," &c., &c.; and in Roper's Legacies, 1116, various other charitable uses, in addition, are enumerated. Under the Succession Duty Act, the cases held to be charitable were cases in which the public were benefitted, but that cannot be the meaning of the word in the Act of Elizabeth. In the 5 & 6 Vict. there are three classes of legacies exempted from duty, viz.: First, legacies given for the education or maintenance of poor in Ireland; Secondly, to be supplied to the support of any *charitable institution* in Ireland, and Thirdly, for any purpose *merely* charitable; if, under the 43 Eliz. every public bequest was a charitable bequest, there would be no necessity for specifically introducing these exemptions into the Act of Victoria. The provision as to the education of poor children was introduced into this Act, because the Legislature did not think that the charities under the Act of Eliz. were charities for fiscal purposes. Neither of these exemptions need have been introduced if the words of the Act of Eliz. had the extended operation. [*Fitzgerald, B.*—What do you define a charitable bequest to be?] A bequest for the poor. With respect to the hearing before the Master, there was not a single document in the case that called upon the Attorney-

General, who was present *alio intuitu*, and for a totally different purpose, to raise this question. If a person is a party to a suit in one court, and for one purpose, a decision in another point cannot bind him.

Chatterton, Q.C., with him *F. Meade, contra*, for the respondents, the executors of Captain Taylor, resisted the information, because the case was already adjudicated on by a competent court, which adjudication is unappealed from, and, secondly, because the Legislature specially exempted such bequest. The reference to the Master was under the order of the Court of Chancery; therefore, he was empowered to adjudicate on every question that might arise in the case. Notice was given to the stamp office and at the inland revenue office that the case would be heard before the Master on a day specially appointed. The exceptions were first contained in the schedule of the 56 Geo. 3, c. 56; the English Act, 56 Geo. 3, c. 104 has no such exemption, and the 5 & 6 Vict., c. 82, s. 38 assimilated the two. The argument for the Crown is, that there is an analogous statute in England; that there have been judicial decisions thereon, and that their interpretation of the word "charitable" must be applied to the words in the Irish Act; whereas, under the Mortmain Act and the Act of Elizabeth, the decisions show that a bequest for the purposes of education in industry and art is a charitable bequest. Where a doubt in the construction of the Revenue Acts, the subject is to get the benefit—*Townley v. Bedwell* (6 Ves., 194); *Trustees of British Museum v. Whyte* (2 Sim. & Stuart, 594), 9 Geo. 2, c. 30; *Whicker v. Hume* (1 De Gex, M. & G., p. 506); 56 Geo. 3, c. 56; 39 Geo. 3, c. 73, s. 1; 55 Geo. 3, c. 184, part 3 of the schedule; 5 & 6 Vict., c. 82; *Morice v. Bishop of Durham* (9 Ves., 399). The words of an Act of Parliament must be construed according to the meaning given them by previous judicial decision. Lord Cottenham in *Earl of Waterford's Claim* (6 Cl. & Fin.; H. of L. Cas., p. 152); and *Doe d. Ellis v. Owens* (10 M. & W., 521.)

FITZGERALD, B.—This is an information filed at the instance of the late Attorney-General to obtain payment of legacy duty in respect of certain legacies bequeathed by the testator to defendants as executors, and directing that £2000 should be disposed of by them at their discretion either for "charitable purposes" or for the promotion of art and industry in Ireland. The testator died on the 2nd of October, 1854, and on the 26th June, 1856, defendants filed a cause petition for the purpose of having these legacies declared charitable bequests, and having a scheme prepared. To that proceeding the Attorney-General was made a party, and the Master of the Rolls, by his final order, declared them good charitable bequests, and ordered defendants to carry out the scheme. This was done and notice served on the Attorney-General. It is not necessary to discuss the scheme further. It is admitted that the bequest is a good charitable bequest; but the question here turns on the words "merely charitable" in the 38th section of the 5th and 6th Vic. c. 82. It seems to me that we must interpret the language of the Legislature according to the existing decisions. A charitable purpose must be one so declared by the 43rd of Eliz. c. 14, s. 1, or decided by analogy. It is said we are to limit

the meaning of the words further, and hold that they have reference to the poor, and two arguments are advanced in support of this view, first, that the words in the section of the Act are to be considered as *ejusdem generis*; and, secondly, that the word "merely" shows that the charity is to be so limited. As to the first of these, the doctrine *noscitur a sociis* is not applicable, and as to the second, the word "merely" equally admits of a sensible interpretation in whatever sense the word "charitable" is interpreted. On the construction of the Mortmain Act a charity has been held to be a charity for all purposes. This bequest being decided to be a charitable bequest is, therefore, within the 5th and 6th Vict. c. 82. The petition, therefore, should be discharged with costs.

Rule accordingly.

DOOLAN v. DOOLAN.—November 5.

Practice—Proceedings in error—Making up the paper books—Irregularity—50th, 80th, and 197th General Orders.

The Court of Exchequer will not set aside "proceedings in error" where defendant did not make up the paper books within six days from filing of the suggestion.

THIS was an action on writ of *scire facias* for £300, and the present application was to set aside an order of the Exchequer Chamber of the 28th of October, on the ground of irregularity on the part of the defendant, because he did not comply with the 50th, 80th, and 197th General Orders. There was judgment on demurrer on the 28th May; memorandum of error lodged the 3rd of June, and rejoinder in error the 14th June. Nothing was then done by defendant till the 11th of October, when he served notice that the paper books were made up.

Mukenna, for plaintiff, submitted that the six days specified in the 50th General Order are to be computed from the filing of the rejoinder in error, and that the court could restrain a party, or his solicitor, in vexatious proceedings, by an order, even though the case was removed into another court. The rule as to demurrer is applicable to writ of error. Referred to 170th and 173rd sects. Common Law Procedure Act; Lush's Prac. 516. The court may indirectly, if not directly, control the party. *Wharod v. Smart* (3 Burr. 1823); referred also to *Roddy v. Clements* (2 Ir. L. R. 229.)

Heron, Q.C., and *Johnstone*, contra, not called on by the court.

PIGOT, C. B.—The only question in this case is whether the 172nd section of the Common Law Procedure Act and 50th General Order applies to proceedings in error. We cannot interfere with a judgment of the Court of Error. The plaintiff has his execution and defendant is going on with his writ of error, in such a case we have no authority to interfere with that course; nor can we encourage desperate motions brought here by persons, in the hope that because parties may have money due to them, they may get costs out of that money.

Motion refused with costs.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., Barrister-at-Law, and H. Fawcett, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN RE WILLIAM KENNEDY, OWNER, EX PARTE JOHN YOEULLE, PETITIONER.

Practice—Deficient fund—The petitioner's demand not paid—The costs of proceedings paid out of the funds.

Where the prior creditor allowed the proceedings to be carried on to a sale, showed no cause against the order for sale, and actually pressed the petitioner on to a sale, the court allowed the petitioner the general costs of the proceedings in the first priority, although the funds realized by the sale did not extend to the petitioner's demand.

*But where the order is for sale of a life estate, there being charges on the fee, the costs of the proceedings will not be allowed in a higher priority than the demand.**

The rule has not been applied to the case where the petitioner is the owner. He will be allowed his costs of the proceedings out of the funds, though there is no surplus left after payment of the charges.†

THE petition in this matter was filed to raise the amount of petitioner's judgment, recovered against the owner in Michaelmas Term, 1844. By a decretal order made by Master Brooke the judgment was declared well charged upon the interest of the owner in the lands comprised in the petition, the owner being lessee for life thereof. The petition disclosed that there was a judgment affecting the premises prior to the petitioner's, vested in the executors of John Bermingham. A conditional order for sale was made, and served upon the executors of Bermingham, and the order was duly made absolute. In the course of the proceedings, the executors of Bermingham urgently pressed the petitioner on to a sale, having on one occasion summoned him before the court to account for some apparent delay which had oc-

* In *Gregory's Estate* a conditional order was made for sale of a life estate, on the petition of a creditor on the life estate, and cause was shown by the owner against the order, on the ground that as there were charges on the fee, the petitioner could not be paid by a sale of the life estate. Judge Longfield disallowed the cause, and made the order absolute, but directed that the costs of the proceedings should be allowed only in the priority of the petitioner's demand; stating at the same time that the court would make the same rule as to costs in all cases where an order is made for sale of a life estate, and there are charges affecting the fee.

† The rule that the costs of the proceedings shall be allowed in the priority of the petitioner's demand only, has not been applied to the case where the owner is petitioner. He is entitled to the costs of the proceedings out of the funds, although he has no surplus. This case does not seem to come within the meaning of the 78th section, which appears intended only to apply to the case where an incumbrancer is the petitioner. The owner carrying on the proceedings for the benefit of all his creditors equally, and having the greatest interest in making the funds extend as far as possible, is justly entitled to the costs of the proceedings although he may not be so fortunate as to receive any surplus after payment of his debts.

curring in the proceedings. When the property was brought to a sale, it did not realise sufficient to pay the prior judgment in full, and consequently there was no fund to meet the petitioner's judgment. In preparing the final schedule, however, the petitioner's solicitor placed the costs of the proceedings in priority to all the charges on the estate, and the schedule was lodged in this form. The executors of Birmingham filed an objection to the schedule, insisting that the costs of the proceedings should not be placed in a higher priority than the demand of the petitioner.

In support of the objection, it was contended that the proceedings were not taken for the benefit of the creditor Birmingham. They were taken by the petitioner for his own benefit, and at his own risk. He had ample notice of the demand of the executors of Birmingham. They had a receiver over the premises, and would most probably have received much more out of the estate by means of their receiver, than they have now got by the sale. It was clearly the intention of the Landed Estates Act, as evidenced by the 78th section, that the petitioner should only be allowed the costs of the proceedings in the same priority as his incumbrancer. If the court paid the costs of the proceedings in this case in the first priority, it would be virtually repealing the Act of Parliament.

For the petitioner, counsel submitted that he was clearly entitled to be paid the costs of the proceedings although the funds did not reach to pay his demand. The executors of Birmingham have adopted the proceedings in this matter, and having derived all the benefit of our exertions, they cannot now repudiate our claim to costs. On the 22nd June, 1859, Master Brooke made an order, to which the executors of Birmingham were parties, attending by counsel; and by that order the petitioner was declared entitled to proceed to a sale in the Landed Estates Court. They did not object to his going on here. They were served with the conditional order for sale, and showed no cause. In fact, they repeatedly pressed us on to a sale; and in December, 1860, they actually served a notice upon us, requiring our attendance before the judge to account for delay in the proceedings. It would be most unjust to allow these parties to compel the petitioner to carry on the proceedings, and then to deprive him of his costs. The matter is wholly within the discretion of the judge; for clearly it was not the intention of the 78th section to deprive the court of the exercise of its judgment in any case.

JUDGE HARGREAVE—It is not open to the executors of Birmingham now to raise the objection that the sale was injurious to them; for they not only did not show cause against the order for sale, but actually pressed on the sale, thereby adopting the proceedings. I am, therefore, of opinion that the petitioner is entitled to the costs of the proceedings in the first priority; and, under all the circumstances of the case, I think he is entitled to the costs of the proceedings generally, and not the costs of sale merely. In fact, the costs are nearly all costs which the petitioner would have got in the Court of Chancery in the first instance, being costs after decree, which the petitioner is always entitled to in the first

instance. The objection must therefore be overruled.

Mr. Lawless, Q.C., for the petitioner.

Mr. White, counsel for the executors of Birmingham.

IN RE JOHN BURKE, OWNER; EX PARTE REDMOND BURKE.

Practice—Sale of lands in Mortgage—The day fixed for repayment not having arrived.

Where lands in mortgage form the subject of a petition for sale, and the day fixed by the deed for repayment of the mortgage money has not arrived the mortgagee has a right to have the lands sold subject to his mortgage; but the Court will not sell the lands subject to the mortgage, if the day for redemption is near at hand, and the security is ample.

The mortgagee cannot show cause against the order for sale on this ground. The proper time for him to intervene is on the settlement of the rental before the Examiner.

THE petition in this matter was filed on the 16th of January, 1860, by Redmond Burke, a judgment creditor of the owner's. The petition set forth the several incumbrances on the lands, amongst others a certain mortgage for the sum of £2,900, which, by deed of the 26th June, 1856, was vested in the Rev. Thomas Twigg, and the Rev. John Benjamin Story; and the prayer of the petitioner was in the usual form, that the premises, or a competent part thereof might be sold for the discharge of the incumbrances affecting the same. Service of the conditional order for sale was directed to be made on the mortgagees, Twigg and Story; and no party having shown cause, the conditional order for sale was in due time made absolute. The lands ordered to be sold were only liable to a moiety of the sum of £2,900, secured by the mortgage of Messrs. Twigg and Story, the deed of mortgage comprising other lands which were liable to bear a moiety of the mortgage debt. On the 9th October, 1860, the owner agreed to sell a portion of the lands comprised in the petition, and order for sale to John Lloyd Bagot, for the sum of £2,700. Subsequently, on the 25th April, 1861, a motion was instituted by the owner to have this agreement carried out by obtaining the approval of the court to the proposal of Mr. Bagot, to purchase the lands by private contract, in the terms of the agreement. This motion was opposed by Messrs. Twigg and Story, the mortgagees, who insisted that the lands should be sold subject to the mortgage of the 26th June, 1856, at least to the moiety to which the lands were liable, as the day for redemption had not arrived, the day fixed by the deed being the 26th June 1861; and as the deed contained in addition a covenant, that the mortgagees should not be compelled to accept payment without six months' previous notice being given.

On the part of the owner, it was contended that, as the mortgagees were duly served with the conditional order for sale, and had shown no cause against the order, they were precluded from objecting to the sale on this motion.

The order for sale was an order to sell the lands for the purpose of discharging the incumbrances thereon. More than a year had elapsed since the conditional order was served, and the mortgagees should not be allowed now to raise an objection which ought to have been raised by way of cause against the order for sale. This, counsel alleged, was established by a decision of Judge Longfield's, *In re Corr's Estate*.* For the mortgagees it was contended, that the lands should be sold subject to the mortgage. This was the proper time for the mortgagees to establish their right, for they now came in to insist that the lands be sold subject to their charge. They could not show cause against the order for sale. The petition was presented by a puisne creditor, who had a right to a sale; a right which could not be controlled by the mortgagees.† By the latter clause of the 54th section of the Landed Estates Act, the court is empowered to sell the estate, subject to any incumbrance, where, under the terms of the incumbrance, the incumbrancer cannot be required to accept payment of the principal money before the expiration of a term of years unexpired. The strict rights of the mortgagees, therefore, were to retain the lands as a security for their money until the month of June next, and then to receive six months' notice of payment.

JUDGE HARGREAVE.—It is, indeed, quite clear that the mortgagees could not show cause against the order for sale in this matter. The proper time for mortgagees to intervene, where under the terms of their deed they cannot be required to accept payment for a term of years unexpired, is on the settlement of the rental in the matter. On the occasion of settling the rental they have an opportunity afforded them of establishing their right to have the lands sold subject to their mortgage, and of seeing that the particulars and conditions of sale in this respect are correctly stated. But a mortgagee cannot show cause against the order for sale, simply because he cannot be required to accept payment out of the purchase money. The present case, however, is one in which, I think, the court ought not to sell the lands subject to the mortgage, although the time fixed by the proviso in the deed for payment of the mortgage has not yet arrived. The

* The case of *Eliza Corr*, cited above, does not sustain the proposition contended for. In that case the mortgagee did not intervene at all until the lands were sold, and the purchase money ready to be allocated. He did not come before the court on the settlement of the rental, and insist that the lands should be sold subject to his mortgage, which he had a right to do, and ought to have done, if he did not intend to waive his right altogether. But he filed an objection to final schedule of incumbrances insisting upon delay of payment of his mortgage, and requiring the court to retain a fund in court sufficient to pay off the mortgage at the expiration of the time fixed by the proviso for repayment in the deed. This objection was overruled, and Judge Longfield said, not that the mortgagee should have shown cause against the order for sale, but that he should have resisted the sale discharged from his mortgage. The proper time for this being the settlement of the rental.

† This argument may be carried further. Not only a creditor, but the owner himself has a right to present a petition for sale of lands in mortgage, though the time for payment of the money secured by the mortgage has not arrived. The owner has a right to sell his equity of redemption. Indeed, if such a right did not belong to the owner as against the mortgagee, it would be difficult to see why it should belong to a creditor puisne to the mortgage.

time fixed by the proviso is so near as the month of June next, a period of about six weeks. The right of the mortgagee to keep the lands as a security for his debt is in this case almost a visionary right. If the court sells discharged of the mortgage, the only effect will be to change the nature of security by turning the lands into money; and surely the purchase money, £2,700, is a sufficient security for £1,500, the amount of the mortgage. If we sell now, the matter will not be in a position to admit of the payment of your mortgage before June. You may, then, insist on six months' notice of payment, pursuant to the covenant in your deed, and the court can retain the money for you. As the mortgage may be paid next June, and certainly next January, and as the security is ample, I think this is a clear case to sell the lands discharged of the mortgage. I will, therefore, accept Mr. Bagot's private offer, but without prejudice to the rights of the mortgagees against the fund to insist on delay of payment of their mortgage, and six months' previous notice of payment. I will allow the mortgagees their costs of attendance by solicitor, but no further costs, as I think this is a case in which the motion ought not to have been resisted by the mortgagees.

Mr. Twigg counsel for the mortgagees.

Mr. Vereker, counsel for the owner.

Mr. Adair, solicitor for the petitioner, having the carriage of the proceedings.

IN RE STEPHEN JOHNSTONE AND OTHERS, OWNERS;
WILLIAM JOHNSTONE AND ANOTHER, PETITIONERS.

Relation of solicitor and client—Purchase by the solicitor of charges on the estate of the client—Practice—Rehearing—Motion for leave to serve a notice to rehear.

A., a solicitor, purchases four judgments affecting the estate of B., his client, for sums less than the amounts due on the judgments. Two of the judgments were assigned to A. by a deed in which B. joined. The third judgment was bought by A, a short time after the death of B., and the fourth during the time that A. had the carriage of the proceedings in a suit to administer the estate of B. The estate of B. was sold in the Landed Estates Court. Held, on the settlement of the final schedule, that A. could not stand upon the schedule as a creditor in respect of the judgments for sums larger than the amounts he actually paid, with interest thereon, and costs of the assignments.

A motion to rehear or review a decision must be made within three months from the date of the order or decision; and liberty must first be obtained before a notice to rehear is served, but the application for liberty to rehear may be made ex parte.

Application to extend the time to appeal must be made before the expiration of the three months, the time within which, by the 41st section, the appeal must be brought.

THIS case originally came before the court by way of

objection to the final schedule of incumbrances. The objection was filed by Stephen Johnstone, one of the owners, objecting to the demands Nos. 5, 12, 16 and 26, on the ground that the claimant had purchased and taken assignments of the judgments constituting those demands, during the time he was acting as the solicitor of Glasgow Conolly, the late owner of the estate, or while he had the carriage of the proceedings in a suit to administer the estate of the late owner. The objector accordingly submitted that the claimant should be held to have purchased the judgments for the benefit of the estate, and that he should be declared entitled to the sums only which he actually paid, with interest thereon, and costs of the assignments.

For the claimant it was contended, that he was not the solicitor of Glasgow Conolly, but only solicitor for his wife in a certain partition suit, at the time he took the assignments of the judgments Nos. 5 and 26. That Glasgow Conolly knew the sums which were paid, and actually joined in the assignments of those judgments to the claimant. As to the judgment No. 16, Glasgow Conolly was dead at the time of the assignment. The claimant was not his solicitor at the time of that purchase; and the administration suit was not then instituted. And as to No. 12, this purchase was not made until a considerable time after the client's death; and it was submitted that the claimant ought not to be deprived of the benefit of that purchase, merely because he had the carriage of the proceedings in the suit to administer the estate on which the judgment was a charge. There was no authority to be found which had gone so far as was contended for by the objector. The solicitor cannot do an act for his own benefit in the same transaction in which he is engaged for his client. All the solicitor and client cases point to this. The solicitor cannot buy an estate which he was instructed to purchase for his client. Nor can he purchase an incumbrance under like circumstances. This is a different case. He was not solicitor *in hac re*. This is not the estate in which he was employed as solicitor. Again, there are cases in which purchases by solicitors have been set aside, where the purchase has been made clandestinely, behind the client's back. There can be no allegation of this kind here. Glasgow Conolly is a party to two of the assignments, and it is distinctly sworn that he was fully aware of the sums paid in consideration of the assignments.

HARGREAVE, J.—As to Nos. 5 and 26, the objection must be allowed, for the claims cannot be sustained for a larger sum than was actually paid, with interest, and costs of the assignments. The claimant was, in fact, the solicitor of Conolly at the time the purchase was made, and the court will not regard it essential to establish that he was solicitor in any transactions affecting the particular lands which were charged with the judgments. It is sufficient to show that he was the general solicitor of Conolly. And it must be assumed that the claimant bought those judgments as a trustee for the owner, for the court will not allow a solicitor to purchase up charges on his client's estate to the detriment or prejudice of the client. And as to the fact that Conolly joined in the assignments, this does not by any means prove that the purchases were not

made for his own benefit. On the contrary, there is one fact in this case which seems clearly to prove that the purchases were made, and the assignments taken, for the benefit of the owner. The fact I refer to is this: In one case, though the principal sum due on foot of the judgment was £60, yet merely a nominal sum of £6 was paid for it. Under these circumstances, it cannot be imagined that the owner intended his solicitor to recover out of the estate, for his own benefit, the full sum due on the judgment. As to No. 16, the objection must also be allowed. This case is a little more difficult than the last, yet the same rule may be applied to it. The claimant was not, indeed, the solicitor of the owner just at the time the purchase was made. But he had been his solicitor a very short time before. He acquired his knowledge from his client and at his client's expense; and he has no right to use that knowledge for his own benefit even after the relationship of solicitor and client has ceased, either during the life of the client or after his decease. This is somewhat like a dealing between guardian and ward a short time after the ward comes of age, where the court protects the ward. And as to No. 12, the like rule also must be made, for almost the very same principles will apply. The claimant, at the time he made this purchase, had the carriage of the proceedings in a suit to administer the estate affected by the judgment. It was as such solicitor he obtained his knowledge which enabled him to make the purchase. As such solicitor he was a trustee for the estate, and the parties beneficially interested therein. He was bound to manage the estate and conduct the proceedings for their benefit, to the best of his ability; and if he gained any advantage or made any profit in discharging such duty, it must be presumed that he did it as trustee for the estate and for the benefit of the parties beneficially interested therein. It is the invariable practice of this court not to permit the solicitor having the carriage of the proceedings in a matter to derive any benefit or profit whatever to himself, beyond his fair and proper costs of conducting the proceedings. And I have no doubt such also is the practice of the Court of Chancery.* The objection to this demand, therefore, must be allowed.

Cases cited:—*Carter v. Palmer* (1 Dru. & Walsh, 722; 8 C. & F. 657); *Reed v. Norris* (2 My. & Cr. 374); *Lees v. Nuttall* (1 Russ. & My. 55); *Montesquieu v. Sandys* (8 Ves. 302); *Edwards v. Meyrick* (2 Hare, 60); *Cane v. Lord Allen* (2 Dow. 294); and the cases collected in 1 W. & T. Lead. Cas.; *Fox v. Mackreth* pp. 130, 136.

Counsel for the claimant, *Dr. Lloyd, Q. C.*, and *Mr. Harty*.

Counsel for the objector, *S. W. Flanagan, Q. C.*

The final schedule was heard, and the objection ruled on the 24th June, 1861. And on the 2nd November the claimant served a notice of motion to the effect that he would apply to the court to alter or vary the rulings on the final schedule, by declaring the claimant entitled to the several sums set forth at

* It was stated by counsel that this rule had recently been acted on by Master Brooke in the case of *Johnston v. Hunter*.

† A solicitor having, under a decree, the conduct of a sale, is under an absolute incapacity to purchase at it. *Atkins v. Dehnage* (12 Ir. Eq. R. 1.)

Nos. 5, 12, 16, and 26 on the draft schedule, or for a rehearing of the objection; and the motion was grounded upon an affidavit of the claimant filed on the 9th of August last, and an affidavit of Mrs. Conolly, the widow of Glasgow Conolly, filed on the 2nd Aug.

J. E. Walsh, Q.C., for the claimant.

S. W. Flanagan, Q.C., for Stephen Johnstone, one of the owners.—I submit that this motion is altogether irregular. After an interval of more than four months, a notice is served, without the leave of the court, to rehear and vary an order made by the court in the presence of this party, and on argument of his counsel. Even if the court has jurisdiction to grant the motion, it ought not to do so after this lapse of time. But I submit the court has no jurisdiction to rehear this case under the circumstances. It is provided by the 39th section of the Act, "that it shall be lawful for the court to review and rescind, or vary any order which shall have been previously made by it, but, save as aforesaid, and as herein after provided, every order of the court shall be final." We must now consider how far this section is controlled by the 41st section. It is provided by the 41st section, that "every order or decision of the judge shall be subject to a direct appeal to the Court of Appeal in Chancery in Ireland, and no other, but such appeal must be entered within three months from the date of the decision or order, or such further time as the court shall by special leave allow, and be thereafter duly prosecuted, otherwise the decision or order shall be final." It is clear that unless an appeal be brought within three months, the order is final. If, therefore, a rehearing is to be obtained it must be within three months from the date of the order. Again, before a party can serve a notice of rehearing, he should first obtain the leave of the court on a substantive affidavit. [*Hargreave, J.*—I cannot allow a party to re-argue a point of law decided so long ago as four months, and from which an appeal should have been brought if the party were aggrieved. But if any new facts have arisen, or been discovered since the date of the order, the proper course is to apply, on affidavit, for liberty to rehear. The application for liberty to rehear may be made *ex parte*.] The rehearing must be on the same evidence. It is the established practice of all the courts, that on a rehearing a party cannot rely on new evidence. [*Hargreave, J.*—It is, in fact, a review which is required, rather than a rehearing. You may apply for liberty to rehear on such evidence as you think will induce the court to grant your application.]

J. E. Walsh.—I may consider my motion then as a motion for liberty to rehear. In the first place, the delay which has taken place only extends over the long vacation. The case is not wound up; the schedule is not yet finally ruled. In fact, the matter is now very much in the position it was in when the court made the order on the 24th of June last. The order we desire to vary, is an order declaring that my client, who is the assignee of four judgments on the final schedule, is not entitled to the full amounts due on those judgments, but only to the sums which he actually paid for them. And as I understand, the ground of this decision was, that my client was the solicitor of Glasgow Conolly, whose estate was

charged with the judgments, or that he had the carriage of the proceedings in the suit to administer the estate of Glasgow Conolly. The case was heard on the owner's objection, the deeds of assignment, and the affidavit of my client, in which he stated that Glasgow Conolly knew the sums he paid for two of the judgments, and joined in the assignments. I admit these were imperfect circumstances on which to bring the case before the court. We can now supply the defect. The affidavit we seek to use now, is made by Mrs. Conolly, the widow and executrix of Glasgow Conolly. She states she had frequent conversations with her late husband about his affairs, and was well acquainted with his embarrassed circumstances; that he contracted several judgment debts, and his creditors threatened him with proceedings; that her husband was well aware my client purchased these two judgments for sums considerably below the amounts due, and was previously aware of his intention to purchase them; that my client purchased the judgments with the full knowledge and consent of her husband, and at his desire, and to accommodate him and relieve him from the pressure of his creditors, and that the judgments were purchased by my client with his own monies, and for his own use and benefit; and that her husband fully understood and wished that my client should have the benefit of whatever sums should be ultimately recoverable out of his property on foot of said judgments; that her husband frequently told her so. And as to another of the judgments she states, that the creditors frequently called on her, both before and after her husband's death, respecting the debt, and that she knows, and that her husband well knew, that the creditors would have taken a sum considerably under the sum due on the judgment in discharge of the debt, but that her husband, and she as his representative, after his death, had not the means of settling with the creditor. And the further affidavit of my client explains why, in the deeds, the assignment was not expressed to be for his own use and benefit. [*Hargreave, J.*—I do not think that very material.] Now, these are additional important facts. The case was formerly ruled on the statements of my client himself. These assignments ought to be supported, unless the court is prepared to hold that it is impossible, under any circumstances, for a solicitor to purchase an incumbrance on the estate of his client. Will the court hold that such a transaction cannot stand, where it is the intention of the client that the solicitor should purchase for his own benefit, where there is no fraud, where it is satisfactorily shown to the court that all was fair and above-board? Where the attorney is not attorney *in hac re*, it is clearly allowable. In two of the assignments, Glasgow Conolly is a party. [*Hargreave, J.*—That fact was pressed upon the court upon the original hearing.] There is no affidavit alleging fraud, concealment, undue advantage, nothing, in fact, but the bare circumstance of being solicitor. There is no rule, under such circumstances, that an attorney shall not purchase. This is clearly established by the authorities which are collected in 1 W. & T. Lead. Cas., 131-136.

HARGREAVE, J.—All this is matter of law, on which you should have gone to the Court

of Appeal. What you have now to do is, to show new circumstances which alter the case. I cannot help seeing that this is in substance an application to rehear the question of law decided four months ago, and not really an application to review the decision on the ground of new facts. No new fact is introduced in the affidavit, except the immaterial one that Conolly told his wife that Johnstone would get the full amounts due on the judgments. The case was a very fair case for appeal. I think I did carry the principle which governs the dealings of solicitors with their clients somewhat further than the cases heretofore decided, and I do not know why an appeal was not brought. The time for appealing has now expired, and any application to extend the time should be made before the three months limited by the act expires. I must, therefore, refuse the motion; and as you served this notice without leave, contrary to the practice of the court, the motion must be refused with costs.

Consistorial Court

OF THE DIOCESE OF DUBLIN.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

THE OFFICE OF THE JUDGE PROMOTED BY THE REV. WM. C. NELLIGAN v. THE REV. THOMAS BEDFORD JONES.
—Nov. 16, Dec. 3.

Officiating and preaching to the inmates and officers of a District Co. Lunatic Asylum, without the consent of the incumbent of the parish, is an infringement of his rights as such incumbent.

A Chaplain to such a Lunatic Asylum is not included under the word "Officers" in the statutes authorising the Lord Lieutenant to appoint such. And a Chaplain so appointed has no right to officiate in such Asylum, without the consent of the incumbent, and the licence of the bishop.

THIS case came on for hearing, on letters of request, from the Consistorial Court of the Diocese of Cork, and the offence complained of was that Mr. Jones had, without the consent, and against the prohibition of Mr. Nelligan, the rector of the parish in which the District Lunatic Asylum of Cork is situated, celebrated Divine service on several occasions in said asylum, and occasionally preached and assumed in it the entire cure of souls, without authority for so doing. The articles alleged that in 1837 Mr. Nelligan was duly presented to and instituted into the rectory in question, and still is the lawful incumbent thereof. And that no service could be performed in the parish without his consent. That Mr. Jones, the impugnant, officiated on Sundays and other days in the chapel of the Lunatic Asylum, within said parish, by reading publicly the morning prayers from the Book of Common Prayer, to a congregation composed of the lunatics, and the inmates and officers of the asylum; and also had preached sermons or lectures explanatory of parts of Scripture; and had assumed the cure of souls and spiritual ministrations of the lunatics dwelling in said asylum. That Mr. Jones was not a curate of said parish. The impugnant, by his articles

contrary and defensive, alleged his appointment as chaplain to the said asylum by the Lord Lieutenant, and that said officiating was not *public* in the sense which would prevent the impugnant officiating without the incumbent's consent. The impugnant was appointed on the 23rd January 1861.

Dr. Battersby, Q.C., and Dr. Ball, Q.C., appeared for the promotor.

The Solicitor-General, Dr. Walshe, Q.C., and Dr. Townsend, for the impugnant.

The cases and statutes cited are referred to in the judgment.

DR. RADCLIFFE, Q.C.—There are two grounds on which the impugnant insists on the right claimed by him. First, that the acts done by him did not amount to a public officiating or preaching, as his congregation was entirely composed of the inmates of the asylum, and that he had not invaded the rights of the incumbent, or violated any rule of Ecclesiastical Law, and that inmates were to be considered as if they were his private family and servants, as in *Trebec v. Keith* (2 Atk. 497); *Freeland v. Neill* (1 Rob. 643). But I cannot concur in that view of the case. In this asylum were resident, besides the lunatics, numerous officers and attendants, some of whom might be, irrespective of their residence in the asylum, the promotor's parishioners, and others were taken from different parts of the country, and all were paid or maintained at the public expense. The cure of souls of the whole parish, including the asylum, was vested in the incumbent, and it was not competent for any clergyman of the Established Church to enter a parish and officiate, without the consent of the incumbent—*Williams v. Browne* (1 Curt. 53, 56); *Queen v. Poor Law Commissioners* (2 Jebb & S. 721; 3 Law Times N. S. 290). The second ground of defence is that by the several statutes relied on, the promotor was deprived of his common law right, and the question was whether a chaplain appointed by the Lord Lieutenant or any of the persons named in the statutes, thereby obtained an authority to preach or officiate without the consent of the incumbent, and without the bishop's licence, for though this suit was only to assert the rights of the former, yet the citation denied that the impugnant had the licence of the bishop, and none was relied on by the impugnant; but he only relied on his appointment by the Lord Lieutenant as chaplain. The learned judge referred to the 57 Geo. 3, c. 106, establishing District Lunatic Asylums, 1 Geo. 4, c. 18; 1 and 2 Geo. 4, c. 33; 6 Geo. 4, c. 54; 7 Geo. 4, c. 14. No mention in any of them is made of chaplains, or of any religious duty to be performed by him, leaving such matters to the regulation of the persons in charge of the asylum. No power was given to interfere with the rights of the parochial clergy, and on the authorities, *chaplains* were not included under the word *officers*. The 8 & 9 Vict., c. 107, s. 19, brought the Cork asylum under the former Acts; but section 9 has nothing applicable to chaplains—*The Queen v. Guardians of Braintree Union* (1 Q. B. 130); *Queen v. Middlesex Asylum* (2 Q. B. 433). But even if that view were erroneous, and that the statutes by implication did confer the power on some one to appoint chaplains, with authority to preach and officiate, and so supersede the rights of

the incumbent of the parish, such chaplains could not lawfully preach or officiate without the licence of the bishop. And this was relied on in the citation, as well as the absence of the incumbent's consent, and no necessity exists for the appointment of a chaplain, as the incumbent with the bishop's consent could act—*The Queen v. the Poor Law Commissioners* (9 Ad. and Ell. 901); *Queen v. Governors of Belfast Lunatic Asylum* (5 I. L. R. 375); *Queen v. Poor Law Commissioners* (3 I. L. R. 147); *Bliss v. Woods* (3 Hagg. 486). I therefore consider that Mr. Jones has committed an ecclesiastical offence, but under the circumstances, and the legal difficulty of the question, I give no costs. I direct Mr. Jones to be admonished, and inhibited from again so acting, without the incumbent's consent.

Revision Court.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE O'HARA, Q.C. AND CHARLES SHAW].

BRODIE'S CASE.—October 14-25.

The grandsons of freemen of the City of Dublin, in the maternal line, are entitled to the freedom of that city.

THIS was an objection to the claim of David Brodie to be admitted as a freeman of the City of Dublin, upon the ground of his mother's father having been a freeman of the same city.

Mr. Henry, solicitor, appeared in support of the objection.

Mr. J. Martin, solicitor, appeared in support of the claim.

The evidence as to the custom of admitting to the freedom of the City of Dublin in right of maternal grandbirth was of the same description as that given in *Abbott's Case* (5 Ir. Jur., N. S., 405; in the Exch. Cham., 6 Ir. Jur., N. S., 104).

MR. O'HARA, Q. C., delivered the judgment of the court.—David Brodie, whose name appears on list No. 13, claims to have his name inserted in the list of persons on the Freemen Roll for the City of Dublin entitled to vote in the election of members for that city. His claim is based on his having been admitted to his freedom of the city as being the grandson of a freeman, whose daughter is the mother of the claimant—or, in other terms, as being the grandson of a freeman in the maternal line. This claim was duly objected to, and the claimant proved the matters requisite to entitle him to be placed on the register, subject to the question as to whether the franchise under which he claims is a subsisting franchise in the City of Dublin. By the tacit assent of the claimant and of the objector, the evidence laid before the court for and against the claim of John Isaac Abbott, at the revision of 1860, was assumed by the court to have been given for and against the present claim. Additional evidence was given by the objector to the present claim of a search made amongst existing beseeches from the earliest period in which they are now to be found down to the year 1839. From this search it is to be collected that the earliest

beseech now to be found claiming freedom by reason of being a grandson of a freeman in the maternal line is one in the year 1807, and that from that time down to the end of the year 1836 beseeches (and admissions on such beseeches) of a like nature have been found, amounting in all to forty; for the year 1839 thirty-three such beseeches are forthcoming. It also appears that for the years 1811, 1812, 1824, 1830, 1833, 1837, and 1838, no records of any kind have been found. The objector called upon the court, upon a consideration of the entire evidence, to reject the claim; and in the opening of the case, and of the argument on his behalf, conceded that the question to be decided on this claim unavoidably involved a reconsideration of the decision in *Abbott's case*, and he contended that this court was the proper tribunal in which to have the validity of the franchise claimed adjudicated upon. Upon this latter question I admit that this court is bound to decide on each case as it is presented; and at the same time I may express my regret that the decision of this court, on a question of fact on which depend rights so important to individuals and to the public, cannot be made the subject of appeal. On the late search, no record on the part of a grandson, either on the paternal or maternal side, has been found earlier than the year 1807. The parol evidence in *Abbott's case*, though principally referable to the claim through the paternal line, was in some degree applicable to the claim through the maternal line; but in *Cunningham's Case* (3 Ir. Jur. 163), which was before the court in the year 1857, the claim was in respect of freedom through the maternal line; and in that case the parol evidence and the cross-examination of the witnesses was pointed directly to the question of the custom of the Corporation to admit as of right to their freedom the sons of the daughters of freemen. The franchise claimed is one not put forward for the first time, or what is termed a colorable claim. The existing records show that this franchise has been granted, though not extensively, by the late Corporation from the year 1807 to the year 1840; and under the provisions of the Municipal Corporation Act, by the successive Lord Mayors of the city (with one, and it is said with more than one, exception) from the year 1846 to the present time. During that long period of time no appeal or legal proceedings have been taken, save in this court, to question the validity of the franchise so claimed, although under the Reform Act an appeal lay from the Revising Barrister's decision, on questions not only of law but fact, down to the year 1840; and that from the year 1840 any Parliamentary elector, under the provisions of 3 & 4 Vict. c. 108, is authorised to question the right of any freeman admitted on the freemen's roll, and can have the right adjudicated on by a summary application to the Court of Queen's Bench. It is unnecessary to recapitulate the evidence, or the reasons for the decision of this court in *Abbott's Case*. The evidence and the principle of the decision in that case appears to me to be applicable to the present claim, and I cannot say that the additional evidence adduced by the objector on the present claim is such as to displace the grounds on which the decision in *Abbott's Case* was ruled.

House of Lords.

[Reported by John Blackham, Esq., Barrister-at-law.]

EYRE v M'DOWELL.**IN RE TIPPERARY JOINT STOCK BANK.**

The claim of J. T. Eyre was declared by the Court of Appeal—reversing the decision of Judge Longfield, who decided that it was not a charge—to be an equitable charge on the estate of James Sadleir, called lot 1, founded upon an agreement of the 13th of April, 1855, entered into between John Sadleir and J. T. Eyre, it was registered on the 14th June, 1856, it was not under seal, and James Sadleir was not a party to it, and would not have been bound by it, were it not for the deed of the 6th October, 1855, which reciting the previous agreement of 13th April by which John Sadleir undertook that James Sadleir would execute a mortgage of lot 1 to J. T. Eyre; to this deed James Sadleir was a party. There was a covenant in the latter deed that this mortgage was to be executed before the 1st January, 1857. John Sadleir having committed suicide the additional lots did not become a security for J. T. Eyre. When the case came to the Incumbered Estates Court, the question arose as to the priority of the claim of J. T. Eyre and the judgment mortgage vested in the official assignee. The deed of 6th Oct. 1855, was registered on the 5th December, 1857. The affidavit of the Official manager was filed on the 4th of November, 1856. Judge Longfield decided that the judgment mortgage had all the rights of a mortgagee by deed. There was an appeal from that decision—this court affirmed the decision of Longfield, J. On appeal to House of Lords that decision was reversed, on the ground that a judgment mortgagee had only the rights which a judgment gave prior to the passing of the Mortgage Act, and affected only the estates over which the creditor had a disposing power of at the date of the filing of the affidavit, and that upon the construction of the Registry Act, 6th Anne, c. 2, sections 4 & 5, that it was not an incumbrance within the provisions of that Act.

This case came before the House of Lords on appeal from the decision by Judge Longfield, a judge of the Landed Estates Court, confirmed by the Court of Appeal. The facts were:—The lands of Coolnamuck were sold in the Incumbered Estates Court by George M'Dowell, as official manager of the Tipperary Joint Stock Bank, as petitioner, and James Sadleir, as owner of those lands. In the schedule of incumbrances attached to the petition George M'Dowell was stated to be an incumbrancer for £65,149 1s. 3d., due by James Sadleir to George M'Dowell, as official manager in re the Tipperary Joint Stock Bank, by an order made under the provisions of the Winding-up Acts, as a registered mortgagee on the 4th November, 1856. The other incumbrancer stated on the schedule was John S. Wheatley for £10,000, secured by a like security. Appellant was not inserted as an incumbrancer, and filed a claim for the recovery of his security. From which it appeared that the estate of James Wm. Wall was sold in the Incumbered Estates Court; lot 1 being sold by John Sadleir to James his brother.

Ten other lots were sold to John Sadleir in trust for appellant, who with his brother had made large advances on the Wall Estate by the agency of John Sadleir, prior to the sale; but which, from the existence of prior incumbrances, became a very deficient estate. Appellant requested John Sadleir to sell these estates. He alleged that he could get a purchaser who would give a price which would discharge all their advances. After considerable delay, by a written agreement dated 13th of April, 1855, between John Sadleir and Thomas Joseph Eyre, it was agreed that J. T. Eyre, in consideration of a sum of £44,884 0s. 4d., by John Sadleir to be paid or secured by J. Sadleir as after mentioned, would convey all T. J. Eyre's interest in the Wall Estate to said J. Sadleir, portion of said purchase money to be secured by the acceptance of the Tipperary Joint Stock Bank payable on 1st December next, £29,922 13s. 7d., to be secured by a transfer of shares in Royal Swedish Railway representing that amount, and a mortgage of the lands of Coolnamuck, and also of a portion of the lot No. 1 on the rental of said estate, as sold in the Incumbered Estates Court, which had been purchased by James Sadleir, who is to join on said mortgage as to lot 1. Jas. Sadleir was not a party to that agreement. John Sadleir offered to become the purchaser of the property, paying the amount of the advances by appellant, with an addition of £2000 as a bonus for the increase of the value of the property. In pursuance of this arrangement an agreement was entered into, and by articles dated the 6th October, 1855, between John Sadleir, first part, Thomas J. Eyre, second part, James Sadleir, third part, reciting a deed of the 20th of October, 1854, whereby John Sadleir, in order to secure to appellant monies advanced by way of loan through John Sadleir, amounting to £40,000 for Earl of Kingston, and £12,000 for H. Smith; and further reciting that the appellant, at the request of John Sadleir, and upon the terms of his executing the deed now being stated, had consented, instead, by the deed of the 20th October, 1854, intended to be given to appellant out of the said lands and premises thereby so agreed to be assured, and to accept the securities mentioned in the now stating deed, and to release the lands by the deed of the 5th of October, 1855, made between appellant of the one part, John Sadleir of the other part; and also reciting that appellant had executed said last-mentioned deed, and that instead of said security the said John Sadleir had handed over to the appellant 20,000 shares, of £5 each, of the Royal Swedish Railway Company, at 5 per cent. interest, payable to bearer. It was by now stating deed witnessed that, in consideration of the premises, the said John Sadleir did hereby assign to appellant, his executors, administrators, or assigns, the said railway shares; provided that if the said John Sadleir, his executors, administrators, or assigns, would out of the proceeds of the sales of said Earl of Kingston's Estates, and of monies to be received out of the policies of insurance therein mentioned, or by any other payment to appellant, his executors, administrators, or assigns, such sums, (after taking credit for all costs and other monies then or thereafter to become due to the said John Sadleir, his executors, administrators, or assigns, for or on account of the appellant, on foot

of his advances to the Earl of Kingston and Henry Smith,) should be equivalent to the balance, which at the date of payment by said John Sadleir should be for the principal so advanced and for the interest thereon, to be computed as therein mentioned, then and in such case the appellant would at any time thereafter re-transfer said shares; and for the purpose of giving further security to the appellant, John Sadleir covenanted that before the 1st day of January then next, to convey to appellant the Wall Estates, to be held by him, his heirs or assigns, free from incumbrances, save those mentioned in the agreement of the 13th May, 1855, subject upon payment of said last-mentioned incumbrances; nothing in this deed to invalidate the said agreement of the 13th day of May, 1855, save that the power of sale therein contained should not be construed as authorising John Sadleir to sell any of the Wall Estate at a less price than that for which such part had been sold in the Incumbered Estates Court." After John Sadleir's demise it turned out that the Swedish shares, as well as the bill of Dargan, were forgeries. The claim being heard upon the 15th January, 1859, before Judge Longfield, was dismissed with costs. A petition of Appeal being presented, it was submitted that James Sadlier, when he executed the deed of 6th October, 1855, had full notice of the agreement of the 13th of May, 1855, and was bound by both as to lot 1. That appellant was an equitable incumbrancer on lot No. 1, prior to the registered mortgage vested in the official manager. There was no mortgage of No. 1 executed by J. Sadleir. The appeal was heard on the 31st May, 1859, which reversed the order of the Incumbered Estates Court, declaring that it was an *equitable charge upon lot No. 1*, and remitted the matter to the court below to proceed thereon as should be just and consistent with the foregoing order. The claim was again brought before the judge of the Incumbered Estates Court, and he decided that the equitable right of the appellant, being unregistered at the time of the registry of the judgment mortgage, was *paisue* to the mortgage, and on appeal that decision was confirmed.

It appeared that the agreement, dated 13th May, 1855, was registered on the 14th of June, 1856, and that of the articles of October, 1855, reciting the previous agreement of May, 1855, was registered on the 5th of December, 1857. The affidavit was registered on the 7th of November, 1856. It was submitted on the part of Mr. Eyre, that the registration of the official manager's affidavit could not do more than vest in the official manager such estate as James Sadleir had in lot No. 1 at the time of that registration, as subject to the charge previously vested in Mr. Eyre, by the articles of May and October, 1855, and that though the agreement of May and October was not registered in the office for the registration of deeds in Ireland until after the registration there of the official manager's affidavit, its priority was not affected by the Registration Act, 6 Anne, c. 2, 1r; it was admitted that if the claim of the manager under the 13 & 14 Vict. had been founded on a deed of mortgage or grant executed by him for valuable consideration, and without notice of Mr. Eyre's charge, and registered before the registration of the deed under which the appellant claimed the claim of the official manager would be

prior to that of the appellant, but in answer to that right it was contended that the judgment mortgage being only founded on the statute 13 & 14 Vict. c. 29, s. 7, had not as against prior unregistered incumbrances the effect of placing a judgment creditor in the position of a mortgagee by deed, and that the object of the registration was to give notice to subsequent incumbrancers of the judgment mortgage.

Counsel for appellants, *Sir R. Bethel, Q.C., Sir R. Palmer, Q.C., Greening.*

Counsel for respondents, *Sir Hugh Cairns, Sullivan, Q.C., and Beales.*

It is not necessary to state here, the arguments of counsel or the cases cited, they are so fully stated in the judgment of the court.

LORD CRANWORTH.—My lords, in this case the question to be decided is as to the priority of two claimants on the mansion and demesne of Coolnamuck, part of the estate of the late James Sadleir. Thomas Joseph Eyre, the appellant, claims an equitable mortgage by virtue of a deed executed by James Sadleir, dated the 6th of October, 1855, in which it was stipulated that, in certain events which have happened, it should be lawful for the appellant to raise, by sale or mortgage of (*inter alia*) the lands in question, a large sum of money due to him from John Sadleir, the brother of James. We intimated, at the close of the argument for the respondent, that we were clearly of opinion that this deed amounted to an equitable mortgage by James Sadleir to the appellant of the lands which he was thereby empowered to sell. On this part of the case we never had a doubt; the right of the appellant as equitable mortgagee is too clear to need any argument or reasoning in its support. McDowell, the respondent, who is the official manager of the Tipperary Joint Stock Bank, claims, by virtue of an order of the Irish Court of Chancery, dated the 25th August, 1856, and registered in the Irish Registry Office on the 4th of November, 1856, whereby James Sadlier was ordered to pay to the respondent a sum of £65,149. The respondent contends that though this order is posterior in date to the appellant's equitable mortgage, yet it gives him a prior right by reason of its being duly registered, whereas the appellant's equitable mortgage never has been registered. The Court of Chancery in Ireland, affirming an order of the Landed Estates Court, decided in favour of the respondent; against that decision Mr. Eyre has appealed to this House. The question was elaborately argued at your lordships' bar, and we have now to pronounce our judgment. The merits of the case will be found to depend entirely upon the proper construction to be put on certain sections of two modern Acts of Parliament—*i.e.*, 3 & 4 Vict. c. 105, and 13 & 14 Vict. c. 29, having regard also to the Irish Registry Act, 6 Ann. c. 2. The first of these Acts (3 & 4 Vict. c. 105) is the Irish Act abolishing imprisonment for debt on mesne process. In the clauses to which I shall have occasion to refer, it is almost literally the same as the corresponding English Act, 1 & 2 Vict. c. 110. By section 19 (following exactly section 11 of the English Act), it is enacted that it shall be lawful for the sheriff to whom any writ of *elegit* shall have been directed, upon any judgment recovered in any of the

Superior Courts at Dublin, to deliver execution to the judgment creditor of all such lands as the judgment debtor shall have been seised or possessed of at the time of entering up judgment, or at any time afterwards, or over which such judgment debtor shall, at the time of entering up judgment, or afterwards, have any disposing power which he might, without the consent of any other person, exercise for his own benefit in like manner as he might theretofore have delivered execution of a moiety; and by section 22 (which follows exactly section 13 of the English Act) it is enacted, that a judgment shall operate as a charge on all lands of which the judgment debtor shall, at the time of entering up judgment or afterwards, be seised or possessed of, or over which such judgment debtor shall, at the time of entering up judgment or afterwards, have any disposing power which he might, without the consent of any other person, exercise for his own benefit, using, in describing the property to be affected, the very same words as had been used in the former section, and the clause then proceeds in these terms, "And every judgment creditor shall have the same remedies in a Court of Equity against the hereditaments so charged by this Act as he would be entitled to in case the judgment debtor had power to charge, and had, by writing under his hand, agreed to charge the hereditaments with the amount of the judgment debt and interest." Sections 27 and 28 (following sections 18 and 19 of the English Act) then proceed to give to orders of Courts of Equity the same force as belongs to judgment at law, with a proviso that no judgment, nor any order of a Court of Equity, shall affect lands under the Act, until it has been registered in the mode there prescribed. If the case had to be determined on this statute alone, there can be no doubt, either on principle or authority, that the appellant's unregistered equitable mortgage would have taken precedence of the respondent's registered order of the Court of Chancery. When the Legislature enabled the sheriff to seize the whole instead of a moiety of a debtor's lands, it did not intend to do more than enable him to take the whole of that of which he might previously have taken half. It was only the debtor's beneficial interest of which, before the statute, the sheriff could seize half; and so now, though he may seize the whole, yet it is the whole of that only of which the debtor was the beneficial owner—of that which, if there had been no judgment, the debtor might have appropriated for payment of the debt. When, by the subsequent section, the Legislature gives to a judgment, or to an order of a Court of Equity, the effect of a charge, the subject-matter affected by the charge is only the same interest of the debtor which might have been taken in execution—i.e., his beneficial interest in the land. This conclusion, which is evidently consistent with justice, has been repeatedly decided to be the true principle of the law. It was acted on by Sir James Wigram, and afterwards by Lord Lyndhurst in *Whitworth v. Gaugain* (3rd Hare, 416, and 1st Phillimore, 728); by Lord St. Leonards in *Abbott v. Stratton* (3 Jones and La Touche, 614); by the full Court of Appeal in Chancery in *Bevan v. Lord Oxford* (6 De Gex. Macnaughten and Gordon, 531); and more recently by the Master of the Rolls, in *Henderley v. Jervis*

(22 Bevan 1). All these authorities, it is true, except *Abbott v. Stratton*, were decided on the construction of the English Act; but in everything relating to this point the provisions of the Irish and the English statutes are identical. If, therefore, the matter had rested on the first statute, the 3 & 4 of the Queen, c. 105, the prior right of the appellant would have been clear, both on principle and authority. The debtor could not have appropriated the land in question to the liquidation of his debt without first satisfying the claim of his equitable mortgagee; and the Legislature did not intend to enable the creditor by judgment to take what his debtor could not give. The question, therefore, resolves itself into this, How have the rights of the parties been affected by the subsequent statute of 13 & 14 Vict. c. 29? That Act, after reciting, among other things, the clauses of the 3 & 4 Vict. c. 105, to which I have adverted, enacts, in the first section, that none of these provisions shall apply to judgments entered up, or to decrees or orders made after the passing of that Act, and then, by way of substitute for those provisions, it enacts, in section 6, "that where any judgment shall be entered up, or decree or order shall be made after the passing of that Act, and the creditor shall know or believe that the debtor is seised or possessed of any lands, or has a disposing power over any lands, it shall be lawful for him to make and file in the court in which the judgment has been entered up, or the decree or order has been made, an affidavit stating among other things, the name of himself and the name of his judgment debtor, and the amount of the sum recovered and the particulars of the lands of which the debtor is seised or possessed, and to register such affidavit in the Office for the Registry of Deeds by depositing there an office copy of the affidavit, which shall be entered in the books and indexes of the office as if it were the memorial of a deed. And the clause goes on to provide, that for the purpose of such entries, the judgment creditor shall be deemed the grantee, the judgment debtor the grantor, and the amount of the debt the consideration. By the next section (section 7) "it is enacted that this registration shall operate to transfer to and vest in the creditor all the lands mentioned in the affidavit for all the estate which the debtor had therein, subject, however, to redemption on payment of the amount of the judgment debt, and that the creditor shall, in respect of such lands, have all such rights as if an effectual conveyance to him of all such estate and interest had been made, executed, and registered at the time of registering the affidavit." On these two clauses the respondent contends that he has precedence over the appellant. He puts his argument thus:—After the passing of the Act, he obtained an order of the Court of Chancery, ordering James Sadleir, the debtor, to pay to him the sum of £65,149. After obtaining this order, knowing that James Sadleir, his debtor, was seised in fee of the lands in question, he, the respondent, made and filed his affidavit as required by the statute, and duly registered it in the office for the registry of deeds, stating therein the name of himself as creditor, the name of James Sadleir, as debtor, the amount of the debt, and the particulars of the lands sought to be

charged. He, therefore, contends that by the effect of the statute, all the estate of James Sadleir in the lands in question, subject only to redemption on payment of the sum of £65,149 were transferred to him, in the same way as if James Sadleir had executed to him a legal mortgage of the lands for that amount, and as if that mortgage had been duly registered before any registry of the appellant's equitable mortgage had been made. This was the view taken by the very high authorities in Ireland, by whom the case was decided, but I own I cannot adopt the conclusion at which they arrive. In the first place it is hardly possible to suppose that the Legislature could have intended so to alter the relative position of debtor and creditor, as to enable the latter to satisfy himself out of property, over which the former had no disposing power. If, for any reason, such a change had been contemplated, we should surely have had some recital indicating an intention to make such an unusual deviation from principle. But the Act contains no indication of the sort. Its object in the clauses in question, appears to have been merely to get rid of the inconvenience so strongly felt in Ireland, arising from the prevailing habit of taking securities by judgments, which materially impede the transfer of land. The statute to prevent that evil, compels the judgment creditor to specify on what lands he means his debt to attach. When this is done, there is nothing to show any intention of varying the rights of debtor and creditor—of putting them in a position different from that in which they certainly stood under the prior statute. All that the 7th section of the statute does, is to transfer to the judgment creditor the lands mentioned in the affidavit for all the estate and interest which the debtor had therein at law or in equity, or might create therein by virtue of any disposing power, following exactly the language of the prior statute, under which it is certain that nothing could be transferred except that which the debtor could transfer to a purchaser or mortgagee, with notice of all prior titles, *i.e.*, that to which the debtor was beneficially entitled. Great stress was laid, in the court below, on the fact that effect is given to the judgment, as if the creditor had obtained a conveyance from his debtor, and that conveyance had been registered at the time of the registration of the affidavit. If it was said such a conveyance had in fact been made and registered, it would have taken precedence of the prior unregistered equitable mortgage, and it was said that the requiring registration clearly indicated the intention of the Legislature to give to the instrument registered priority over that which had not been registered. This reasoning does not satisfy me. There was an obvious reason for requiring the affidavit to be registered, namely, to enable subsequent purchasers or mortgagees of the lands mentioned in the affidavit, to know that such an incumbrance existed. The provisions of the Act enable any subsequent purchaser to ascertain who is the incumbrancer, by whom the incumbrance was created, and what is its amount. Besides, it is to be observed that no greater effect is given to the judgment followed by the affidavit, than if the debtor had executed a mortgage which must mean a mortgage of that which he had power to mortgage, *i.e.*, of his beneficial estate and interest in

the lands in question. Nothing beyond this beneficial interest could have been taken by the creditor on an *elegit*, or could have been appropriated in discharge of his debt. This view of the case is strongly confirmed by considering what has been decided with reference to the registry Acts on the subject of notice. It is familiar law, that notwithstanding the stringent language of these Acts, no registered purchaser or mortgagee has precedence over a prior unregistered purchase or mortgage of which he has notice. If, therefore, in such a case as that now under consideration, the judgment debtor had given to his creditor a conveyance or mortgage of his lands, with notice of a prior unregistered incumbrance, it is certain that the creditor would not, by registering his deed, gain any priority over the incumbrance of which he had notice. But, under the statute, notice is out of the question. Where a purchaser or mortgagee, deriving title under a vendor or mortgagor, has notice of a prior title created by the person under whom he claims, it would be a fraud in him to insist on the want of registration—so, at least, it has been held both in England and Ireland. The object of the Registry Act was to give notice, and where that notice has been given independently of the registry, it has been considered that it would be a fraud in any person to contract with the owner, on the pretence that he had no notice by means of the registry; but no such principle is applicable to the case of a judgment creditor. He does not claim by contract, but by virtue of a statute giving him a title irrespective of any question of notice, and the result would be, that the consequences of the equitable doctrine of notice might always be defeated by the subsequent incumbrancer, proceeding on a judgment and affidavit instead of, or in addition to, an ordinary mortgage. My interpretation of the statute is, that a judgment creditor shall no longer have a claim by way of lien extending over all his debtor's lands, but only on those which he enumerates in an affidavit. By making and registering such an affidavit, he shall have the same rights as he would have had if his debtor had made a mortgage to him of all his estate and interest in the lands enumerated, and as if he had registered that mortgage as if he had obtained from his debtor a mortgage of all the estate and interest which the sheriff might have taken on the *elegit*, *i.e.*, of all the beneficial interest of the debtor. The appellant called our attention particularly to the 18th section, which enacts that where an affidavit shall have been registered pursuant to the Act, then every voluntary conveyance made subsequently to the date of the judgment shall be void as against the judgment creditor. This provision, it was truly said, would have been superfluous, if the effect of the judgment and subsequent registration of the affidavit was to put the creditor to all intents and purposes in the position of or registered mortgage without notice; for if the argument of the respondents were sound, such registered mortgagees would certainly have priority over all voluntary conveyances, whether subsequent or prior to the date of the judgment. There is great power in this argument, but even if the 18th section had not existed, my conclusion would have been the same. It remains only to advert to the provisions of the Irish Registry Act, 6 Anne, c. 2. That Act, after provi-

ding for a registry of deeds, enacts in sec. 4 that all deeds when registered shall have priority both in law and in equity over deeds subsequently registered; and by section 5 deeds unregistered shall be deemed to be fraudulent and void, not only against registered deeds, but also against creditors by judgment claiming against the party so registering. These enactments, however, will be found not to affect the question in dispute. By the joint operations of this Act and the Act 13 & 14 Vict., c. 29, the registered affidavit gives to the judgment creditor priority over all prior unregistered deeds. Be it so. It gives him, however, only the same priority as he would have had if the debtor had executed to him a mortgage of the lands enumerated in the affidavit, i.e., a mortgage of such interest as was enjoyed by the debtor beneficially, and interest as might have been taken in execution, the debtor's interest in the lands after satisfying the equitable claim of the unregistered mortgage. The registration of the affidavit gives to the respondent a right against the persons claiming subsequently to the registration, and by the effect of the 8th section against all voluntary settlements executed subsequently to the date of the judgment or order. The statute of Anna, therefore, leaves the question untouched. Three previous cases have been decided in Ireland, in which the decision has been the same as now under appeal, viz:—*Corbett v. De Cantillon* and *McEvoy v. Montgomery* (5 Ir. Chan. R.), and *Ex parte Hamilton* (9 Ir. Chan. R., 512). In the two former the reports are very meagre, but in the latter the Lord Chancellor and the Lord Justice of Appeal go fully into the argument, and give their reasons in favour of the respondent, founded mainly on the 6th and 7th sections of the 13 and 14 Vict., c. 29. Their Lordships considered that by the effect of these sections all the interest of the debtor in the lands comprised in the affirmation was transferred to the respondent as a judgment creditor freed and discharged from the equitable incumbrance, which, in the hands of James Sadleir the debtor, had previously attached on it by virtue of the unregistered mortgage. I have already stated my reasons for dissenting from that view of the case. In the only other reported case on the effect of these statutes, the view taken by the court was in strict conformity with that which I have taken. I allude to the case *McAuley v. Clarendon* (11 Ir. Chan. Rep. 121 and 568.) In that case a judgment was obtained by a creditor and an affidavit was duly registered against a debtor, who, in respect of the lands included in the affidavit, had been declared to be a mere trustee for himself and others. It was argued that as the affidavit was duly registered the creditor registering had priority over all other charges and trusts affecting the land, and particularly over the title of those declared by the decree of the court to be *cestui que trust*. But the Master of the Rolls first, and afterwards Lord Chancellor Napier and Lord Justice Blackburne held that the judgment followed by the affidavit and by the registration of the affidavit gave the judgment creditor no right except against the beneficial interest of the debtor. In the propriety of that decision I most entirely concur, and its principle seems to me to govern the case now before us. The result, therefore, of my investigation of this case is, that the judgment below was erroneous and ought to be reversed.

LORD WENLEYDALE.—My Lords, the only question now remaining to be considered in this case is, whether the registered affidavit of the respondent, the official manager of the Tipperary Joint Stock Banking Company, made upon an order for the payment of £65,149 1s. 3d. by James Sadleir, due from him as a contributor to the Company, and affecting the lands of Coolnamuck, in the county of Waterford, the estate of James Sadleir is to have a priority over an equitable charge previously made on that estate by James Sadleir in favor of the appellant. Your lordships have already declared your opinion that there was an equitable charge created by James Sadleir on that estate by the articles of agreement 6th Oct., 1855, for the amount due to the appellant under the provisions of that deed, so that the only matter to be decided is whether the registered affidavit of the respondent is to have priority to that charge or not. The equitable charge never was registered. The answer to this question depends upon the construction of the Act 13 & 14 Vic., c. 29, which applies to Ireland alone. I agree entirely with my noble and learned friend that this Act does not give a priority to the person entitled to the benefit of the registered affidavit over previous equitable charges though unregistered. It has been settled by numerous authorities referred to at your lordship's bar by Sir Hugh Cairns in his most able argument, that before the 1 & 2 Vict., c. 110, s. 13, equitable interest prevailed over an elegit, and since that Act a judgment entered up operates as a charge on the beneficial interest only of the judgment debtor. The judgment creditor takes subject to all the equities by which the debtor was bound. The Irish Act 2 & 3 Vict., c. 105 follows the provisions of that Act, as my noble and learned friend, who has already spoken, has fully explained. Is a different construction to be put on the Act 13 & 14 Vict., c. 29, s. 6? I think not. The 6th and 7th sections provide that the creditor under any judgment, decree, order, or rule may make affidavit that the debtor is seised or possessed, or has a disposing power over certain lands described which he may without the assent of any person exercise for his own benefit, and state the amount of the debt, and may register that affidavit, and that such registration shall operate to transfer to the registering creditor all the lands mentioned therein, for all the estate and interest of which the debtor at the time of registration is seised or possessed at law or in equity, or might at such time create by virtue of any disposing power which he might then, without the assent of any other person, execute for his own benefit, subject to redemption, and the creditor shall have all rights, &c., as if an effectual conveyance, assignment, or assurance of all such estate and interest had been made, executed, and registered at the time of registering such affidavit. By the 8th section, voluntary conveyances after the registration are made void. It seems to me that this statute does not place the judgment creditor on the footing of a purchaser for the valuable consideration of the money payable by the judgment. The last part of the 6th section, which provides that the creditor shall be deemed the grantee, the debtor the grantor, and the amount of the debt ordered to be paid the consideration, seems clearly to apply to the form only of entry in the registration book, under the 2 & 3 W. 4, c. 87, ss. 11 and 12 (Appea-

dix E), which provides only for the names of grantor and grantees. Farther, the provision in section 8, which enacts that subsequent voluntary conveyances shall be deemed void, afford some, though not a very strong reason for holding that the Legislature did not mean to put the filing of the affidavit on the footing of a conveyance for value; for on that supposition the provision would be wholly unnecessary. For these reasons I am of opinion that the true meaning of the statute 13 & 14 Vict. c. 29, is the same as that of 1 & 2 Vict. c. 110. No more is conveyed by the former statute than is charged in the latter—viz. the beneficial interest of the debtor in the property charged. It occurred to me, in the course of the discussion, that as the deed of the 6th October, 1855, constituting the equitable charge in favour of the appellant, might have been registered under the 6 Anne, c. 2 (Irish Act), the registered affidavit being in effect a conveyance and registered, might be held to have a preference by virtue of the 4th section of that Act, and the equitable charge, therefore, rendered inoperative. But I am satisfied that this argument is of no weight. The 4th section provides that every deed or conveyance of which a memorial is duly registered shall be deemed good and effectual both in law and in equity, according to priority of registration—"according to the right title and interest of the person conveying, and against all and every other deed, conveyance, or disposition of the lands comprised in such memorial." The interpretation of these words, Lord Redesdale, in *La Touche v. Lord Dunsany* (1st Schwaes and Lefroy, 359) says, is according to the right title and interest which such person had to make a conveyance, which conveyance would have been good if such prior conveyance had not existed. Now, if we reject, as we are entitled to do, this unregistered conveyance of the equitable charge, what will be the effect on this statutable conveyance? It does not purport to convey the land itself by metes and bounds, or by other description, which would have prevailed, where the grantor was the owner, against the unregistered conveyance, which would be put out of the way, but conveys only the real beneficial interest of the judgment debtor. It conveyed no more, and its effect could not be increased or lessened by the absence from or presence on the register of the previous or equitable charge. The 5th section and the 6th are shown by Lord Redesdale, in the above cited case, to have no application to this. I concur, therefore, in the opinion that the judgment should be reversed.

LORD KINGSDOWN.—My lords, I am entirely of the same opinion. I had prepared a statement of the grounds upon which I had come to this result; but the matter has been so completely exhausted by what your lordships have heard from my noble and learned friends, that I feel it unnecessary to occupy your lordships' time with reading it.

Sir Hugh Cairns.—Will your lordships allow me to suggest a form of declaration, as I presume that your lordships will, according to the usual practice, remit the case to the court below with a declaration. The words I should humbly suggest would be these—"To declare that the charge or incumbrance of the respondent, as official manager of the Tipperary Banking Company, under and by virtue of the Mas-

ter's order of the 26th August, 1855, is not entitled to priority over the charge or incumbrance created in favour of the appellant by the agreement of the 6th October, 1855, and, with that declaration, remit the case to the Landed Estates Court in Ireland."

LORD CRANWORTH.—To the Court of Chancery.

Sir Hugh Cairns.—The Court of Chancery only intervened by appeal from the Landed Estates Court. The Landed Estates Court has seisin of the case.

LORD CRANWORTH.—The case comes before us by appeal from the Court of Chancery.

Sir Hugh Cairns.—It is a double appeal from both orders. Perhaps I may be wrong about that; that is a matter of mere detail. My suggestion is, that it should be remitted to the proper court to deal with it.

LORD CRANWORTH.—I will put the question that the decree complained of be reversed, and that the case be remitted to the Court of Chancery with a declaration. I was going to propose a declaration, not that the second charge had not precedence, but to declare that the first had precedence; but the form suggested at the bar is probably the best.

Sir Hugh Cairns.—Will your lordships allow me also to make this suggestion, lest a question should hereafter arise about it. The appellant here is a mortgagee, and he should be declared entitled to add the costs of this appeal to his security. I apprehend that your lordships would be the proper tribunal to order that, and not the court below.

LORD CRANWORTH.—He certainly is entitled to that. The only question would be whether it should be done by us; but I suppose there can be no harm in our declaring that he is so entitled.

Mr. Lawless.—This does not seem to me to be the proper court to make the declaration. This is not a suit for foreclosure by the mortgagee. He will have his costs, if it be proper, in the court below, in which he proceeded to realise his security.

LORD CRANWORTH.—It appears to me that we may give a direction as to the costs here.

Sir Hugh Cairns.—Of course we shall be told in the court below that your lordships have disposed of everything. Then here is the cross-appeal. Your lordships' judgment has disposed of that also. In point of form, there will be an order dismissing the cross-appeal. The appellant in the cross-appeal asks your lordships to decide that there is no prior charge. Your lordships have decided that there is.

LORD CRANWORTH.—The cross-appeal must be dismissed with costs.

Decrees appealed from, so far as complained of, reversed. Cause remitted, with declarations, and cross-appeal dismissed with costs.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-law.]

[BEFORE THE LORD CHANCELLOR].*

IN RE FAHY, A BANKRUPT—Nov. 8.

Composition—20 & 21 Vict., c. 60, sec. 149—Functions of the court.

The Courts of Bankruptcy and Insolvency in Ireland

* The Lord Justice of Appeal was absent from illn.

have no jurisdiction over compositions between bankrupts and their creditors, save to see that the amount of composition offered corresponds with that advertised, and to annul (with or without costs) the adjudication of bankruptcy.

Semble—The offer must be of a composition by a money payment, and not by bills of exchange.

This was an appeal from an order for the attachment of Mathew Concannon and Patrick Dooly, made by the Hon. Judge Lynch on the 22nd of May, 1861. It appeared that James Fahy was adjudged a bankrupt on the 15th of November, 1860. Thomas Fahy, a brother of the bankrupt, having applied to Matthew Concannon and Patrick Dooly to join the bankrupt in certain bills of exchange, to be passed to the creditors of the bankrupt, they agreed to do so, upon Thomas Fahy undertaking to indemnify them, which he agreed to. They accordingly signed an undertaking to that effect, and, at a meeting of the bankrupt's creditors, held, pursuant to notice, on the 5th of February, 1861, the following undertaking, duly entitled and signed, was read. "We hereby undertake to join the bankrupt, James Fahy, in this matter, in the offer of composition of 10s. in the pound, and as gazetted, being the drafts of the said James Fahy in and accepted by us, payable by four equal instalments of 2s. 6d. each, viz., at four, eight, twelve, sixteen months from the date of the composition.—Signed," &c. That offer of composition was accepted by the requisite number of creditors, who, however, declared that it should be modified as follows, viz., that the respective instalments should be secured by the joint and several promissory notes of M. Concannon, P. Dooly, Thomas Fahy, and the bankrupt, at the above dates from the 1st of February, 1861. A second meeting for deciding upon the composition was appointed for the 22nd of February; but Concannon and Dooly having been informed of the alteration made by the bankrupt in their proposed securities, at the suggestion of their creditors, their solicitor, under their direction, on the 20th of February, wrote to the agent of the bankruptcy a letter, stating that notwithstanding that their names had been proposed as sureties for payment by the bankrupt of the composition, they declined to join him in the security offered, and to make themselves liable for any portion of his debts. The creditors met upon the 22nd of February, and Concannon and Dooly were summoned to attend as witnesses on the bankruptcy upon the 12th of April, on which occasion, in reply to the judge's direction, they both refused to sign the promissory notes tendered to them, stating that Thomas Fahy had refused to indemnify them in case they did so, in accordance with his promise. On the 12th of April, the judge granted a conditional order for their attachment. Concannon and Dooly filed a joint affidavit, showing cause against that order, which, however, was made absolute by an order of the 22nd of May, which, amongst other things, recited what had been omitted in the preceding order, viz., the refusal of the appellants to sign the notes in obedience to the direction of the court. From that order Concannon and Dooly now appealed.

A. Brewster, Q.C. (with him *M. Morris*) for the appellant.—The creditors should have either accepted

or rejected the offer of Concannon and Fahey; they had no right to assume that the latter would give antedated promissory notes instead of the bills they offered. The creditors might have proposed alterations in the securities at their second meeting, but they could only approve or reject the offer of composition at the first meeting, 20 & 21 Vict., c. 60, s. 149. The appellants had full right to disclaim the altered arrangement. The Court of Bankruptcy had no control over this composition, as it was to be carried out by means of bills of exchange, and not money, for it has been held by Bramwell, B., that the composition clauses of the English Bankrupt Consolidation Act, 1849 (which are identical with those of the Irish Act) apply only "where the offer is of a composition in money, and that creditors cannot be compelled to take bills of exchange without their consent," *Taylor v. Pearce* (2 Exch., N.S., 36). [*The Lord Chancellor.*—I don't see why the court below should interfere at all in an arrangement between a bankrupt and his creditors]. The appellant's counsel were then stopped by the court.

James Kernan, Q.C. (with him *D.C. Heron, Q.C.*, and *P. Martin*), for the assignees.—Two points were relied on by the assignees in the court below—first, that an undertaking had been given by the appellants; secondly, that a conditional order, giving indulgence to the appellants, issued before the attachment issued. [*The Lord Chancellor.*—I do not see how the court could attach a man who was not before it. The Court of Bankruptcy should abstain from interfering in compositions. If a man whose offer of composition has been accepted by his creditors, withdraws from his arrangement, his creditors can then call in the aid of the Court of Bankruptcy]. A bankrupt who enters into a composition is before the court. The meetings of the creditors are held before the judge in the court, and the 140th section of the Bankrupt and Insolvent Act enacts that if at the second meeting of the creditors three-fifths of them agree to accept the offer of composition, "the court may, upon such acceptance being testified in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy." [*The Lord Chancellor.*—That means that the court may order the payment of the costs incurred prior to the composition being entered into; but the court cannot force creditors to prosecute the bankruptcy].

The LORD CHANCELLOR.—I am of opinion that the order below cannot be sustained. Here is an undertaking made without any consideration, and on which no action would lie. The creditors of the bankrupt reject it when it is offered at their first meeting. That undertaking is only an agreement which the appellants were willing to enter into with the creditors, in case the latter accepted it, and until it was accepted, either party were at perfect liberty to withdraw from. The creditors proposed such alterations as to change it materially, whereupon the appellants withdrew. No doubt the court below is to sit and hold the meetings of the creditors, and to see if the advertisements in the *Gazette* are correct, and that the amount of composition really corresponds with that advertised. But the court has no other functions in relation to compositions. If the requisite number of creditors accept

the composition, the judge may annul the adjudication of bankruptcy, but he cannot otherwise interfere in the arrangement. The bills of exchange proposed by the appellants were never tendered to the creditors.

Discharge the order below, with costs of the proceedings below—no costs of appeal.

[BEFORE THE LORD CHANCELLOR].*

IN RE SANDERSON, A BANKRUPT.—Nov. 28.

Trading exclusively in Ireland—20 & 21 Vict. c. 60, s. 31.

A trader, who had resided and carried on business in England for several years, took premises in Ireland in November, 1860, closed his place of business in England, removed his family to Ireland, and, pursuant to advertisements in the Irish newspapers, carried on his trade thenceforward in Ireland only. Five-sixths of the amount of his debts were contracted in England. In April, 1861, he was adjudged a bankrupt in England, and in May following the Irish Court of Bankruptcy and Insolvency made a similar adjudication. On appeal by the bankrupt from the latter, Held, that the bankrupt was residing and trading exclusively in Ireland, under the 31st section of the Irish Bankruptcy and Insolvency Act.

THIS was an appeal by F. Sanderson, a bankrupt, from an order made by Judge Lynch on the 23rd of May, 1861. The following were the facts of the case:—F. Sanderson, the appellant, carried on the trade of a coach and a cab-builder for several years at No. 12 Tottenham-street, Middlesex, England, and, in the month of June, 1860, he took a house and premises at No. 34 Lower Dominick-street, Dublin, where he opened a branch of his trade, and here his wife and family resided from November in the same year. The appellant becoming embarrassed, at the request of his creditors in England, he signed a declaration of insolvency, and on the 17th of April, 1861, a petition for adjudication was presented to the Court of Bankruptcy for the London District against the appellant, describing him as of 34 Dominick-street, Dublin, and 12 Tottenham-street, in the County of Middlesex, coachmaker. By an order of Mr. Commissioner Fonblanque of the above date, the appellant was adjudged a bankrupt, and on the 20th of April, 1861, the messenger of the English Court of Bankruptcy took possession of the goods and effects of the appellant at No. 34 Lower Dominick street, Dublin. The appellant surrendered himself to the adjudication in London, and, on the 7th of May, 1861, assignees of his estate were duly nominated. On the 4th of May, 1861, a trader-debtor-summons, at the suit of an Irish creditor, was issued out of the Court of Bankruptcy and Insolvency in Ireland, requiring the appellant to attend and admit the debt upon the 7th of May, 1861. The appellant was unable to attend upon that day, his presence being necessary at the Bankruptcy Court in London; and upon the petition of the same Irish creditor, the appellant was adjudicated a bankrupt on the 15th of May, 1861. It was proved that from

November, 1860, there was only a caretaker residing in the bankrupt's premises in Tottenham-street, London, but that five-sixths of the amount of his liabilities were incurred to creditors residing in England, some of them, too, after his removal to Dublin. On the 20th of May, 1861, the bankrupt moved to set aside the adjudication made by the Court of Bankruptcy in Ireland, when Judge Lynch, by his order of 23rd of May, affirmed the adjudication.* From that order F. Sanderson now appealed.

A. Browder, Q.C., (with him James Kernan, Q.C., and Twigg), for the appellant.—This case turns on the construction of the 31st section of the 20 & 21 Vict. c. 60, which enacts that the Court of Bankruptcy and Insolvency in Ireland "shall have exclusive jurisdiction in bankruptcy over all traders residing or carrying on business exclusively in Ireland." [The Lord Chancellor.—Does "exclusively" apply to both "residing" and "carrying on," or to both?] To "carrying on" only. This case is the converse of *Ex parte Rogers* (9 Ir. Chan. 150). In that case the bankrupt never resided in England, nor carried on business there, and the adjudication of the English Court of Bankruptcy was very properly annulled. When a man carries on business in both countries, the first commission issued prevails, and extends over all his property in both countries. In this case a commission issued first in England. Five-sixths of the bankrupt's debts were contracted in England. Even if the bankrupt had retired from business in England, he could become a bankrupt there.—*Ex parte Bamford* (15 Ves. 449).

Serjeant Sullivan (with him D. C. Heron, Q.C.) contra.—The bankrupt advertised in the newspapers that he was coming over to this country to carry on his trade in Dublin exclusively. It is sworn that he and his family have been residing in Dublin since November, 1860. The bankrupt, on his examination, admitted that his coach-building yard in London had been closed since the above date, and that only one man resided on the premises, for the purpose of letting them. If the bankrupt did not cease to trade in England under these circumstances, when can a man be said to cease to trade in England? This statute must be construed according to its plain grammatical meaning.—*Miller v. Salomons* (7 Exch. 560); *Grey v. Pearson* (6 Ho. of Lds. 106). This case is governed by *Ex parte Rogers* (9 Ir. Chan. 150). The English assignees are not under the control of the Irish Court of Bankruptcy.

James Kernan, Q.C., in reply.

THE LORD CHANCELLOR.—This is the case of a man residing in Ireland, and carrying on business here, and here only. What is this but trading exclusively in Ireland, under the Act of Parliament? It is true that some of his debts were contracted in England, but I do not see how that prevents his being an Irish trader. I cannot bind the assignees under the adjudication made in England by any order I may make in this case. They may bring their action to-morrow. I can only affirm the order of the court below. The costs to come out of the estate, and the deposit to be returned.

* The Lord Justice of Appeal was absent from illness.

* *In re Sanderson* (11 Ir. Chan. 421).

[BEFORE THE LORD CHANCELLOR.*]

IN RE WOODROFFE, A BANKRUPT; EX PARTE FORTUNE
Nov. 29; Dec. 9, 17.

20 & 21 Vict. c. 60, sec. 143.

No appeal lies against the granting of a certificate to a bankrupt, unless the appellant's objection be made in writing, at the final examination.

THIS was an appeal from an order made by Judge Berwick on the 13th of June, 1861, granting a certificate to James Woodroffe, a bankrupt. It appeared that at the final examination of the bankrupt, held on the above date, counsel for Mr. Fortune, a creditor, objected to the final examination of the bankrupt being passed, and a certificate being granted, upon the grounds of fraud on the part of the bankrupt. The judge below signed the certificate of the bankrupt's conformity, passed his final examination, and granted him a certificate; but upon the memorandum of the sitting of the court, upon the 13th of June, when the order was made, it did not appear that any objection was made to the granting of the bankrupt's certificate. From this order Mr. Fortune now appealed; pending the appeal, the bankrupt's certificate was not issued.

James Kernan, Q.C., (with him *Dowse*), for Mr. Fortune, the appellant.—This appeal is brought under the provisions of the 143rd section of the 20 & 21 Vict. cap. 60, (the Irish Bankrupt and Insolvent Act, 1857), which directs that where a charge of fraud is made against a bankrupt, the passing of his final examination shall be suspended. Counsel for the appellant charged fraud against the bankrupt here, and examined witnesses in support of the charge.

D. C. Heron, Q.C., (with him *P. Martin*), for the bankrupt.—This appeal cannot be heard. Both the charge of fraud, and the objection to the certificate of conformity, should be taken down and entered upon the order, to entitle a creditor to appeal under the 143rd section. [*James Kernan, Q.C.*—I made the objection below, and it was the duty of the court to take it down.]

The LORD CHANCELLOR.—All I can do here is to require the judge below to certify what is the settled

* The Lord Justice of Appeal was absent from illness.

† Section 143 enacts, "Forthwith after the bankrupt shall have passed his last examination, if no prosecution shall have been directed by the court, nor any charge of fraud shall have been entered on the proceedings, nor any objection to the signing of the certificate be entered in the court, the certificate of conformity shall be prepared by the chief registrar, and signed by the court, and notice of the allowance of such certificate shall be advertised in the *Dublin Gazette*, in such manner as may be directed in any General Order, but if any objection to the granting of the certificate be made before or at the last examination, then the court shall appoint a public sitting for the allowance of the certificate (whereof twenty-one days notice shall be given in the *Dublin Gazette*), and at such sitting or any adjournment thereof, the assignees, or any of the creditors of such bankrupt, may be heard against the allowance of such certificate, and the court having regard to the conformity of the bankrupt to the law of bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or suspend the allowance thereof for any period not exceeding three years.

practice of the court as to the mode of taking objections on such occasions.

December 9.—On this day, the certificate of Judge Berwick was read, in which he stated, "that by the practice of the Court of Bankruptcy and Insolvency, objections to the granting to the bankrupt of the certificate of conformity must be taken at the time of the passing of the first examination of the bankrupt, and must be entered on the proceedings of the court, pursuant to the statute, and the ground of objection must be distinctly specified therein, and thereupon the court appoints a public sitting for the hearing and deciding thereon. The court has, however, been in the habit, at the request of the parties concerned, and to save the expense of a second public sitting, of hearing all the objections to the conduct of the bankrupt at the sitting for his final examination, and where the case would call for a suspension of his certificate, to make an order adjourning the passing of his final examination to such future period as the court considers right, which in effect acts as a suspension of his certificate to that time. This course is only adopted when the parties assent thereto, and if the opposing party intends to insist upon his right to object to the granting of the certificate, I should consider bound to adopt the regular practice of the court." The judge below also amended the order of the 13th June, 1861, by reciting therein—"That counsel on the part of Mr. Fortune opposed the passing of the final examination of the bankrupt on the ground of fraud," &c. The Lord Chancellor having directed a further reference to ascertain whether the objection must be tendered in writing or not.

December 17.—On this day the Registrar of the Court of Bankruptcy and Insolvency certified that the objection of the appellant should have been in writing.

D. C. Heron, Q.C., cited *Ex parte Holthouse* (1 De Gex M. & G. 237).

Dowse contra.—The judge below admits that his original order was wrong.

The LORD CHANCELLOR.—The order made by the court below has, upon reference back, been amended by the insertion of the very facts which Mr. Kernan described, viz., that fraud was charged against the bankrupt, but that no objection was raised to the granting of the certificate. The case cited by Mr. Heron is very strong, and this is an *a fortiori* case. Creditors must conform to the rules of the Bankrupt Court. I do not wish to encourage such appeals as this. I cannot allow every one to appeal from every order of the Bankrupt Court. By reason of the appellant's delay great hardship has been inflicted upon the bankrupt. If this appeal had been brought last Trinity Term the whole matter might have been disposed of in a fortnight, whereas the bankrupt's certificate has been suspended for six months, pending this appeal, so that he has been punished very severely. I wish to say that I mentioned this case to the Lord Justice of Appeal, and that he quite concurred in the view I have taken of it. I regret extremely that I have not had his valuable assistance in hearing it. Dismiss the appeal with costs.

Court of Chancery.

Reported by Charles H. Foot, Esq., Barrister at-Law.

TALBOT v. KENNEDY AND OTHERS.—Nov. 10; Dec. 2

Practice—Cause petition to perpetuate testimony—
Purchase for valuable consideration.

A petition was filed to perpetuate testimony of the contents of a lost deed, by a party claiming a reversionary interest thereunder. Held, that under a commission issued according to the prayer of the above petition, the respondents named in the latter could not examine witnesses on their own behalf. And that the defence of purchase for valuable consideration without notice, is no answer to a suit to perpetuate testimony.

THIS was a petition for permission to examine witnesses, in order to perpetuate their testimony as to the contents of a family settlement, now lost, which had been made in the year 1841, and under the limitations of which, George Talbot, the petitioner, claimed to be entitled to certain lauds, subject to an existing life estate. No answer was put in by any of the respondents named in the petition, but, at the hearing, counsel appeared for John Talbot, a minor, and asked leave to file an answer on behalf of the minor, which application was granted, and the case was ordered to stand over.

Dec. 2.—*P. Creagh* for the Kennedys minors, who now appeared, and who were permitted to file answers, contended that the respondents were entitled to examine witnesses on their own behalf, under the commission to examine witnesses for the petitioner.—*The Earl of Abergavenny v. Powell* (1 Merr. 434).

J. E. Walsh, Q.C., for Mrs. C. Talbot, whose jointure was payable out of the lands in question, contended that as against his client, being a purchaser for valuable consideration, this petition should not be granted at the suit of a volunteer.—*Jerrard v. Saunders* (2 Ves. J., 45, 8).

P. Blake, Q.C., (with him *James Monahan*), for the petitioner.—The mere dictum of Lord Eldon, uttered in *Jerrard v. Saunders, supra*, is overruled by his subsequent decision in *Dursley v. Fitzhardinge Berkeley* (6 Ves., 251). Although a bill of discovery will not lie against a purchaser for valuable consideration, a bill to perpetuate testimony will.—2 Story Eq. Jurisp., 968. If the respondents wish to perpetuate testimony in their own behalf, they must file a substantive petition for that object. Our witnesses must be named in the order, therefore no other witnesses can be examined under the commission.

THE LORD CHANCELLOR.—I am quite of Lord Eldon's opinion, that a bill to perpetuate testimony is not to be viewed as a bill giving relief. I will make the common order, only following the form established. The respondents can cross-examine the petitioner's witnesses if they wish. I cannot make any order as to costs at present.

Rolls Court.

[Reported by William Woodcock, Esq., Barrister at-Law.]

BURLEY v. ARMSTRONG.—June 17.

Will—"Just debts"—*Mortgage*—*Marshalling*—*Legacy*.

A direction in a will to pay the testator's just debts extends to a debt due on a covenant contained in a mortgage deed.

Where, in 1828, a testator, being indebted on a covenant contained in a mortgage of real property, made his will, not attested, as then required, to pass real estate, directing that his chattel property should be sold, and that out of it his just debts should first be paid, and then his legacies, Held, that the debt due on the covenant was rightly paid out of the produce of the sale; that the testator's heir-at-law took the mortgaged estate discharged of the mortgage, and that the legatees were not entitled to have the assets marshalled so as to recover out of the mortgaged estate so much of the sum paid out of the personal estate in discharge of the mortgage as would be necessary to pay the legatee's demand.

THE facts upon which this case were decided are as follows:—John Armstrong being seized in fee of the town and lands of Drumroe, in the County of Fermanagh, and in quasi fee, under a lease for lives renewable for ever, of the lands of Moybane, in the same county, by deed of release by way of mortgage, bearing date the 29th of April, 1815, in consideration of the sum of £500, then currency, conveyed the said lands of Drumroe and Moybane to Robert Nixon and his heirs, to hold the same unto and to the use of the said Robert Nixon, his heirs and assigns, subject to a proviso for redemption, on payment of the said sum of £500, with interest. This deed contained the usual covenants by the mortgagor. By deed of the 1st November, 1828, Andrew Nixon, the administrator of the mortgagee in the deed of 1815, in consideration of the sum of £461, Irish, and, at the request of the said John Armstrong, assigned the said lands to Ralph Scott, with a clause of redemption, on payment of said sum of £461. That assignment contained a covenant by John Armstrong, to and with Ralph Scott, to pay to the said R. Scott the said sum of £461, with interest. John Armstrong died in 1829. By deed of 1850, the said Ralph Scott reassigned the mortgaged premises to Montgomery Armstrong, the respondent. John Armstrong made his will, dated the 24th March, 1829, not attested, as then by law required, to pass real estate, and by it he left and bequeathed to his son William Armstrong the sum of £300, to be applied as in the will mentioned, and to his daughter Elizabeth Armstrong the sum of £200, and desired that all his chattel property, of every kind and description whatever (except as before bequeathed), to be sold by public auction; and, in the first place, the produce thereof to be applied to the payment of his just debts and funeral expenses, and, in the next place, to the discharge of his legacies; and, finally, he appointed his brother Montgomery Armstrong his residuary legatee and principal executor, together with two other persons

therein named. The will contained dispositions of the testator's real estate, to which, however, it is unnecessary further to refer, as they failed by reason of the insufficient attestation of the will. The testator died in December, 1829, and thereupon Montgomery Armstrong entered upon his lands, and took possession of his personal estate. The petition in the present matter was filed by Alexander Burley, who had married Elizabeth Armstrong, and the said Elizabeth, to recover her legacy. The case went into Master Brooke's office, and the respondent, by his discharge, amongst various matters, stated that the debts of the deceased were more than sufficient to exhaust his personal estate, and that he, the respondent, applied said personal estate in discharge of those debts, including the mortgage debt due to Mr. Ralph Scott, on foot of which respondent paid the sum of £552 15s. 4d. The Master, by his order, bearing date the 21st December, 1860, reciting that it appeared that the respondent alleged that he applied a portion of the testator's personal estate in paying off a mortgage of the real estate of the testator, and further reciting that it appeared that such mortgage had been executed by the testator himself, to secure his own debt due by him to the mortgagee, and that the testator died intestate as to all his real estate, and that such real estate descended to the respondent as heir-at-law of the testator, declared the petitioner, Elizabeth Burley, as pecuniary legatee under the will of said John Armstrong; and that the said petitioner, Alexander Burley, in right of his wife, the said Elizabeth Burley, entitled to have the assets of the said testator marshalled so as to recover out of the mortgaged estates of the said testator the amount so paid out of the personal assets of said John Armstrong to the mortgagee of said estate, or so much thereof as would be necessary to pay the said petitioner's demand. The respondent appealed from this order, on the ground, as set forth in his notice, of appeal that the petitioner, as a pecuniary legatee under the will of the testator, was not entitled to have the assets marshalled for said purpose, inasmuch as the testator by his will directed all his chattel property to be sold by public auction, and in the first place to apply the produce thereof in payment of his just debts and funeral expenses, and, in the next place, to the discharge of the legacies (including petitioner's demand) therein mentioned; and that the respondent, as the executor thereof, by paying said mortgage-debt out of the said assets obeyed the directions, and fulfilled the intention of testator in that behalf, and that accordingly respondent is entitled to hold said mortgaged estate exonerated and discharged from said legacy, and other the pecuniary legacies bequeathed by said testator.

Serjeant Sullivan and G. O. Malley for the appellant.

Brewster, Q.C., and Dove, for the petitioners.

The following cases were cited:—*Hollivell v. Farmer* (1 Russ. 663); *O'Neal v. Mead* (1 P. Wms. 693); *Lutkins v. Leigh* (Cas. temp. Talbot, 53); *Ancaster v. Meyer* (1st Wh. & Tud. 505); *Strickland v. Strickland* (10 Sim. 374); *Galton v. Handcock* (2 Atk. 426); *Clifton v. Birt* (1 P. Wms. 678); *Earl of Ingestre v. Carnarvon* (1 Beav. 209); *Foster v. Thompson* (6 Ir. Eq. Rep. 168); *Davies v.*

Gardiner (2 P. Wms. 190); *Forrester v. Lord Leigh* (1 Ambl. 171); *Rider v. Wager* (2 P. Wms. 328); *Smith v. Smith* (10 Ir. Ch. Rep. 89); *Woolstonecroft v. Woolstonecroft* (6 Jur. N.S. 1170); *St. 17 & 18 Vict. c. 113.*

June 17.—The MASTER of the ROLLS delivered a written judgment, in which he stated the facts of the case as given above, and said that Ralph Scott was creditor of John Armstrong at the time of his death, by reason of the express covenant contained in the deed of the 1st November, 1828, and the sum due by John Armstrong was one of his debts at the time of his decease.—*Smith v. Smith* (10th Ir. Ch. Rep. 89 and 460), and the cases there cited. It would, of course, appear that if the clause directing the sale of the chattel property and the payment of the testator's just debts had not been contained in the will, the order made by the Master would be right, the personal estate having been applied to pay off the mortgage, and the petitioner could have come upon the real estate *pro tanto*.—2nd Jarm on Wills, 570. But the Master had overlooked the clause directing the payment of debts, and the decision in *Smith v. Smith*. If the words "my just debts" were to be construed as excluding the mortgage debt, the Master's order was right, but if not, the order was wrong, as he had decided that the personal estate was liable to pay first the legacies, and then the mortgage-debt. The court would not marshal assets in contravention of the terms of the will.—*Chester v. Powell* (7th Jur. 389). That case was referred to by the Lord Chancellor in *Smith v. Smith*. His Honour then referred to *Townshend v. Mostyn* (26 Beav. 72); *Smith v. Smith*; *Woolstonecroft v. Woolstonecroft* (30 L. J. Ch. 22) on appeal from the decision of Vice-Chancellor Stuart in 29th L. J. Ch. 511; *Stone v. Parker* (29th L. J. Ch. 874), and said the question in the present case was, What was the meaning of the words "my just debts?" All the authorities established that they included debts due on covenants contained in mortgage deeds. If so, the Master had decided, in contravention of the terms of the will, that the legacies were to be paid out of the proceeds of the chattel property in priority to the testator's debts. His Honour was, therefore, of opinion that the Master's order should be reversed.

Court of Queen's Bench.

[WESTMINSTER].*

[Reported by John Thompson, T. W. Saunders, and C. J. B. Hertalet, Esqrs., Barristers-at Law.]

SIKES v. WILD AND OTHERS.—Tuesday, July 9.

Vendor and purchaser—Non-completion of purchase from want of title—Damages—Loss of bargain.

The defendant's trustees, with power of sale of an estate, in which A had a life interest, put the estate up for sale by auction, acting bona fide, and reasonably believing that A would join in the conveyance to the purchaser. The plaintiff became the purchaser, and paid the deposit. Subsequently A refused to join in the conveyance, whereupon the defendants offered to return the deposit, which the

* By permission of *Law Times*.

plaintiff refused, claiming compensation for the loss of the bargain, Held (Cockburn, C.J., dissentiente), that the plaintiff was not entitled to damages for the loss of the bargain, but only to the return of the deposit and costs of investigating the title.

THE first count of the declaration alleged that the defendants being about to sell certain land, comprising, amongst others, two closes of land described in the particulars of sale as Lot 4, in consideration that the plaintiff, at the request of the defendants, would bid for and purchase at the sale the said two closes of land, undertook and promised the plaintiff that the said closes were then wholly unincumbered, and were subject to no outgoing or charge whatsoever, except the land-tax, and the plaintiff, confiding in the said promise and undertaking of the defendants, bid for the said closes of land, and was declared the purchaser thereof, and paid, &c., as and for a deposit upon the said purchase. That the defendants did not perform their promise, but deceived the plaintiff in this, that the said closes were, and still are, incumbered by a certain annuity charged thereon, to wit, to the amount of £100 to a certain person (still living) for life, whereby a good title could not be made, and the sale and purchase could not be completed, by reason whereof the plaintiff was deprived of all the advantages he would have derived from being the purchaser of the said closes, and has been put to great charges, &c. The second count alleged that the defendants caused to be put up for sale the said closes of land, and fraudulently and deceitfully stated and pretended to the plaintiff that the same were wholly unincumbered, and subject to no outgoing except the land-tax, whereby the plaintiff was induced to bid at the said sale, and to become the purchaser thereof, and to pay to the defendants a certain large sum of money as a deposit upon the said purchase, whereas in truth and in fact the said closes were, and still are, incumbered by an annuity, &c., as the defendants well knew, and by means whereof the plaintiff was deprived of all the advantages he would have derived from being the purchaser of the said closes, &c. Pleas:—1. As to the first count, payment into court of 150*l.*; 2. As to the second count, not guilty. As to the first plea, the plaintiff replied that the sum paid into court was not sufficient, and he took issue upon the second plea. At the trial before Cockburn, C.J., at the last Spring Assizes for Leicestershire, it appeared that the land in question had been devised by a Mr. Ella to the defendants, upon trust to sell the same, and to pay out of the interest of the proceeds 100*l.* per annum, &c., to his wife. The estate was held subject to a settlement, by which the legal estate was in trustees for the purpose of securing that sum to her. On the 29th July, 1859, the defendants offered the land for sale by auction, believing that Mrs. Ella would, in accordance with the recommendation of Mr. Campbell, their attorney, concur in the conveyance of the land free from incumbrance. These closes were sold to the plaintiff, and a deposit made by him. Subsequently Mrs. Ella refused to join in the conveyance, and the defendants offered to return the deposit money to the plaintiff, who refused it, insisting upon compensation for the loss of his bargain. The plaintiff then brought the present action, claim-

ing, besides the deposit money and interest, 50*l.* for damages for the breach of contract, and 45*l.* for expenses incurred by him in the purchase. The jury found that the defendants had acted *bona fide*, and that they had reasonable grounds for thinking that they could make a good title to the land if purchased. The verdict was entered for the plaintiff for 209*l.* 11*s.* with leave reserved to the defendants to move to reduce the damages, or to enter a verdict for the defendants; and it was arranged that the plaintiff's attorney's bill should be taxed, in order to ascertain whether the money paid into court was sufficient to cover the expenses of investigating the title, and also the deposit money. A rule *nisi* was accordingly obtained.

Mellor and Field (June 13) showed cause, and *Hayes, Serjeant* (*S. Bristowe* with him) supported the rule. Cases cited:—*Hopkins v. Grazebrook* (6 B. & C. 31); *Robinson v. Harman* (1 Ex. 850); *Walker v. Moore* (10 B. & C. 416); *Pounsett v. Fuller* (17 C. B. 660); *Hadley v. Bazendale* (9 Ex. 341); *Sugd. V. & P.* 424, 11th ed.; *Flureau v. Thornhill* (2 W. Bl. 1078); *Bratt v. Ellis* (*Sugd. V. & P.*); *Jones v. Dyke, ib.*

Cur. adv. vult.

BLACKBURN, J.—This was a case argued before the Lord Chief Justice, my brother Wightman, and myself. The judgment I am now about to deliver is that of my brother Wightman and myself. In this case the plaintiff purchased from the defendants a farm; the defendants proved unable to make a good title. The plaintiff brought this action against them for not doing so; the defendants paid money into court; and the question is, on what principle the damages should be estimated. On the trial before my Lord Chief Justice, at Leicester, it appeared that the farm in question was part of an estate devised to the defendants on trust to sell as soon as they conveniently could. The solicitor employed in the affairs of the trust (who for this purpose must be identified with the defendants) was aware that the testator held the estate subject to a settlement by which the legal estate was in trustees for the purpose of securing a life annuity to a lady, and he knew that no title free of incumbrance could be made to any part of the estate unless that lady and her trustees agreed to discharge the part sold from the trusts to secure the annuity. He had represented to the lady that it would be for the benefit of the farm that the farm now in question should be sold, and that it would not be disadvantageous to herself if, in the case of a sale, she would consent to transfer her security to another property, whilst it would benefit the estate. She was satisfied that this was so, and verbally expressed her concurrence. After this, the farm was offered for sale, and the plaintiff agreed to buy it. The jury have expressly found that the defendants acted *bona fide*, and that they had reasonable grounds for thinking that they could make a good title to a purchaser. It must, however, be taken along with this, that the solicitor (with whom for this purpose the defendants were identified) knew that the lady was not legally or equitably bound by her parol consent, so that she could be compelled to concur, and consequently that

the power of the defendants to make a good title to the farm free of incumbrances was precarious, in so far as it depended on the lady continuing in the same mind. The jury have found that it was reasonable in him to expect she would so continue, but in fact she did not. She was persuaded by other friends of the family to refuse her assent, and the bargain went off. It was agreed at the trial that the costs incurred in the investigation of the title should be referred to taxation. The Lord Chief Justice left it to the jury to assess the damages generally, reserving leave to reduce the damages, or enter a verdict for the defendants, if, after the taxation, the money paid into court proved sufficient to cover the expenses of investigating the title and the deposit, unless the plaintiff, under the peculiar circumstances, was entitled to general damages. On the taxation, the amount paid into court proved to be sufficient to cover all the expenses, except some attendant on an attempt to make a fresh arrangement after the bargain was off. It was properly admitted on the argument, that the case of *Pounsett v. Fuller* (17 C. B. 660) conclusively decided that those expenses could not be claimed. The question, therefore, which was argued before us was, whether, under the circumstances, the plaintiff could claim damages for the loss of his bargain. I am of opinion that there is nothing in this case to take it out of the general rule as to the assessment of damages for the breach of a contract to sell real property where the bargain goes off on account of a defect in the title. That rule, which is an exception from the general rule of common law, was first laid down in *Flureau v. Thornhill* (2 W. Bl. 1078) as long ago as 1776. It was constantly acted upon until the case of *Hopkins v. Grazebrook* (6 B. & C. 31), which introduced an exception in cases where the vendor was not in possession, on which I shall observe presently. It was again acted upon in *Walker v. Moore* (10 B. & C. 416), where Parke, J., puts the rule on what I take to be true ground, namely, that it is implied from the usage of this particular business. He says: "A jury ought not in the case of a vendor in possession to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau v. Thornhill*, which was recognised in *Johnson v. Johnson* (3 B. & P. 167); *Bratt v. Ellis* (1 Sug. V. & P. 40); and *Jones v. Dyke* in the same volume, p. 41. In the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." In the more recent case of *Robinson v. Harman* (1 Ex. 850) the general rule was recognised, but the exception in *Hopkins v. Grazebrook* was acted upon. In the most recent case upon the subject, *Pounsett v. Fuller*, the cases of *Hopkins v. Grazebrook* and *Robinson v. Harman* were expressly recognised as binding authorities; but the Court of Common Pleas considered the general rule applicable under such circumstances as leaves it very difficult to say to what cases, if any, the exception supposed to be established by *Hopkins v. Grazebrook* still applies. In the present case, how-

ever, it is enough to say that, giving the two cases of *Hopkins v. Grazebrook* and *Robinson v. Harman* their fullest effect, the exception established by them is one within which the present case does not fall. *Hopkins v. Grazebrook* was moved in Michaelmas Term, 1826. The facts were, that Hill & Co. had agreed to sell real estate to one Harewood, and Harewood had agreed to sell it to the defendant, who again agreed to sell it to the plaintiff. In consequence of disputes between Hill and Harewood, the defendant could not complete his title. It was admitted that the defendants had acted *bona fide*; but, according to the views as to the law relating to public policy which Lord Tenterden then entertained (which were not finally shown to be erroneous till after his death in *Hibbithwaite v. McMorine*, 5 M. & W. 462), the defendant had acted improperly and in violation of law. It was only in the immediately antecedent sittings after Trinity Term, that in *Bryan v. Lewis* (Ry. & Moo. 386), Lord Tenterden expressed in the strongest terms an opinion which he declared he should always entertain till told by the House of Lords he was wrong, that any speculative contract to sell things not in possession was illegal and void as against the policy of the law. It is upon this ground, it seems to me, that in *Hopkins v. Grazebrook* he makes the case an exception, because the defendant had entered into a contract to sell "without the power to confer even the shadow of a title." Bayly, J., as reported, says: "The case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title." If this was the ground for the decision it is clearly untenable, and is inconsistent with the last decision in *Pounsett v. Fuller*; but in *Walker v. Moore* (10 B. & C. 416), Bayly, J., says, that in *Hopkins v. Grazebrook* the court was of opinion that the defendant "was in fault by representing himself to be the owner of the property when he was not so." Littledale, J., who had been one of the judges in *Hopkins v. Grazebrook*, but whose reasons are not those reported, says in *Walker v. Moore*, at page 420, "It is contrary to the policy of the law that a man should sell an estate before he has a title and possession." Parke, J., in the judgment already quoted, tacitly assumes that this had been the ground of the decision in *Hopkins v. Grazebrook*, as, in enunciating the general rule on which he acts, he confines it to the case of a vendor "in possession." In *Robinson v. Harman* the vendor had, with the object of bringing about the bargain, expressly stated that under his father's will the property was his out and out. In fact it had been devised to trustees to pay the defendant a moiety of the rent during life only. If the defendant knew this, he was guilty of a fraud; if he was ignorant of it, the transaction must have been so recently after his father's death that the will had not yet been acted upon, and he was not in possession; for if he had been in possession he could not be ignorant that he only got half the rents. The report leaves it uncertain how the facts were as to this, and the judgment merely being that the case was not distinguishable from *Hopkins v. Grazebrook*, leaves it uncertain whether the court thought the exception in question was when there was misconduct or want of possession,

or a want of a legal title. In *Pounsett v. Fuller* the Court of Common Bench expressly held that the mere want of legal title does not bring the case within the exception in *Hopkins v. Grazebrook*, which they all seem to consider as depending upon misconduct. My brother Williams expresses doubts, in which I fully sympathise, as to the soundness of the exception in *Hopkins v. Grazebrook*. In any point of view, I do not see how the existence of misconduct can alter the rule by which the damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Parke, J. in *Walker v. Moore*, and I think the true one), and that the usage is such that this implied condition excludes such cases as *Hopkins v. Grazebrook*, I think that it will be worthy of the consideration of any court competent to review that case, whether the strong opinions of Lord St. Leonards, reported in his *Vend. and Purch.* 301, 13th edition, do not show that the general understanding of conveyancers has been misapprehended. However, it is enough for the decision of the case before us, that it is not brought within that exception, however it is understood. The defendants here were not out of possession, nor were they entirely without title. The only ground for imputing misconduct in them was, that though they knew that their power of making a title free from incumbrances was precarious as depending on the stability of the lady's mind, they nevertheless put up the property for sale; but the jury have found that this was done *bona fide*, and done reasonably; and it is impossible, I think, to say, as a matter of law, that there is misconduct in putting property up for sale without disclosing every material fact, as if it was a case of marine insurance. And, lastly, though the defendants had not the complete legal title at the time they put the property up for sale, *Pounsett v. Fuller* is a distinct authority that in the absence of misconduct that does not bring the case within the exception. I am, therefore, of opinion that the rule must be made absolute.

COCKBURN, C.J.—I regret that I am unable to concur with my learned brothers in holding that this rule should be made absolute in favour of the defendants. I cannot bring my mind to think that the immunity which the law allows to a party contracting to sell real estate, in the event of his being unable to make out a title from all liability on the breach of his contract beyond the expenses incurred in investigating the title, can properly be extended to a case like the present. That immunity is, in itself, an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate having contracted to sell is too frequently placed from not being able to make out a title such as a purchaser would be bound or willing to take. The hardship which would be imposed on a *bona fide* vendor, if upon some legal flaw appearing in his title he were held liable in all the consequences which would attach upon a breach of contract relating to personality, and

the difficulty which might be thrown in the way of bringing real property into the market if the full liability attached in such a case, have, probably by an understanding and usage among those engaged in the transfer of estates, led to this exception to the general law. But I can see no reason, in the absence of authority, for extending the exception to parties who, knowing that they have no present estate to convey, take upon themselves to sell, in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance. There is an obvious difference between an owner who knows that he alone is entitled to an estate and has a right to sell it although he may fail to make out a sufficient title, and a person who, not having the estate, takes upon him to sell on the expectation of acquiring the estate in time, and making out a title. The cases of *Hopkins v. Grazebrook* (6 B. & C. 21) and *Robinson v. Harman* (1 Ex. 850), are direct authorities for saying that a person disposing of real estate to which he has no present right, although under a *bona fide* belief that the right will be acquired in time to fulfil the contract, will be liable to the full extent. These cases appear to me to be directly in point. Their authority does not appear to have been shaken by the decision of the Court of Common Bench in *Pounsett v. Fuller* (17 C. B. 660); for although in that case the defendant, who was held not to be liable in the full extent of damages, had been unable to fulfil his contract in consequence of not having the legal estate, he was in possession and had an equitable interest, and believed himself, under the circumstances, to be in a condition to convey according to his agreement. But the present defendants knew themselves to have neither the legal nor the equitable estate in the land which they contracted to sell to the plaintiff. They were trustees under a devise which was inoperative in consequence of the land of which the devisor had taken upon himself to dispose being vested in trustees under a settlement. They knew that without the consent of the *cestui que trust* (the testator's widow) and her trustees, to abandon the settlement, and their concurrence in the sale, they, the defendants, had no right or power to convey the land; and, though it is true they had obtained the assent of the *cestui que trust*, and had every reason to believe that that assent would not be revoked, and that the trustees under the settlement would concur in the sale, they equally knew that none of these parties were under any obligation, legal or equitable, to join in the conveyance, while without them no title could possibly be made. They were, therefore, contracting to sell at a time when they had no power to sell, and no more than the expectation of making out a title. The case appears to me not within the rule as settled in *Flureau v. Thornhill*, but within the exception engrafted on that rule, as established by the cases of *Hopkins v. Grazebrook* and *Robinson v. Harman*, to which I have before referred. In my opinion, therefore, the plaintiff is entitled to the damages assessed by the jury in respect of the loss he has sustained by the non-completion of the sale. The majority of the court think the rule should be made absolute, therefore there will be a

Rule absolute.

[DUBLIN.]

[Reported by William Woodlock, Esq., Barrister-at-law.]

LAVELLE v. ORANMORE—Nov. 5, 19.

Libel—Justification—Innuendo—Demurrer.

A publication stated that Archbishop M. had selected for a particular purpose "the Rev. P. C., whose praiseworthy and Christian conduct at the M. election caused him to be prosecuted, &c.; but even his ministration was too mild and orderly, and a more worthy successor was appointed, the Rev. P. L., whose unruly conduct and disobedience to his superiors had caused him to be removed from Paris by the police." In an action brought for libel by the Rev. P. L., the plaint set out this publication with an innuendo, "that the Rev. P. C. was a disorderly and unchristian person, and that the plaintiff was a still more disorderly and unchristian person."

Held, by Lefroy, C.J. & Hayes, J. (Fitzgerald, J. dissenting, and O'Brien, J. not taking any part in the judgment), that this innuendo was too large, and that the plaint was bad.

The defendant to so much of the libel as was contained in the passage beginning with the words, "But his ministration," &c. to the end, pleaded a justification setting out certain facts, shewing that the plaintiff had, for disobedience to his superiors, been removed from Paris.

Held, on demurrer (Fitzgerald J. dissenting, and O'Brien J. not taking any part in the judgment), that this defence was good, as meeting the sting and substance of the libel.

THIS was a demurrer to the third defence taken to the first paragraph of the summons and plaint. The action was for libel, and the first paragraph of the summons and plaint complained, "For that the plaintiff is a Roman Catholic clergyman, and at the time of the committing of the grievances hereinafter mentioned had, and still has, the ecclesiastical charge of the parish of Partry, in the county of Mayo, and Lord Plunket was and is the landlord of certain property, situate in said parish," and the said plaintiff says that "the said defendant falsely and maliciously composed and published of and concerning the plaintiff the words following, that is to say:—'Archbishop M'Hale, knowing he could not meet it effectually by moral influence, first selected as his administrator in the parish that representative of order and decorum, the Rev. Peter Conway, whose praiseworthy and Christian conduct at the famous Mayo election caused him to be prosecuted by order of the House of Commons, and rewarded by his Archbishop with the best living in the diocese; but even his administration was too mild and orderly, and a more worthy successor was chosen, the Rev. Patrick Lavelle, a priest, whose unruly conduct and disobedience to his superiors, had caused him to be removed from Paris by the police,' (meaning thereby that the said Rev. Peter Conway was a disorderly and unchristian person, and that said plaintiff was a still more disorderly and unchristian person, and was as such put in the place of the said Rev. Peter Conway)." To this paragraph, the third defence pleaded was—"And for a further defence to so much of the said first paragraph of the said summons and plaint as

is contained in the following words, that is to say:—'But even his administration was too mild and orderly, and a more worthy successor was chosen, the Rev. Patrick Lavelle, a priest whose unruly conduct and disobedience to his superiors had caused him to be removed from Paris by the police.'" The defendant saith that heretofore, and before the time of the printing and publishing of the words in the introductory part of this defence mentioned, the plaintiff had been a professor at the Irish College at Paris in the Empire of France, and, during the time that he was such professor in said college, he had upon several occasions conducted himself improperly, disobediently, and disrespectfully towards the Very Rev. John Miley, the then president or superior of the said college, his superior therein, and who was a priest of the Roman Catholic Church, and who thereupon, having authority in that behalf, did, in the month of March, 1858, direct the porter of said college to prevent the plaintiff to enter the same, and the said plaintiff, having endeavoured against the will of the said president or superior to force his way through the entrance gates of said college, and having failed to effect such his purpose, obtained ingress into said college by getting over a wall, and, being directed to quit said college by the order of the then minister of worship and public instruction in said empire of France, and having refused so to do, was in consequence of such his conduct ordered by the minister of the interior and general safety in said French empire to leave said empire of France, which the plaintiff was obliged to do, wherefore, &c. To this defence the plaintiff demurred. Plaintiff's points noted for argument on the demurrer were the following: That the defence severs a statement in the plaint, and seeks to justify one passage of said statement; that the defence does not justify the charge as made in the plaint, nor does the defence justify the charge in the sense imputed by the plaint; that the defence, although purporting to justify the portion of the statement in the introductory part of the defence stated, does not cover said statement, or state facts which are sufficient justification of said statement; that the defence is no answer to the portion of the plaint to which it is pleaded.

M. Morris (with him *Blake, Q.C.*) in support of the demurrer.—This defence is bad, for it does not justify the libel. The libel complained of is one which states that the Rev. Peter Conway was a disorderly and unchristian person, and that the plaintiff was worse. A defence purporting to deal with the whole libel, but setting up only an instance of disorderly conduct, is not sufficient, as it leaves the other part of the libel, that imputing unchristian conduct, untouched. The statements relative to the French affair are not the whole libel complained of, yet they are the only matter justified. The libellous matter here is not divisible.

Buchanan and Whiteside, Q.C. for the defendant.—The defence is good. The sting of the libel is contained in the statement relative to what happened in France, and that is sufficiently justified. Then the summons and plaint is bad, as the innuendo is too large, for the libel does not bear the meaning given to it, namely that the plaintiff was an unchristian person, but only that he was of a disorderly character.

Blake, Q. C. replied.

The following cases were cited—*Tiggs v. Cooper* (7 Ell. & Bl., 639); *Helsham v. Blackwood* (11 C. B., 111); *M'Gregor v. Gregory* (11 M. & W., 287); *Broome v. Gordon* (1 C. B. 728); *Mountney v. Watson* (2 B. & Ad., 673); *Williams v. Gardiner* (1 M. & W., 245); *Harvey v. French* (1 Cr. & M., 11); *Blagg v. Sturt* (10 Q. B., 899); *O'Connell v. Mansfield* (9 Ir. L. Rep., 179); *O'Connor v. Wallen* (8 Ir. C. L. Rep., 378); *Morrison v. Harmer* (3 Bingham, N. C., 759).

Nov. 16.—The judges having differed in opinion, now delivered their judgments *seriatim*.

FITZGERALD, J.—In this case the plaintiff has demurred to the plea of justification pleaded by the defendant, and he says that the justification is defective, first, because it is not sufficient to answer more than a part of the portion of the libel to which it is pleaded; and secondly, because it does not justify the libel in the sense imputed. The defendant, however, asks for our judgment in his favour on two grounds. He says, first, that the plaintiff's innuendo is too large, and therefore that the count is not sufficient; and secondly, that if the innuendo is to be rejected only, and the decision of the court that it is too large is not to defeat the plea, then the defence is an answer to the sting of the libel, which imputes disorderly and disobedient conduct only; and in that sense the case of *O'Connor v. Wallen* was resorted to as an authority in this case. Another authority says that it is quite sufficient if the defence meets the very sting of the libel, though it leaves small matters unanswered. Now the first question is, whether the meaning assigned by the innuendo to this publication is too large; and, as I collect from the authorities, and especially from the case of *Sturt v. Blagg*, I apprehend that it is the duty of the court here now, in determining whether the innuendo is too large or not, to see whether the publication is capable of the meaning which the pleader has applied to it. That is what the court decided in that case. The truth, as matter of fact whether it does bear that meaning, is to be settled by the jury. To that we have nothing at all to say. The question which we have to decide is, whether the publication is capable of the meaning which the pleader has adopted. In reference to the views which the courts take, I could not refer to two more important authorities than the cases of *Sturt v. Blagg* and *Long v. Barrett* (3 H. of L. Cas. 395). There the libel complained of was, "What possessed Lord H., if he knew anything about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker's, the other day? If mere trade was his object, he had several respectable houses open to him." The innuendo given was, "that the house of business of the plaintiff was not respectable, and that the said visit was paid thereto for political objects." The question for the House of Lords was to determine whether the publication was capable of the large meaning given to it by the innuendo, and the House of Lords came to the conclusion that it was. So in the other case a very large meaning was assigned to the publication, and the court held that it was capable of that meaning. Now let us see whether the

publication here is capable of the meaning which has been given to it. The innuendo is, that the imputation intended to be cast upon the plaintiff was, that he was a more disorderly and unchristian person than the Rev. Peter Conway, who had been previously mentioned, and that he was on that account put in place of the Rev. Peter Conway. The objection is, that the innuendo is too large in the introduction of the word "unchristian;" for, that though it is true that the Rev. Peter Conway is stated to have been an unchristian person, yet the comparison instituted between him and the plaintiff is in respect of disorderly and disobedient conduct, and that disorderly and disobedient conduct forms the only ground of the imputation cast upon the plaintiff in the libel complained of. Then, in order to ascertain whether the libel is capable of the meaning given to it, so that a jury might find that to be the true meaning, let us refer to the libel again; and for this purpose we must take the whole publication. What do we find on the face of it? I find a statement in the commencing part of it, that Archbishop M'Hale, having certain objects to carry out, selected the Rev. Peter Conway as his instrument to effect his purpose. I find the Rev. Peter Conway described as the representative of disorder and indecorum. I find the same Rev. Peter Conway described as one "whose praiseworthy and Christian conduct at the famous Mayo election caused him to be prosecuted by order of the House of Commons;" and then it is stated that he was "found not to be sufficient for the purpose which Archbishop M'Hale had to carry out, and that the Rev. Patrick Lavelle was chosen as a more fit instrument for the purpose. I then find the writer going on to say, that for his unruly conduct and disobedience, the Rev. Patrick Lavelle had been expelled from France. The question now is, whether the libel is capable of the construction which is put upon it by the innuendo; and, having regard to the authorities, and to the plain meaning of the libel, it may be described shortly as stating that for some purpose Archbishop M'Hale required an unworthy instrument; that for that purpose he selected the Rev. Peter Conway, whose character is drawn, that, however, he was not black enough, and that then Archbishop M'Hale selected another and a worse man in the person of the plaintiff. If that is the meaning of which the libel is capable, the pleader is, in my opinion, justified in his innuendo, and so the judgment I would come to is in favour of the plaintiff upon this point. But I shall now pass to the second question, and, assuming that the court should come to the conclusion, and that the true view is that the innuendo is too large, either entirely or in the use of the word "unchristian," I shall consider what, in that view of the case, the court is to do. Well, with respect to this, I find by the cases which I have cited that if the innuendo is too large, whether the objection be made after verdict, as by way of a motion in arrest of judgment, or before verdict by demurrer, the course to be adopted in such a case is to reject it, and to look to the defamatory matter and see if it is defamatory, putting the innuendo altogether aside. That mode of acting was carried very far in *Harvey v. French* (1st Cr. & Mees. 11). The libel there was as follows:—

"Threatening Letters.—The Middlesex Grand Jury have returned a true bill against a gentleman of some property named *French* (the plaintiff), and the innuendo was, that "the defendant meant to insinuate and have it understood that the plaintiff had been suspected to have been, and had been, guilty of the offence of sending a letter, without any name or signature thereto subscribed, directed to one *Trotter*, threatening to kill and murder the said *Trotter*, a subject of the realm, with a view and intent to extort." Lord Tenterden and the court were of opinion that the innuendos in the declaration were not warranted by the preceding words in the counts, but then he held that the averment in the innuendos might be rejected, and that the counts might be sustained without it. I apprehend that rejecting the innuendo here altogether, and taking the plaint as if the whole innuendo was struck out, the plaint discloses a defamatory sense for which the plaintiff would, upon such an objection, be entitled to our judgment. Then comes the further question; and it is said that if we reject the word "unchristian" from the innuendo, the defence is an answer to the sting of the libel, and so that judgment ought to be given for the defendant. The case of *Morrison v. Harmer* was very much relied upon on this branch of the case. I do not dispute that case, or the case of *O'Connor v. Wallen* before Chief Justice Monahan; but the true answer to the argument founded on these cases is this—the words which are taken and justified are mere words of opprobrium, independent of the libel itself. I do not cavil with the authorities, but, striking out the innuendo, is the defence here an answer to the action? Take the libel in this view, striking out the innuendo, and what it says is, that Archbishop M'Hale selected for his purpose a more disorderly character than the Rev. Peter Conway, namely, the Rev. Patrick Lavelle, and then it goes on to add, that the same Rev. Patrick Lavelle, who was so selected, on some antecedent occasion had been driven out of France. I do not look upon that as the sting of the libel. If you stop before the words "a priest whose unruly conduct and disobedience to his superiors had caused him to be removed from Paris by the police," you have the accusation that the Rev. Mr. Lavelle was a more disorderly person than the Rev. Mr. Conway. The rest may be treated either as matter of aggravation or as matter of evidence; but it is not the sting of the libel itself which is what has gone before, and is left uncovered by the justification. On these grounds it seems to me that on whatever view we take of this case, judgment ought to be given for the plaintiff.

HAYES, J.—I will not read the libel again; it has been read by my brother Fitzgerald. Having sketched the character of the Rev. Mr. Conway, it goes on to institute a comparison between him and the Rev. Mr. Lavelle; but it is merely with respect to mild and orderly conduct that Mr. Conway is said to be better than Mr. Lavelle, whose conduct was of such a nature as to cause him to be removed from Paris by the police. Then comes the innuendo which says that the meaning is, that Mr. Conway was a disorderly and unchristian person, and that the plaintiff was a still more disorderly and unchristian person. Now it appears to me that this innuendo, so far as it speaks of

the Rev. Mr. Conway and the Rev. Mr. Lavelle being unchristian persons, is unfounded. No such imputation is made against the Rev. Mr. Lavelle in the publication complained of, and I think there is nothing on the face of the plaint which warrants that innuendo. Then comes the defence, which says, that the accusation made in the publication is true, and relies, by way of justification, on the matters which occurred at the Irish College. To this defence the plaintiff demurs, and to this demurrer the defendant replies that at all events the plaint is bad. When a defendant is required to plead to a plaint for libel his duty is, first, to examine whether the words complained of are capable of bearing the meaning which is assigned to them. If he finds that they are, and he is desirous of justifying the libel, he must do so in the sense imputed. If he finds that they are not capable of that meaning he ought to demur. If the defendant, instead of demurring, goes to trial, then, after trial, if the innuendo is found to be bad, the court will reject the innuendo if necessary. This appears from a series of cases beginning with *Corbett v. Hill* (Cr. Eliz. 609), all of which are cases arising after verdict. I think, therefore, there is nothing in the libel to warrant the meaning assigned to it by the plaint, and that our judgment should be for the defendant. But, suppose the charge made is one merely of disorderly conduct. Then the defendant has set forth a full statement of the facts which occurred at the Irish College, and he relies on this, that that narrative contains a sufficient justification for his publication. Under the former system of pleading it is well known, since the case of *J'Anson v. Stuart* (2 Sm. L. C. 24), that it is not sufficient, by way of justification, to reiterate the charge. The defendant must set forth the particular facts on which he relies, so that his adversary may have the opportunity of disproving the charges made against him, and the facts composing the justification are the only matters to be inquired into at the trial. Then the only question which we have to consider here is, whether the facts set forth in the defence would warrant the imputation made in the libel. In my opinion they would. I think the justification, if true, would be sufficient, and, therefore, I think judgment ought to be given for the defendant.

LEFROY, C.J.—In this case it would be both unnecessary for me to state the case generally, and it would be equally unnecessary in respect of the ground on which my opinion proceeds, and the views of the case which have been so well put by my learned brothers. My opinion is generally that we must judge in every case upon the language and the context in each case, and if it were necessary to find and produce authority either to establish that a particular document is a libel, or to establish that particular facts form a defence in an action for libel, it would be very hard, indeed, to say *a priori*, or for counsel to advise what was a libel or what was a good defence to an action for one; for there is such a variety of cases, and each turning, as it ought to do, upon the language of the libel and of the defence, that we must always come back to the inquiry, in the given case, what was the libel and what was the defence. Now, here it appears to me that the libel consists of a comparison between a gentleman named Conway and the plaintiff. In what

respect are they compared? It is said, and truly said, that Mr. Conway is represented to have been a person of unruly and disobedient conduct to his superiors. It is also said that Mr. Conway, and I take it that the innuendo will bear it out, was also of an unchristian character. Then a comparison is instituted between him and the Rev. Mr. Lavelle; but in what respect is the comparison instituted between them? It is not in respect of their unchristian character, but of the unruly and disobedient conduct to superiors of the one compared with the other. The justification for that comparison is the account which is given of the unruly and disobedient conduct of Mr. Lavelle on the occasion on which he was expelled from the French Empire; and I ask if that be true will any body say that it does not justify the comparison, or, at least, is there not enough to lay a foundation for inquiry for the jury to say which of the two was the more disobedient or unruly? The whole sting of the libel is that, and no more than that, that one was more than the other disobedient and unruly to his superiors; and if the facts be true,—and that is for the jury to say—will any one say that on the face of this publication there is a libel? There is no charge whatsoever of unchristian conduct. No imputation of the sort is made, and, therefore, it appears to me that taking that which is the sting, and the only sting of the libel, and comparing it with the justification, it is not for us to say that there is of necessity a libel, but only a comparison; and if the defence is true, is that comparison such as that we can say that on the face of it the charge is unjust, unfair, or untrue? Under those circumstances, therefore, it appears to me, judging in this case, as we must in every case, as to what is the sting of the libel, and whether the sting of the libel is met by the justification, that in this case it is met by the justification, which, if true, will or may fully justify the comparison, and the imputation that one was more violent and disorderly than the other. Under these circumstances it appears to me that the imputation is made, not generally, but in comparison, and in reference to his conduct as stated to have taken place in Paris. And it is not even a general charge of disorder but the justification points to an absolute particular case of disorderly and disobedient conduct. It appears to me that that defence does support and justify the publication and the charge of being disorderly and disobedient conduct even in the abstract. But I say it is the comparison, and that comparison is a matter not for the court but for the jury. Then, with respect to the other question upon the objection, that if the matter of the libel does not warrant the innuendo, the opposite party may demur generally, I confess I should have to retrace my view of the law which I have taken from the earliest time that I can remember, if I were to hold otherwise. Here is an imputation, according to the innuendo, of unchristian conduct. But there is no foundation for that innuendo, for although the charge of not being of a Christian character is made in the early part of the libel, it is afterwards dropped when the writer comes to speak of Mr. Lavelle, and the charge against him is confined to unruly and disobedient conduct; and that charge is justified in the defence. Upon all these grounds I am of opinion that our judgment should be for the defendant.

O'BRIEN, J., had not been present at the argument, and did not take any part in the judgment.

WHARTON v. KELLY.—Nov. 12.

Contract—Construction—Tenancy from year to year.

Agreement by which A. agrees to let to B. certain premises for one year certain, at a yearly rent of £28, payable quarterly in each year during the tenancy, B. to be allowed £1 10s. for repairs out of each of the four first quarters' rent. Held, that this agreement created a tenancy from year to year.

THIS was an ejectment on the title, to recover possession of the house, No. 4 Swift's-row, in this city. Upon the trial before the Lord Chief Justice, at the sittings after last Trinity Term, it appeared that the defendant held under the following agreement:—"Between the Rev. Joseph James Wharton, Rector of Ballyburley, in the King's County, of the one part, and Mrs. Bridget Kelly, of Gloucester-street, widow, of the other part, the said Reverend Joseph James Wharton agrees to let, and the said Bridget Kelly agrees to take, All That and Those the house and premises now known as No. 4 Swift's-row, in the city of Dublin, for one year certain, to commence from the 1st day of April, 1860, at the yearly rent of £28 sterling, over and above all manner of taxes and rent, payable quarterly, 1st day of July, 1st day of October, 1st day of January, and 1st day of April, in each and every year during the tenancy of the said Bridget Kelly, the first payment thereof to be made on the 1st day of July next ensuing the date hereof, and the said Bridget Kelly is to be allowed the sum of £1 10s. out of each of the first four quarters' rent for repairing said house and premises. The receipts thereof to be produced, to satisfy the said amount has been laid out and expended in repairing said house and premises, and the said Bridget Kelly hereby agrees not to sublet or assign said house and premises; and further, that she, the said Bridget Kelly, shall and will give up the quiet and peaceable possession of said house and premises to the said Reverend Joseph James Wharton in good tenantable order, repair, and condition, reasonable wear and tear excepted.—Dated this 27th day of March, 1860.—J. J. Wharton.—Bridget Kelly." A proposal, dated the 9th of March, 1860, was also given in evidence, but as it was never acted upon, it is unnecessary to set it out. On the 24th April, 1861, a demand of possession was made, and possession refused. It was contended, on the part of the defendant, that under the agreement above stated, she was a tenant from year to year of the house, and, as such, entitled to a regular notice to quit, the giving of which had not been proved. A verdict was had for the plaintiff, but leave was reserved to the defendant to move that the verdict had for the plaintiff should be set aside, and a verdict returned for the defendant, or a new trial had upon the ground that upon the construction of the proposal and agreement proved, defendant was tenant from year to year, and that no notice to quit had been given. A conditional order accordingly was obtained, and against this order clause was now shewn on behalf of the plaintiff.

Armstrong, Serjeant, (with him Blackham) for the

plaintiff, contended that upon the construction of the proposal and agreement, a tenancy for a year certain was created, and not a tenancy from year to year, and that therefore notice to quit was not necessary.

Heron, Q.C., (with him *O'Driscoll*) argued that the defendant was tenant from year to year, and cited *Doe v. Porter* (3 T. R. 17), for Lord Kenyon's definition of a tenancy from year to year—*Thompson v. Maberley* (2 Campb. 573); *Agar v. King* (Cro. Eliz. 775); 4 Jarman's Conveyancing, 457.

LEFROY, C. J., said that all the members of the court were of opinion that the verdict should be entered for the defendant. Both upon the words of the contract, and upon the authority of Lord Ellenborough in *Thompson v. Maberley* upon the construction of words that were equivalent to those in the present case, the contract should be held to be for a tenancy from year to year. If the parties only intended a contract for a year, why did they not stop at the words "for one year certain?" As the parties contracted for a future tenancy, it could not be supposed that that future tenancy was merely a possible one, and not an actual one. Why did they enter so elaborately into what should be the nature of the tenancy after the expiration of the year, if a future tenancy was not actually intended? The words "first four quarters" evidently implied that there were to be succeeding quarters, and of what? Of a tenancy that the parties were naturally providing for, an actual, not merely a possible, tenancy. Then there was Lord Ellenborough's decision, which was very important. That decision was, that although the words "for one year certain" occurred, yet the words that were superadded gave to the contract the effect of creating a tenancy from year to year; so, following that decision, he was of opinion that in this case the true construction of the contract was that it created a tenancy from year to year.

O'BRIEN, J., said that it would be rather a forced construction to hold that the parties had provided for the terms of a tenancy which had not been created. The plaintiff said that everything in the instrument was to be read with the qualification that the defendant was holding for one year certain, and that a tenancy from year to year could not be created till after the tenancy for that one year had terminated, but that in case it was created, it was to be on the same terms as the previous tenancy for one year. But the words "in each and every year during the tenancy" were not to be lost sight of. On the construction put on the instrument by the plaintiff, what, at the end of one year, would be the position of the landlord and tenant? The tenant would remain in possession; the landlord would have done no act to create a new tenancy, and everything would be uncertain between the parties, a state of things not to be encouraged, and which had originally induced courts of law to give effect to uncertain tenancies as tenancies from year to year. Then the case cited from Campbell's Report shewed that the meaning given to the word "certain" was that what was certain for the first year was uncertain afterwards, giving power after the year to terminate the tenancy by a notice to quit. He was of opinion that the verdict should be turned into one for the defendant.

HAYES, J., concurred. Whether he regarded the

language of the instruments, or the reason and convenience of the thing, or the authorities cited, by each of those three ways his mind was led to take the same view. It was plain from the language of the instruments that the parties themselves intended that there should be a tenancy from year to year. Any other construction than that would be wholly unreasonable, and would be exceedingly inconvenient for both parties. It might be contended that at the end of the first year the landlord would be able to eject the tenant without notice. That was a right which must be reciprocal, and he apprehended that it would be very inconvenient for both parties—for the landlord, not to know if the tenant intended to go out—for the tenant, not to know if his landlord intended to require possession. He thought, therefore, upon those grounds, and also upon the maxim *stare decisis*, considering the case of *Thompson v. Maberley* which had been cited, that the verdict for the plaintiff should be turned into one for the defendant.

FITZGERALD, J., concurred.

Rule absolute.

RYAN v. HORGAN.—Nov. 22.

Practice—Payment into court—Particulars.

Action on the money counts, claiming £400 in respect of the items specified in the plaintiff's bill of particulars. Defence as to £30 portion, &c.; payment of £30 into court, and that that was sufficient to answer plaintiff's demand as to that sum, with traverses as to the rest. Held, that the court would not compel the defendant to give particulars specifying the items as to which the money was paid into court.

Waters, for the plaintiff, moved that the defendant might be ordered to give particulars as to the sum of £30 brought into court by him, to show to what items of the bill of particulars endorsed on the summons and plaint the said sum was applicable. The action was for goods sold and delivered, goods bargained and sold, work and labour, money lent, money paid, and interest, and claimed a sum of £400 as due by the defendant to the plaintiff, in respect of the several items specified in the plaintiff's bill of particulars. The defendant, as to £30 portion of the moneys claimed, and the causes of action relating thereto, paid £30 into court, and said that that was sufficient to satisfy the plaintiff's demand as to that sum, and as to the residue, he traversed the paragraphs of the summons and plaint. The plaintiff wished to know to what items the £30 was particularly applicable. Counsel cited *Baxendale v. The Great Western Railway Company* (6 Hurl. & Norm. 35).

O'Brien for the defendant. The case cited was that of a special action. This is an action on the money counts. The court has no jurisdiction to make the order sought. Before the Common Law Procedure Act only two sorts of particulars could be ordered—particulars of demand or of set off, and particulars of payment. The Common Law Procedure Act has not added anything. Issues have been settled in this case.—*Godfrey v. Cross* (6 Ir. Jur. N.S. 133); *Kingham v. Robins* (5 M. & W. 94). There

is a distinction drawn in every case between a special action and an action on the *indebitatus* counts.—*Tattersall v. Parkinson* (16 M. & W. 752). Payment into court does not admit any specific part of the plaintiff's demand.

Waters replied.

O'BRIEN, J.—It appears to me that it is not necessary for us to decide the general question raised here as to whether, in a fit case, the court would order particulars such as those asked for to be given. The authority cited from 6 Hurl. and Norm. shows that in that case the court thought they had jurisdiction to make the order sought; but that case was different from the present one, and there may be cases in which the court may think it right to make the order. In the present case we do not think that we ought to make it. The defendant has a right to pay the 30*l.* into court, and say that that is sufficient. He may do that as the result of a calculation in his own mind of what he really owes. We say no rule on the motion, the defendant to have his costs of the motion as costs in the cause.

HAYES, J.—I confess it would require a far stronger case than has been made here to induce me to narrow the already narrow rights of the defendant in taking the course which he has done. I think the defendant has a right to say, when a demand of 400*l.* is made against him, that he owes nothing, but that he pays 30*l.* into court for peace' sake, and to say to the plaintiff to go on if he likes; and I do not think that we are called on to give the particulars which are asked for.

FITZGERALD, J.—This is an application to compel the defendant to give an account of the particular items of demand in respect of which he has paid money into court. I neither wish to assert that in an action of this character the court has jurisdiction to make the order, nor on the other hand do I wish to disclaim it. It is an authority which may be well exercised in particular cases, and all that the court says in this case is, that this is not a case for its interference. I think it would be a matter of oppression to compel the defendant here to specify the items in respect of which he pays the money into court. By the 76th section of the Common Law Procedure Act, he has a right to pay money into court. He is not obliged to specify any particulars, and it might be very oppressive to compel him to specify the items in respect of which he pays the money in. He may be unable to do so, though admitting a general demand; and I know that when I was at the bar myself, I have repeatedly advised a defendant, who said there was really no demand against him, to pay money into court as a peace-offering, and not to run the risk of having a verdict found against him for some small amount. There must be a strong case made to deprive the defendant of his right to pay in money thus generally. There is no affidavit here to show that it is necessary for the plaintiff to get these particulars; and in coming to the conclusion at which we have arrived, we do not lose sight of this, that what we have here is a sum of 30*l.* paid into court in respect of a demand of 400*l.* I must say that a great deal of the embarrassment in cases like the present arises from the abuse of the money counts, where a plaintiff

having a demand really, say, for money lent, adds counts also for money paid, and other such counts. Upon the whole, I concur in thinking that in this case we should say, no rule upon the motion.*

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

GRAY v. MURPHY.—Nov. 21.

Pleading—Setting aside Judgment—Summary Bills of Exchange (Ireland) Act, 24 and 25 Vic. c. 43.

In an action brought under the Summary Bills of Exchange (Ireland) Act, 24 and 25 Vic., c. 43, a count on an account stated may be added in the summons and plaint to the count on the Bill of Exchange, without altering the nature of the action, so as to exclude the jurisdiction of the 24 and 25 Vic., c. 43, provided there be an endorsement of particulars, which endorsement of particulars consists of the Bill of Exchange, and is referred to in the body of the plaint.

THIS was an action brought under the Summary Bills of Exchange Act. The summons and plaint contained a count on an account stated in addition to the count on the Bill of Exchange. There was also an endorsement of particulars, to which reference was made in the body of the plaint. On the day succeeding the last day allowed for pleading, the defendant obtained leave to plead upon an affidavit, which set forth that he had been discharged as an insolvent in the month of July, and that he believed the bill in question had been endorsed to the plaintiff subsequently to his discharge. On the same day judgment was entered by the plaintiff.

Martin for the defendant, applied that the writ and judgment, and proceedings should be set aside. This action purports to be brought under the Summary Bills of Exchange Act. Yet, the summons and plaint contains a count on an account stated, which is sufficient to alter its nature, and on this ground alone the proceedings should be set aside, *Leigh v. Baker* (2 Common Bench, N. S., 367), was an action brought under the analogous Act in England, 18 and 19 Vic., c. 67, and it was conceded in argument by the plaintiff's counsel, that the action brought upon the note was not within the statute; but he insisted that this only made the writ irregular, and that it might be amended, under the powers given by the Common Law Procedure Act, and made applicable to such cases by one of the sections of the Summary Bills of Exchange Act. And Cockburn, C. J., comments as follows:—"The statute introduces an entirely new course of proceeding, unknown to the law. A defendant who is served with process under it, cannot defend the action, which is the common law right of every subject, without the special leave of a judge. If a plaintiff issues a writ in a case which is properly within the contemplation of the Act, then he is, of course, entitled to the benefit of all the provisions, as to amendment contained in the Common

* See *The Thames Iron Works and Ship-building Company v. The Royal Mail Steam Packet Company* (30 L. J., N.S., G.P., 265).

Law Procedure Acts; but if he chooses to misapply the process created by the Act in a case not within the purview of the Act, I do not see how he can avail himself of those provisions." So, in this case, it is not open to the plaintiff to amend his summons and plaint, although sec. 6 of the Summary Bills of Exchange Act, provides that the powers of amendment given by the Common Law Procedure Acts of 1853 and 1856 shall be applicable to writs issued under this Act: for this is not an action within the statute at all. But for sec. 5 no special damage could be recovered even for the expense of noting. Besides we obtained leave to plead upon an affidavit of merits, and by sec. 3 of the Act, the court has power to set aside the judgment upon such terms as it may think proper to impose.

Dowse contra.—The defendant was bound to make an affidavit of merits, and this affidavit only states that he believes he has merits. There is no irregularity in the judgment, if there be any it is in the summons and plaint, and the defendant has waived it by his application for leave to plead. *Leigh v. Baker* is an authority to show that this writ may be amended. It was an action brought on a note which had been due and payable for more than six months previously, and there was no question that it was not within the English Summary Bills of Exchange Act, and notwithstanding the observations of Cockburn, C.J., which have been quoted on the other side, the Court ultimately held that the writ might be amended so as to make it a good writ under the Common Law Procedure Act, 1852. In *Robinson v. Cottrell* (11 Ex. Reports, 476), the judges had a conference, and decided that by the incorporation of the Common Law Procedure Act, 1852 with the English Summary Bills of Exchange Act, a claim for costs might be inserted in the writ, and a blank filled up, although the forms of endorsement to be used were specifically given by the last-mentioned Act; so, sec. 6 of the Irish Act enacts that "the provisions of the 'Common Law Procedure Amendment Act (Ireland) 1853,' and the 'Common Law Procedure Amendment Act (Ireland) 1856,' and all rules made under or by virtue of either of the said Acts shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act." I have been arguing up to the present on the supposition that the writ is rendered irregular by the insertion of the count on an account stated, but the writ is not irregular. The second count is only a count on the bill; the nature of the action is not altered. I am ready to consent, however, that the judgment be set aside, and the summons and plaint amended upon payment of the costs of the judgment, payment of the costs of this motion, and upon condition that the defendant takes short notice of trial.

MONAHAN, C.J.—The question is, does the bill of particulars endorsed on the writ make the second count substantially a count on the bill of exchange?

CHRISTIAN, J.—The Summary Bills of Exchange Act does not insist on any form of action on bills of exchange; it only says the action shall be brought on the bill of exchange.

MONAHAN, C.J.—The only case involving a doubt which has occurred to my mind is this—supposing

such an infirmity in the bill of exchange as the want of a stamp, could the plaintiff recover on the count on an account stated?

On the 25th November, MONAHAN, C.J. delivered the judgment of the court.—This is an action by the indorsee of a bill of exchange, who sues under the Summary Bills of Exchange Act. The summons and plaint contains the count given by the Common Law Procedure Act, and also a count on an account stated, and an endorsement of particulars which is referred to in the body of the plaint. On the day following the last day allowed for pleading, the defendant obtains leave to plead upon an affidavit of merits without any terms being imposed on him. An hour or two subsequently the plaintiff, having no notice of the step taken by the defendant, marks judgment. We are asked to set aside this judgment and the proceedings on the ground that the count on an account stated makes the action cease to be one under the Summary Bills of Exchange Act. I personally believe that the meaning of this Act is that the action shall be substantially brought on the bill of exchange; otherwise, the monstrous consequence would follow, that, to part of the summons and plaint the defendant might, and to part he might not plead without leave. Is this action, then, substantially brought on a bill of exchange? We are of opinion that by reason of the endorsement of particulars, to which reference is made in the body of the plaint, this only amounts to two ways of suing upon the one cause of action. The count on an account stated is a count on the bill of exchange. There might be more difficulty in proving the second count because it would be necessary to shew something transacted between the parties over and above the endorsement of the bill of exchange, but the plaintiff cannot recover at all if the first count be not substantially true. Having disposed of this point in the plaintiff's favor, we are next to consider the effect of the defendant's affidavit. The third section of the Act is as follows: "After judgment the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear and defend the action, if it shall appear to be reasonable to the court or judge to do so, and on such terms as to the court or judge may seem just." We held the affidavit in this instance to be an affidavit of merits; the defence set up in it is substantially this, that the defendant was discharged under insolvent proceedings. On the ground that this is an action under the Summary Bills of Exchange Act, we will make use of the powers conferred by the third section and set aside the judgment, but as it has been regular, the defendant must pay the costs of it. Each party will abide the costs of the motion. Upon the objection, that the defendant waived the irregularity he complained of, we say nothing. *Rule accordingly.*

JOHNSTON v. BLOOMFIELD.—Nov. 21.

New trial motion—Evidence of reputation—Ancient documents—Declarations against interest—Recitals, &c.

An agreement to finish a vault in a church, made between a stone mason and an ancestor of the party

claiming under him, signed by the stone mason only and produced from the proper quarter, is evidence to prove that the vault in question was finished, on the same ground that counterparts of leases are admissible, but is not evidence of any of the facts recited in the agreement, nor is it admissible as an ancient document to prove possession of the church in the ancestor.

A codicil to a will, by which the testator charges his property with the endowment of a church, is evidence to prove the bequest, but is not evidence of the facts recited in it, that an ancestor of the testator had commenced and that the testator had himself completed the said church, either as an ancient document relating to ancient possession, or on the ground that it amounted to a declaration against interest, or as evidence of reputation.

This was an action of assault and battery. Plea—that the plaintiff was a trespasser. Replication—that the premises in question were an ancient churchyard or public burial ground. Issues—whether the close was the defendant's close? whether the replication was true in substance and fact? The plaintiff's servants being about to inter a relative of the plaintiff in a vault within the walls of a church, the defendant's servants obstructed them. At the trial the defendant tendered two documents in evidence to prove possession of the church in an ancestor under whom he claimed. They were, firstly, an agreement between a stone mason named Hugh Macawarrell and Sir James Caldwell, the defendant's ancestor, bearing date the 18th July, 1707, which ran thus:—"Hugh Macawarrell doth oblige himself to finish one vault, about nine or ten feet square, in a chapel now built by the said Sir James," &c. This was signed by the stone mason only, and there was no evidence of anything having been done under it, but it was produced from among the papers of Sir James Caldwell. The other document was the codicil to the will of the same Sir James Caldwell of 30th May, 1711, and contained the following clause:—"Whereas Francis Blennerhasset commenced a church, and whereas I have completed the said church, my will is to endow the said church, and to charge my property with the sum of £30 a year to enable a pious clergyman to perform divine service, duly and regularly, within the said church," &c. Monahan, C. J., received these documents at the defendant's risk, and directed the jury, who found a verdict for the defendant.

Whiteside, Q.C., having obtained, in Michaelmas Term, a conditional order for a new trial, on the grounds of reception of illegal evidence and misdirection,

Armstrong, Q.C., (with him *Dowse*), showed cause. [The cases quoted on both sides will be found, for the most part, collected in Taylor on Evidence.] These documents are both admissible as ancient documents proving ancient possession. They are also both admissible as evidence of reputation, for this is not a question between A. B. and C. D., but between A. B. and the public, whom the plaintiff represents. Furthermore, the codicil is evidence on a third ground, it is a declaration against the interest of Sir J. Caldwell. This agreement is an act and an assertion of evidence. A contract cannot be unilateral. It is an act of possession

as regards the vault, which is one step towards showing possession of the church. There is no need to prove acts done under either instrument,—see Taylor on Evidence, vol. 1, p. 527, of 2nd edition. The agreement, though only signed by the stone mason, stands on the same footing with the counterpart of an old lease executed by the lessee, and this has been held evidence to prove the land in question part of the estate of the lessor's ancestor,—*Doe v. Pulman* (3 Q. B. 622). So also *Duke of Bedford v. Lopes*, which is quoted in *Doe v. Pulman*. The agreement and codicil are both evidence of the facts recited in them. See *Brett v. Beales* (Moody and Malkin, 419); *Rogers v. Allen* (1 Campbell, 309). In *Tilman v. Tarver* (Ryan and Moody, 141), in a question of pedigree, a declaration that a party was entitled to a remainder after a life estate of one in possession, was admitted as evidence for the person claiming under him, it having been made *ante litem motam*. This agreement was made and this codicil was executed *ante litem motam*. Again, reputation is evidence against a public right as well as in its favour; that was decided in *Drinkwater v. Porter* (7 Carrington & Payne, 181). In *Carr v. Mostyn* (5 Exch. Rep. 69), in a question relating to a chapelry, a witness's statement of what a former rector had said was admitted as evidence of reputation, the matter being a matter of public or general interest. The present question involves a matter of public or general interest. *Barracough v. Johnson* (8 Ad. & El. 99); *Reg. v. Inhabitants of Bedfordshire* (4 Ellis & Blackburne, 535.) And, lastly, this codicil contains a declaration against the interest of Sir J. Caldwell, it charges his property with the payment of £30 a year, and is, therefore, evidence of ownership and evidence of the facts recited in it. *Higham v. Ridgeway* (10 East. 109), decided that a declaration against interest is admissible after the death of the declarant as evidence of facts as between third parties, if the person declaring had a peculiar means of knowing a fact. In the notes to *Barker v. Ray* (2 Russell, 67), it is said that a declaration by a person having competent knowledge and against interest is evidence of everything in the declaration as to third parties, and that it need not be accompanied by any act. [*Christian, J.*—Would the repairs now being executed in St. Patrick's Cathedral be evidence, a hundred years hence, of possession of the church in Mr. Guinness?] They would be *prima facie* evidence, but there would be abundance of evidence to rebut the presumption.

Whiteside, Q.C., (with him *J. E. Walsh, Q.C.*), in support of the order.—These documents are inadmissible on any of the grounds alleged. This agreement was not signed by Sir J. Caldwell, nor is there any proof the thing agreed for was done. The passage quoted from Taylor is a comment on one in Phillips on Evidence, vol. 1, page 276, in which he quarrels with the doctrine of the latter, that some act done with reference to these ancient documents is required to be shown, if the nature of the case admits of it. There is no evidence that the £30 was ever paid to the pious clergyman. [*Monahan, C.J.*—The present incumbent never got it.] The agreement is inadmissible for any purpose; a counterpart of a lease is allowed because forgery is never presumed and the lease is, therefore, assumed to have existed, and it

deals with the very subject-matter in question, it is an act of ownership over the land; its existence is irreconcilable with any other supposition than that of property in the lessor. So an agreement for a lease followed by receipt of rent would be admissible, but without this it would not. *Doe v. Pulman* could only apply if in a lease of Blackacre a reference to Whiteacre were allowed to be evidence of ownership of Whiteacre. No recital in an ancient document ever was evidence of possession. *Fort v. Clarke* (1 Rus. Chan. Cases, 601); *Stanley v. Wade* (1 Mylne and Craig, 355); *Doe v. Dodd* (2 Nev. & Man. 836); *Didsbury v. Thomas* (2 Smith's Lead. Cases, 396). As to reputation, see *Outram v. Morewood* (5 Term Rep. 123). There Lord Kenyon says:—"Although a general right may be proved by traditional evidence, yet a particular fact cannot." To admit this codicil would be to allow Sir J. Caldwell to make evidence for himself. In an anonymous case in 1 Strange, 95, a survey taken by one under whom the lessor claimed was held inadmissible as evidence for the plaintiff in an ejectment. In *Cooke v. Banks* (2 Car. & Payne, 478), on the question whether a place was parcel of a certain parish, old entries made by a churchwarden in a book, by which he did not charge himself, but in which he made statements relative to repairs done to a chapel in the parish church, alleged to belong to the place in question, were held inadmissible. So, in *Reg. v. Inhabitants of Debenham* (2 Barnew. & Ald. 187), an entry in an old parish book of the acknowledgment by another parish that A. B. was a settled pauper amongst them, which entry was made by a former parish officer, was rejected because it was made in their own interest. The case of *Reg. v. Bliss* (7 Ad. & El. 550), is an important one for this argument. In a question whether a road was public or private, evidence that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to show where the boundary of the road was, when he was a boy, was held inadmissible either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. We admit the codicil would be evidence to prove descent, but there is no statement against interest in it. See the observations of Lord Brougham in the *Sussex Peerage Case*. Also in Taylor on Evidence the following expression is given, which was held not to amount to an admission against interest:—"A. came as a servant, to have for the half year £2." The following cases were also cited:—*Jones v. Williams* (2 M. & W. 326); *Weeks v. Sparke* (1 Maul & Selw. 681); *Earl of Dunraven v. Llewellyn* (15 Q. B. 803); *Evans v. Taylor* (7 Ad. & El. 621).

On the last day of Term the judgment of the court was delivered by MONAHAN, C. J., who, after repeating the facts, proceeded:—"The question here was not merely whether the burying-ground in question was an ancient public burying-ground, but whether, supposing it was not, it was ever so dedicated to the public as to entitle the plaintiff to act in the manner he did. It has been urged upon us, by the plaintiff's counsel, that the agreement between the stone mason

and Sir James Caldwell was not evidence of anything and ought not to have been admitted at all; while the analogy of the counterparts of leases has been insisted on for the defendant. We see no distinction between this agreement and the counterpart of a lease, if offered to show that the vault in question had been built. We are equally certain that it is admissible for no other purpose. *Doe v. Pulman* governs us in this decision. Upon this ground, alone, therefore, the rule for a new trial must be made absolute. The codicil we conceive to be evidence to prove that a bequest was made by Sir James Caldwell, and that he did charge his property; but the recitals in it are not evidence of the things recited. It does not appear that he had peculiar knowledge of the fact; on the contrary he must have been a baby when Blehnerhasset built the church, if he did build it. Neither was this a declaration against his own interest. As the verdict is set aside on the ground of misdirection, each party will abide his own costs.

Rule absolute.

Consistorial Court

OF THE DIOCESE OF DUBLIN.

[Reported by W. R. Miller, Esq., LL.D., Barrister at Law.]

ANNE GIBBONS otherwise DALY, PROMOVENT; ALEXANDER GIBBONS, IMPUGNANT.—Dec. 3.

A marriage celebrated by a Roman Catholic priest between a Roman Catholic and a Protestant, who it was sworn represented himself at the time as a Roman Catholic, but who had always before been a member of the Established Church, and within the previous twelve months attended its services, Held, void under the 19th Geo. 2, c. 19.

THIS was a suit for restitution of conjugal rights. The libel stated that the promovent and impugnant were married, in March, 1855, by a Roman Catholic clergyman, the Rev. Patrick Mannion, at Ballymahon, both parties being at the time Roman Catholics; that afterwards they cohabited as man and wife, and that he afterwards deserted her. The impugnant, by a peremptory exception, denied the validity of the alleged marriage ceremony, on the ground that he had been born of Protestant parents, and baptized and educated a Protestant, and always attended the services of that Church, and had, during the twelve months immediately prior to the said marriage, frequently, by such attendance and by receiving the communion in Church, professed himself a Protestant, and never had been a Roman Catholic. The promovent, and one witness to the marriage, had been examined in support of the libel, and they swore that immediately before the ceremony of marriage was performed, the priest asked the impugnant if he was a Roman Catholic, and that he replied that he was a bad one, and that thereupon the priest performed the usual service of marriage, according to the rites of the Roman Catholic Church. The priest, though cited to give evidence, and though he had been in at-

tendance, refused to give any evidence to the Examiner. The parties cohabited after the marriage; but on account of the objections of the impugnans' family to the promovent, who was in an humbler rank of life than the impugnans, they did not reside together in the same house. After some time the impugnans sent the promovent to America, promising to follow her shortly; and several of his letters to her before and after she went were given in evidence, in which he addressed her as his wife in most affectionate terms; and in one he urged her not to conceal her marriage, but to make it known. He, however, never went after her, and she returned, but he then refused to receive her, and denied the validity of the marriage.

Dr. Ball, Q. C., for the impugnans, insisted that the marriage ceremony was, under the 19 Geo. 2, c. 13, absolutely void. The enactment is as follows:—"That every marriage that shall be celebrated after the 1st day of May, 1746, between a Papist and any person who hath been, or hath professed him or herself to be a Protestant at any time within twelve months before the celebration of the marriage, or between two Protestants, if celebrated by a Popish priest, is and is hereby declared null and void to all intents and purposes, without any process, judgment, or sentence at law whatever." There was not in this case any proof whatever (beyond the statement of the promovent and her witness, that the impugnans said he was a bad Catholic) to show that he was then, or ever had been, a Roman Catholic, though it was pleaded directly that he was a Roman Catholic; and this was encountered by the evidence of the impugnans on cross-examination, who denied that he ever said so. Then as to cohabitation, it was of no value, as the character of it must be judged of by the validity or invalidity of the ceremony of marriage; and unless the ceremony was perfectly valid, cohabitation would not advance the case in the slightest degree. As to the validity of the ceremony, the 19 Geo. 2, c. 13, is still in full operation, and, therefore, the inquiry here is, What was the religion of the impugnans when the ceremony was performed, and what had it been for twelve months previously thereto? The evidence proved that he was born of Protestant parents, was baptised a Protestant—and the certificate thereof was produced. He was educated as a Protestant, and always, up to the time of the marriage, attended and received the rites of the Protestant Church. The 2 Anne, c. 6; 6 Anne, c. 16; 9 W. 3, c. 28; 12 Geo. 1, c. 3; 9 Geo. 2, c. 11, and the following cases were cited—*O'Connor v. Malone* (6 L. Rec. N.S. 191); *Darcy's Minors* (6 L. L. R. 306); *Kirwan v. Kirwan* (Batty, 712); *Bruce v. Burke* (2 Add. 471); *Steadman v. Powell* (1 Add. 58).

Dr. Miller, for the promovent, contended that the marriage was, as against the impugnans, binding and valid. Besides the evidence of two witnesses to the fact, that at the time of the marriage, the impugnans said and admitted that he was a Roman Catholic, we have the powerful evidence from his own letters, in which he appeals to her to proclaim her marriage, and wear her ring as evidence of it; and unless he knew

and believed that at the time of the marriage he was a Catholic, he could not entertain the belief, which he evidently did, that the marriage was valid. As to the cases cited at the other side, they were all (save one) cases where the question arose between the remainderman as to estates, or as to the status of children; but *Bruce v. Burke* (2 Add. 471) was a case of nullity of marriage, and there the first marriage, at which Burke represented himself a Catholic was held binding, though evidence was offered to show that he was really a Protestant—that case is in favour of the promovent. *Re v. Hanley* (Carr. Cr. L. 254); *Reg. v. Orgill* (9 Car. & P. 80); *Mace v. Caddel* (Cowp. 232), were cited, and in *re Darcy's Minors* (6 Ir. Jur., N.S. 37), in which, at p. 39, Chief Justice Monahan says, "I can well understand how it could be argued, that if a man represented himself to a woman whom he was about to marry that he was a Roman Catholic, and made the same representation to the clergyman who was about to marry him, that if a question afterwards arose between himself and herself, and that he wanted to get rid of that marriage on the allegation that he was not a Roman Catholic, why an ecclesiastical or other court should have held, in a case between the parties, that he was stopped by his representation, and that he had induced the woman to marry him under this false representation." The 10 & 11 Car. c. 3, which avoids all charges made by ecclesiastical persons on their lands, is equally strong in its language—"All leases, charges, &c., made by Archbishops, &c., of any lands, &c., being parcel of the possession of any such archbishop, &c., should be utterly void and of none effect to all intents and purposes, any law, usage, or custom or other thing to the contrary notwithstanding;" and yet it has been settled, that a charge by a beneficed clergyman on his glebe-lands, notwithstanding those words, is valid and binding on him for his life, or during his seisin of the benefice.—*Wynne v. Robinson* (Hayes, 336).

DR. RADCLIFF, Q. C.—In this case the evidence is clear that the impugnans was a Protestant. There is no doubt that he was a member of the Established Church; and though it was pleaded that he was at the time of the marriage a Roman Catholic, the promovent and her witness only say that he said he was a bad Catholic. The priest who married them was not the parish priest, and he violated the rule of his Church to celebrate this marriage without a certificate from the parish priest. As to the law, the 19 Geo. 2, c. 13 was plain. This is a suit for restitution of conjugal rights, and the first condition for restitution is to prove a valid marriage. The doctrine of estoppel did not apply to cases of this kind, though it might in a suit for jactitation of marriage—as, if a man marries a lady by a false marriage, and then sues her for representing herself as his wife, there he would be estopped, as he had given her a title to say that she was his wife. But that did not apply here, where the Act of Parliament declared the marriage null and void; and but for that Act the greatest abuses might arise. The cases cited as to bigamy do not, I think, apply. They appear to me to be all overruled by the *Queen v. Millis* (10 Cl. & F. 534),

which decides that to sustain an indictment for bigamy on a second marriage ceremony, the first marriage must have been a valid one; and the Statute of Car. referred to was passed for the benefit of remaindermen, but could not interfere with beneficed persons doing what they liked, while in possession, with their benefices. Under these circumstances, I must dismiss the suit.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., Barrister-at-Law, and H. Fawcett, Esq.]

[BEFORE JUDGE HARGREAVE.]

THE EARL OF LIMERICK, OWNER; HAROLD TURNER, PETITIONER.

Sale of life estate on creditor's petition, notwithstanding heavy charges on the fee and cause shown by prior creditors on the life estate—Jurisdiction—Judgment mortgages.

The lands of Blackacre, being subject to heavy charges, are put in settlement, and A. made tenant for life. A. incumbers his life estate, and B., one of his puisne creditors, files a petition for sale. A. and his prior creditors show cause against the order for sale, and question the jurisdiction of the court. Held, that the court has jurisdiction to sell, and will sell, protecting the interests of the prior life estate creditors as far as possible, and giving the owner an opportunity to relieve the fee from incumbrances, before proceeding with the order for sale of the life estate.

An affidavit made for the purpose of registration, under the provisions of the Act 13 & 14 Vict., c. 29, is objected to on the following grounds, viz. :—

1. Because the owner's Christian name is erroneously stated to be William, his correct name being William Henry, he having been sued by the name of William simply. Held, that the affidavit is sufficient, on the authority of the case of *Walter John Curew*, decided by the Judicial Committee of the Privy Council. Held, also, that the description of a peer by his title alone is sufficient for the purposes of the Act.
2. Because the title of the cause is not accurately stated in the affidavit, the words, "in England," having been omitted from the plaintiff's description, and also the words "William" and "defendant" being omitted. Held, that the affidavit sufficiently complies with the Act, the title of the cause being correctly stated in the margin, on the authority of *Humble's Case* (11 Ir. Ch. R., 356).
3. Because the copy affidavit lodged in the registry office is not a true copy of the affidavit made and filed in the court of law. Held, that the copy lodged is sufficient to satisfy the Act, it having been testified by the officer as an office copy, and being correct and sufficient in the particulars required by the Act.
4. Because the affidavit omits to state the parish, the premises being situate in a city—admitted by all parties to be a fatal error.

5. Because the affidavit states that the lands are situate in the barony of Bunratty, in the County of Clare, there being no barony of Bunratty per se, but two distinct and different baronies of Upper Bunratty and Lower Bunratty. Held, that the affidavit is bad, and does not comply with the Act.

This case came before the Court by way of cause against the conditional order for sale, being an order for sale of the owner's life estate in certain lands in the city of Limerick, County of Limerick, and certain other counties. The order for sale was made on the petition of a judgment creditor of the owner's, and the petition disclosed the fact of the existence of heavy charges on the inheritance, and also large incumbrances on the life estate prior to the petitioner's judgment. Against this order cause was shewn by the prior creditors on the life estate, and also by the owner, on the grounds of want of jurisdiction in the court to sell a life estate, subject to the charges on the fee, and of defects in the petitioner's affidavit of judgment, and relying, if it were in the power of the court to sell, that the court, in the exercise of its discretion, would make no order under the peculiar circumstances of the case. The petitioner moved to make the order absolute notwithstanding this cause to the contrary.

Mr. S. W. Flanagan, Q.C., for the petitioner.—There cannot be any doubt that the court has jurisdiction to sell the owner's life estate in this case. The petitioner's judgment is an incumbrance on the owner's life estate. By the 43rd section of the Act, it is provided that "where any land, in Ireland, shall be subject to any incumbrance, it shall be lawful for any incumbrancer on such land, or for the owner of any estate therein charged with such incumbrance, to apply to the court, under the provisions of the Act, for the sale of the estate in said lands charged with such incumbrance." The estate in land we seek to sell is the owner's life estate, and the incumbrance on that estate is our judgment mortgage. Now, it is contended that the petitioner is deprived of the remedy here given him, and the court of its jurisdiction, by reason of there being charges on the inheritance of the lands. For, it is said, the court cannot sell the life estate subject to the charges on the fee. The charges on the fee are now payable, and consequently do not come within the meaning of the 54th section of the Act, whereby the court is authorized to sell, subject to any incumbrance under the terms of which the incumbrancer cannot be required to accept payment of the principal money before the expiration of a term of years unexpired. But this section was never intended to restrain the powers conferred on the court by other sections of the Act. Besides, the 54th section applies to incumbrances on the particular estate sought to be sold, and not to those on an estate paramount to the one to be sold, and different from it. This question of jurisdiction has, in fact, been decided by the court, in *Gregory's Case*, and *James Daly's Case*, before Judge Longfield. And now, as to the validity of the registration of the petitioner's judgment. The first point made is, that the affidavit does not state the name of the owner correctly; his name is

William Henry Tenison Pery (Earl of Limerick), and the affidavit gives it William Tenison Pery (Earl of Limerick), omitting "Henry," but the creditor sued Lord Limerick by that name, and I submit the affidavit is sufficient. The next point is, that the title of the cause is not properly stated in the body of the affidavit. The title of the cause is, Harold Turner, of Longacre, in Middlesex, in England, &c., and the affidavit omits the words "in England," but in the margin it is correctly stated. There is no repugnance between the margin and the statement in the affidavit. The statement of the title in the affidavit may be treated as surplusage, and then the statement of the title in the margin is enough, for we may incorporate the margin with the body of the affidavit—*In re Humble's Estate* (11 Ir. Chan. R., 356). Another point is, that "William" is omitted from the name of the owner in the affidavit lodged in the registry office. This is a mistake of the officer of the court of law. The affidavit made and filed in the Court of Queen's Bench is correct. The creditor had to register an office copy of this, which he did. If it should appear that a mistake was made in the office copy by the officer of the court of law, the court would, if necessary, direct the copy to be corrected. I submit that the order for sale must be made absolute, and the cause disallowed, with costs.

Sergeant Sullivan for John Vanderkiste and Messrs. Senior & Cooper, creditors shewing cause.—Mr. Flanagan has silently passed over the principal defects in his affidavit—defects undoubtedly fatal. Where the lands or premises are in a city, the affidavit must state the parish, and where in a county, the barony—13 & 14 Vict., c. 29, s. 6. Now a very large portion of the lands sought to be sold is situate in the city of Limerick, and yet the affidavit does not state the parish in which the premises are situate. [*Mr. Flanagan*.—I could not dispute the validity of this objection]. Again, the affidavit states that certain lands are situate in the barony of Bunratty; now, there is no barony of Bunratty, but there are two distinct and separate baronies called Upper Bunratty and Lower Bunratty. It cannot be said that the barony has been correctly stated in the affidavit, and, therefore, the Act has not been complied with. As to the error in stating the owner's christian name, it is of vital importance that the christian name should be correctly given—*Forse v. Diemar* (7 Term Rep., 661). Again, if the court should sell a life estate like this, it would be a positive confiscation of the rights of prior creditors; but admitting the jurisdiction, and putting the matter to the discretion of the court, will the court sell the life estate under the peculiar circumstances of this case? The purchaser of the life estate might be ejected the day after he obtained his conveyance by the mortgagees of the inheritance.

Mr. H. Barry for the same parties.—The affidavit filed by the petitioner in the Registry Office is not a true copy of the affidavit filed in the Queen's Bench, the word "William" being omitted. The copy must be an exact copy of the original affidavit, and if it be not exact, no copy is lodged within the meaning of the Act, even though the omission be immaterial. The sale sought for by this petition is not within the

policy of the Landed Estates Act. It is the policy of the Act to sell estates discharged from incumbrances. [*Judge Hargreave*—That was the policy of the Incumbered Estates Act, not of this Act]. Again, by the 43rd section, it is implied that an incumbrance is a charge on land only, and not a charge on an "estate" in land; and equity of redemption is part of the definition of land, and not of the word "estate." Therefore an incumbrancer on land may petition for sale, but the sale of any estate in land must be on the petition of the owner of such estate.

Mr. May for the owner.—It is necessary that the affidavit of judgment should state the name of the defendant and the title of the cause. The petitioner has done neither, for in the name he has omitted "Henry," and in the title "William Henry." Both the christian name and surname must be stated in the title of the cause.—*Archbold's Prac.* 1513.

Mr. A. Graydon in reply.—As to the word "Henry" being omitted from the owner's name, it is immaterial. "Earl of Limerick" would be sufficient, for the owner's title alone will satisfy the Act. As to the expediency of selling here, the court should bear in mind that this is the only remedy available for us. No receiver could be obtained; another creditor has tried, and failed.

JUDGE HARGREAVE.—This is a petition presented by Mr. Turner claiming to be an incumbrancer, by means of a judgment registered by affidavit, upon the life interest of the Earl of Limerick in large fee-simple estates in the City of Limerick and the Counties of Clare, Limerick, and Cork. The estates themselves are subject to charges to the extent of 95,000*l.* principally vested in the executors of the late Earl of Cottenham; and the life estate of the Earl of Limerick (the petitioner's debtor) is subject also to considerable charges, including three, amounting together to 11,300*l.* principal, vested in Messrs. Senior and Cooper, which are secured also by policies of insurance on the owner's life, the premiums on which are payable out of the rents, and also including one of 2,000*l.*, similarly secured, vested in Mr. Vanderkiste. The rents of the whole property are received by Messrs. Barrington and Vanderkiste, as the nominal agents of Lord Limerick, under the provisions of one of the deeds constituting Messrs. Senior and Cooper's security. Mr. Vanderkiste states that the net fund annually available, after payment of all outgoings, and the interest on the charges affecting the fee, is about 2,300*l.* The conditional order proposes to sell the life interest in the estate subject to the charges affecting the fee, and cause is shown by the creditors on the life estate whom I have named, and also by the owner. The first question raised is as to the jurisdiction of the court to sell a life interest in an equity of redemption, where the mortgages affecting the fee are not made for a fixed period, but are redeemable in the usual manner. The Act authorizes the court to sell any interest in land; and the doubt, such as it is, arises from the clause taken from the Incumbered Estates Act, directing the court to sell subject to mortgages which, by their terms, cannot be paid off for a fixed period. This, however, is an enabling power, and not a restraining one; and I

think it would not prevent the court from exercising an inherent jurisdiction, in selling an estate, to determine in each case whether the sale should be subject to a charge or not. But, in fact, the statute expressly authorizes the court to sell an equity of redemption. It was contended by Mr. Barry that this applies only to the case in which the owner is the applicant for a sale, on the ground that by the 43rd section the power to apply to the court is given to any incumbrancer on land, and to the owner of any estate in land. The interpretation clause, however, proves clearly that this distinction is merely one of expression and not of intention; for the word "land," by definition, includes any estate in land, and "estate in land" includes also, by definition, an equity of redemption, so that both phrases, "land" and "estate in land," comprehend an equity of redemption. The next class of questions raised by the affidavits showing cause relates to the sufficiency of the petitioner's affidavit of judgment to give him a charge on the life estate. It appears that the owner's Christian name is William Henry, whereas the petitioner has sued him as William only, by which name also he is described in the affidavit made for the purpose of registration. In the case of *Walter John Carew* it was held by the Judicial Committee of the Privy Council, reversing a decision of the Commissioners for sale of Incumbered Estates, that a judgment registered, under Sugden's Act, against Walter John Carew by the name of Walter Carew was well registered, although in fact it was not returned by the officer upon a search made by the mortgagee; and if it were necessary, I should be disposed to follow the principle of that decision, though not concurring in it. But I am of opinion that the description of a peer by his title is sufficient, as such a description absolutely identifies him, if it be fully and clearly given, for there can scarcely be at the same time two persons having in all respects the same title. I, therefore, think that this point is not tenable. It is then said that the title of the cause in which the judgment was recovered is not accurately stated, because it omits from the plaintiff's description the words "in England," and from the defendant's the word "William," and also the word "defendant." I think that this statement of the title of the cause is not false, but merely insufficient, and that the paragraph may be treated as surplusage. The affidavit is entitled in the action, and properly states the title in the margin; and a recent decision of the Court of Appeal has ruled that the margin may be read as part of the affidavit; and, from the principle of that decision, it follows that the deponent is not bound to aver on oath what the title of the cause is. It is sufficient if the title be stated without an averment that it is the title. The third point is, that the document registered at the Registry Office is not a copy of the affidavit sworn in the Queen's Bench, as there are various discrepancies between them. I am of opinion, however, that, though not a copy, it is an office copy within the meaning of the Act. I think it is sufficient if it be signed by the proper officer in token of its being a copy, provided it be correct, or sufficient in the particulars required by the Act, and in other

respects bear a sufficient resemblance to the original document to make it certain what document it is that has been attempted to be copied. I am, therefore, of opinion that all the objections which allege the total invalidity of the petitioner's charge fail; but there are other objections relating to a portion of the property which appear to be, to that extent, fatal. As to a very large portion of the property in the City of Limerick, North Prior's Land and South Prior's Land, the affidavit is insufficient, for want of any statement as to the parishes in which it is situate. As to the townlands of Shandangan and Kilmurry, which are described as being in a barony called Bunratty, it appears that there is no barony which goes by the name of Bunratty *simpliciter*, but that there are two different baronies in the County of Clare called respectively Upper Bunratty and Lower Bunratty. I yield unwillingly to this objection, but it is impossible to say that the requirements of the Act have been complied with; for, putting the most liberal construction possible on the affidavit, it still leaves it in doubt in which of two baronies the lands are situate. As to these townlands also, therefore, the petition must be dismissed. The petition is sustainable as to the other portions of the estate; but I think it is practically impossible for the court to proceed to a sale of the owner's life interest in a portion of the lands, the whole of them being liable to heavy charges on the fee. Nor would such a sale serve the petitioner, as it clearly could not reach his demand. If the petitioner's demand affected the whole estate, the Court would not dismiss his petition, but would make the order absolute; and before taking any further proceedings upon it would give to the owner an ample opportunity of relieving the estate from the incumbrances on the fee by means of a petition of his own. I have no doubt that by such a proceeding the fund available for the owner and his own creditors could be considerably increased, not only by a diminution of the expenses of management, but by the sales realizing a larger sum than the property sold pays the interest on; and the court would then consider in selling the life estate, in what was left, how far it might be proper to sell subject to those mortgages which are secured also by policies. If, within a reasonable time, the owner should not take steps to disincumber the fee, it would probably become the duty of the court to execute the order for the sale of the life estate, however prejudicial it might be to the owner, the court providing, as far as possible, for the safety of the early creditors on the life estate. On this petition, however, it is impossible to make an order which would not be detrimental to every one interested in the life estate, and in the exercise of the discretion reposed in the court by the Act, I think it better that the petition should be dismissed.

Order—That the petition be dismissed with costs to the creditors showing cause, but not to the owner.

NOTE—It may not, perhaps, be inopportune to mention here that the execution of an order for sale of a life estate, where there are heavy charges on the inheritance, would appear to be beset with some little difficulty. The proceeding is, necessarily, one in which the incumbrancers on the fee can

not be paid off, and by which they cannot, in any manner, be bound; and the question naturally arises, how is the court to ascertain the charges on the fee, and the sums due to each incumbrancer? These facts should be accurately known, for without this information it would be idle to attempt to sell the life estate. No purchaser could be found, for a purchaser could not set any value on the life estate until he knew the amount of the charges on the fee. In this particular case of Lord Limerick, this difficulty is not great, as nearly the entire of the charges on the fee are vested in one creditor, and the precise amount due could be readily ascertained. But the creditors on the fee, in any particular case, may be very numerous, and this consideration would lead one to suppose that the question, whether the court will sell a life estate, notwithstanding that there are charges on the inheritance, must depend on the circumstances of each particular case. For it may safely be assumed that the court will not make an order for sale unless there is a reasonable probability that it can execute it.

IN THE ESTATE OF RICHARD PILSON AND WIFE, OWNERS
AND PETITIONERS.

Judgment mortgage—Affidavit of registration.

Where a judgment is recovered for two distinct sums, one for debt, and the other for costs, the affidavit made for the purpose of registering the judgment as a mortgage, must state both sums.

In an affidavit made under the provisions of the statute 13 & 14 Vict., c. 29, for the purpose of registering the judgment as a mortgage, the principal sum recovered by the judgment, £600, was correctly stated, but the amount of costs recovered, £3 1s. 11d., was omitted from the affidavit. Held, that the affidavit does not comply with the requisites of the 6th section of the statute.

THIS case arose on the settlement of the final schedule in this matter. The executors of J. J. Dockrill filed an objection disputing the validity of a certain judgment mortgage placed upon the schedule in priority to their demand. This judgment was vested in J. Sawyer. From the attested copy of the judgment it appeared that the judgment was a security for two distinct sums, viz., £600 debt, and £3 1s. 11d. costs. The affidavit stated the amount of the debt only, omitting the costs.

Mr. Hemphill for the executors of Dockrill.—Both sums recovered by the judgment should be stated in the affidavit, in order to comply with the 6th section of the 13 & 14 Vict., c. 29. The affidavit should disclose the full amount secured by the judgment. If you allow the costs to be omitted, you may, with equal propriety, allow the principal sum to be omitted. A judgment cannot be made partially a charge on land; it must operate as a charge for the entire amount recovered, so far as it remains unpaid, and therefore the entire amount must be stated in the affidavit.—*In re Davis* (13 Ir. Jur., 11, cited).

Mr. Flanagan for Sawyer.—The Act does not require the costs to be stated in the affidavit. If the amount of the debt recovered be stated, it is sufficient. The 6th section requires the affidavit to state "the amount of the debt, damages, costs, or moneys, recovered or ordered to be paid by such judgment, decree, order, or rule;" *redendo singula singulis*, the word

"costs" refers only to costs ordered to be paid by decree, order, or rule, and not to costs recovered, along with a debt, by judgment. In fact, the point here raised has been decided by a very eminent judge, the late Mr. Macan—*In re Thomas Farrell* (7 Ir. Jur., 307).

JUDGE HARGREAVE.—I have carefully considered the case cited, *Farrell's Case*; but I am still of opinion that, if one judgment be recovered for two distinct sums, as in this case, it must be stated as such, and that it cannot be registered for one sum, and not the other.

Order—Allow the objection, and declare that Mr. Sawyer's judgment is not registered as a mortgage within the meaning of the stat. 13 & 14 Vic., c. 29, sec. 6.

[BEFORE JUDGE LONGFIELD.]

T. R. BLACKLEY, OWNER AND PETITIONER.

A tenant for life, of Freehold Estate, having a power of appointment among his children, devised the estate to trustees to sell and divide the purchase money among the children in certain shares. Upon a petition for sale by the trustees of the will, the court granted an order for sale.

S. D. being seized of the premises in the schedule to the petition in this matter mentioned, under a lease for lives renewable for ever, previous to his marriage, executed a settlement, dated 31st July, 1822, and he thereby conveyed the lands to trustees, in trust for himself for life, and in the event of his surviving his intended wife (which event happened) in trust for the children of the marriage, as he should by deed or will appoint, with remainders over in default of appointment. There were eight children issue of the marriage.

By will, dated 10th January, 1840, S. D. directed the lands to be sold by his executors, and the purchase money to be divided equally among his children, and he appointed two executors, one of whom was the petitioner, to whom probate was granted. S. D. died, without, in any way, executing the power of appointment under the settlement, save so far as he had done so by the will. Travers Blackley, the executor, filed a petition to sell the lands, pursuant to the directions contained in the will, which petition was dismissed by the court, on the ground that the testator had no power to direct the estate to be sold, and the estate was not incumbered.

Crozier, counsel on behalf of the petitioner, moved for a fiat on the petition, and relied upon *Kenworthy v. Bate* (6 Vesey, Jun., 793), where it was held that a power of appointment of real estate was well executed by a devise to trustees to sell, and an appointment of the money produced by the sale. Counsel also relied upon *Cowx v. Foster* (6 E. Jur. N. S., 1051;) and upon *Roberts v. Dixall* (2 Eq. Ca. Abm., 6); and *Long v. Long* (5 Vesey, Jun., 445); cited in *Kenworthy v. Bate*.

The court upon hearing counsel, upon the authority of *Kenworthy v. Bate*, and none of the children of S. D. objecting, granted a conditional order for sale.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister at Law.]

[BEFORE THE LORD CHANCELLOR].*

STIRUM AND OTHERS v. RICHARDS.—Nov. 26.

Settlement—Construction—Erroneous decree—Acquiescence—Evidence.

*In a suit by a mortgage creditor, a decree was pronounced in the year 1818; by which S, a party to the suit, was declared entitled to the sum of 3,000*l.*, under a marriage settlement of 1776. The decree was erroneous and informal, no day having been named for R, an infant tenant in tail (party to the suit), to show cause. Interest upon the sum of 3000*l.* was paid to S for forty years by R, and those from whom he derived, in ignorance of the true construction of the settlement. S, having filed a cause petition praying that the above sum of 3,000*l.* might be declared a charge upon the lands belonging to R, relied upon the decree of 1818 as evidence only of acquiescence by R, and his predecessors in the decree. Held, that the construction put upon the settlement of 1776 by the decree of 1818 was erroneous.*

That (reversing the order of the court below), not being pleaded, but only relied upon as evidence, the respondent could go behind the decree, and show it to be erroneous by filing a supplemental petition in the nature of a bill of review.

That the acquiescence of a minor, represented in a suit by a guardian who is interested adversely to him, is not entitled to much weight.

THOMAS RICHARDS, being seised of certain lands in the County of Wexford, by his marriage settlement, dated the 1st of August, 1776, conveyed his estates to Francis Harvey and Cornelius Grogan, the survivor of them, and the executors, administrators, and assigns of the survivor of them, for the term of 300 years; and, subject to that term, to other trustees, after his own life estate, to the use of his first and other sons in tail male; and for default of such issue, to the use of the first second, third, and every other daughter and daughters issue of the marriage severally and successively in tail male; and for default of such issue, then to the use of Thomas Richards, his heirs and assigns, for ever. And as to the term of 300 years, it was declared that the same was so limited to Francis Harvey and Cornelius Grogan upon trust, that they should, by and out of the the annual rents and profits of the lands and premises, levy the principal sum of 3,000*l.* for the portion or portions of the daughter or daughters and younger son or sons of the marriage; in case there should be more than one daughter or younger son of such marriage, to be paid and payable amongst them in such manner, shares, and proportion, and at such times as Thomas Richards should, by deed, will, or other writing, to be executed by him in the presence of two or more witnesses, direct, limit, or appoint, and, in default thereof, then the same to be paid and payable equally to and amongst such daughters or younger sons,

share and share alike to such daughters at the age of twenty-one years or day of marriage, and to such sons respectively at the age of twenty-one years; but if any of those sons or daughters should die before such time of payment, his, her, or their portion or share should go and be payable unto the survivor and survivors of such sons and daughters equally. But in case there should be one only daughter, or one younger son only, who should not at the time of the decease of Thomas Richards be his eldest son, then upon trust to levy and raise any sum of money not exceeding 2,000*l.* as and for the provision of and for such only daughter or younger son to be paid and payable unto him or her in such manner and at such time as Thomas Richards should appoint by deed, will, or other writing, and in default of such appointment, then to pay the same to such daughter at the age of 21 years or on her day of marriage, and to such son on his attaining 21 years. In the settlement there was a power whereby Thos. Richards was enabled, at any time during his life, by deed or will to charge the several lands and premises thereby conveyed with any sum of money not exceeding in the whole the sum of 2000*l.*, with such interest for the same, not exceeding legal interest, as he should direct. There was issue of the marriage two daughters only, and no issue male. Thos. Richards died in the year 1785, leaving his widow him surviving, as also his two daughters—Martha, the eldest, who under the limitations contained in the settlement, became entitled to the lands therein comprised, and the petitioner Elizabeth, then Elizabeth Richards. Thomas Richards, before his death, and about the 1st November, 1781, made his will, and thereby bequeathed the sum of 2,000*l.* to his daughter Elizabeth, as a further portion in addition to the portion which she should be entitled to under the marriage settlement. Martha Richards, having attained her full age, barred her estates in tail in the lands, and acquired the fee-simple and absolute interest therein, and in Hilary Term, 1802, Elizabeth Richards obtained a judgment in the Court of Common Pleas in Ireland against her sister, for the penal sum of 1,600*l.* debt, besides costs, to secure the principal sum of 800*l.*, with interest at 6 per cent., upon foot of which judgment all interest was paid to the 24th of October, 1858. By the settlement executed in 1802, upon Elizabeth Richards' marriage with her late husband, Count Limburg Stirum, Elizabeth Richards, alleging that she was entitled to the sum of £3000 under the deed of 1776, assigned the two sums of 3,000*l.* and 2,000*l.* to trustees, upon trust to pay the interest thereof to Elizabeth Stirum, during her life, for her sole and separate use, and after her decease upon trust for her children, share and share alike as tenants in common, to sons at twenty-one years of age, and to daughters at twenty-one years of age or day or days of marriage. Count Stirum died several years ago; and there was issue of that marriage seven children, who all attained their respective ages of twenty-one years, now, together with their mother, claimed under the limitations of the last-mentioned settlement, to be entitled amongst them to the two sums of 3000*l.* and 2,000*l.* Martha Richards intermarried with Baron John Lewis Gideon Ernest Von Prebenton Von

* The Lord Justice of Appeal was absent from illness.

Wilmsdorf, who took the name of Richards; and on the occasion of the marriage a settlement was executed, dated the 5th of March, 1802, whereby her estates were limited, subject to the separate use of Martha Richards during her life, and an annuity to her husband in case he survived her, to the use of the first son of Wilmsdorf Richards and Martha, his wife, in tail male, with remainder to the use of the first and every other daughter and daughters of John Von Wilmsdorf. There was issue of that marriage three daughters, and Thomas Frederick William Von Prebenton Von Wilmsdorf Richards, the appellant; his father having died in 1834, and his mother in 1855, he barred his estate tail in the lands conveyed by the settlement of 1776. Martha Richards and her husband having become embarrassed in their circumstances, a bill was filed in the Court of Chancery in Ireland, on the 4th of July, 1814, wherein William Callow (a mortgagee of John Von Wilmsdorf Richards and Martha his wife), was plaintiff, and John Von Wilmsdorf Richards, and Martha his wife, Frederick Count Stirum, and Elizabeth his wife, the surviving trustee of the marriage settlement of the latter, Thomas Richards, a minor, the then tenant in tail in remainder of the estates under the settlement, and several other parties, were defendants, praying for a sale of the premises comprised in the settlement of 1776, for the payment of the charges and incumbrances affecting the same. Thomas Richards appeared and answered by Count Stirum, his guardian, and by a decretal order, dated the 26th of June, 1816, it was referred to the Master to take on account of the sum remaining due to the plaintiff on foot of his mortgage; and also to take an account of all debts, charges, and incumbrances affecting the lands comprised in the suit prior to the incumbrance of the plaintiff. The Master made his report on the 19th of May, 1818, and thereby, amongst other things, found that under the settlement of 1776 the lands were charged with the principal sum of 3,000*l.*, with legal interest, thereby provided for the younger children of the then intended marriage of Thomas and Martha Richards, as secured by a term of 300 years; and that Elizabeth Stirum, on the death of Thomas Richards, as the only younger child of Thomas Richards and Martha, his wife, became entitled to the sum of 3,000*l.*, and also to 2,000*l.*, under the will of Thomas Richards, and the judgment debt of 800*l.* The report having been confirmed, a final decree was pronounced, dated the 12th of June, 1818, whereby it was ordered that the several sums reported due, with interest, were charged on the lands, and that the same should be sold in default of payment by the defendants; but no day to show cause was given or allowed by the decree to the appellant, then the infant tenant in tail of the lands. Thomas Richards, the minor tenant in tail, and elder brother of the appellant, having died, the suit was renewed against his sister Elizabeth, as presumptive tenant in tail. Interest upon the sum of 3,000*l.*, as if that amount were chargeable on the lands, was paid by Martha Richards to her sister Elizabeth, up to 1855, and from that date by Thomas Richards, the appellant, up to 1858, when he refused to pay interest upon more than the sum of 2,000*l.* On the 20th of

April, 1860, Elizabeth Countess Von Limburg Stirum and her children presented a cause petition against the appellant, praying a declaration of her rights as to the sums of 3,000*l.*, 2,000*l.*, and 800*l.*, respectively, and that same, together with the interest due thereon, might be declared all charged on the lands and premises, and for a sale. The matter having come before the Master of the Rolls, on the 17th of April, 1861, it was ordered that the further hearing of the said cause petition should stand over until the first day of the then next term, to enable the respondent to take such proceedings as he might be advised, to set aside or vary the said report of the 19th of May, 1818, and the decree of the 12th of June, 1818. The appellant did not take any steps to vary that decree, and contended that it was not necessary to do so; and the case having come on again before the Master of the Rolls, by a decretal order, dated the 1st of June, 1861, the several sums of 3,000*l.*, 2,000*l.*, and 800*l.*, making the whole sum of 5,800*l.* late currency, equivalent to the sum of 5,358 16*s.* 4*d.*, present currency, together with the sum of 851*l.* 2*s.* 4*d.*, interest thereon, to the date of the order, and also interest thereon until paid, were declared charges upon the lands in the settlement of the 1st August, 1776, mentioned, or on such of them as had not been sold for payment of prior incumbrances. And it was further ordered that the petitioners were entitled to these sums under the limitations of the settlement of the 5th March, 1802; and that the respondent, the appellant, should, within one month, pay to the petitioners these sums, as also the petitioners' costs in the matter, when taxed and ascertained, and that in default thereof the lands comprised in the settlement of the 1st of August, 1776, or such of them as had not hitherto been sold, or so much thereof as should be sufficient to discharge the principal, interest, and costs decreed to the petitioners should be set up and sold. From that order Thomas Von Wilmsdorf Richards now appealed, upon the grounds that, upon the true construction of the settlement of 1776, and in the events which happened, no greater sum than 2,000*l.*, late currency, and the interest thereon, was chargeable upon the lands; because the decree of 1818 was erroneous; because that decree was also erroneous in not having given a day to show cause to the infant tenant in tail, defendant in that cause; because that decree directed a sale of the inheritance for payment of the sum of 3,000*l.*, whereas it was a charge only upon the term of 300 years; because the decree and report were not, nor was either of them, pleaded or relied on by the petitioners by way of estoppel; nor was the cause petition in this matter founded on that decree, or filed for the purpose of carrying said decree into execution, but was relied on only as evidence on behalf of the petitioners; and because the court was not bound by the report and decree.

A. Brewster, Q. C. (with him R. E. Warren, Q. C., and A. Vance, for the petitioners.—If the decree of 1818 be formal, the appellant is bound by it. He refused to file a bill of review, therefore he must be taken to have acquiesced in it: The Master of the Rolls treated the appellant with much indulgence when he gave him liberty to file a bill of review; for a bill

of review for error apparent will not lie after twenty years from the making of a decree.—*Smith v. Clay* (2 Amb. 645); *Kelly v. Lennon* (1 Jon. & Lat. 305). There is a fair presumption that some arrangement must have been made between Elizabeth Richards and her brother and sister at the time of her marriage, and her marriage settlement must have been made in conformity with it.

The Solicitor-General (with him *J. E. Walsh* and *Owen*) for the respondent and appellant.—The decree of 1818 was not pleaded by the petitioners, therefore its existence is no bar to our defence.—*Joly v. Swift* (11 Ir. Eq. 410. That decree was an erroneous decree, therefore they are not entitled to have it carried into execution.—*Hamilton v. Houghton* (2 Bligh. 169-188); *O'Connell v. M'Namara* (3 Dru. & War. 411). The decree of 1818 might have been read as evidence.—*Askew v. The Poulterers' Company* (2 Ves. S. 89); *White v. Panther* (1 Lapp. 179). This court will examine if its decrees be right, when it is called on to enforce them.—*West v. Skip* (2 Ves. Sr. 245); *Johnson v. Northley* (Chan. Prec. 134, and 2 Ves. 407); *Baker v. Child* (ib. 226). There are two errors on the face of the decree of 1818; first, no day was given to the infant tenant in tail, the respondent in that suit, to show cause. The decree was made against a person who never had the estate; for the respondent took an estate tail the moment he came into esse prior to his sister Elizabeth. This question was mooted in *Lloyd v. Johns* (9 Ves. 64. The second error was, that a creditor upon a term was made by the decree a creditor upon the inheritance. But little allusion was made to the settlement in the report, and Count Stirum, as guardian of two minors, put in an answer for both. As to the acquiescence of the appellant in the decree of 1818, he did not learn that the decree was erroneous until 1858. Under the construction of the settlement put upon it by the petitioners, they are entitled only to 1,500*l.*, and not 2,000*l.* "Youngerson or daughter" have been construed to mean "younger son, or younger daughter."—*Scarisbrick v. Eccleston* (5 Cl. & F. 398, and Lord St. Leonards' Ho. of Lds. 304). *R. B. Warren, Q.C.*, in reply, cited *Dill v. The Earl of Haddington* (8 Cl. & F. 168.)

The Lord Chancellor.—In this case I find that no formal judgment was given by his Honour the Master of the Rolls, but that he merely made the order which is the subject of this appeal. The first point to be considered is the construction of the settlement of 1776. It was contended by the counsel for the petitioners that the event in which the sum of 2,000*l.* was to be raised did not occur—viz., if there should be only one daughter, who, in consequence of there being a son, would not be entitled to the estate; and that if there had been but one daughter, she would have been entitled to take the estate and 2,000*l.* I do not think, however, the settlor contemplated that event. If we go back to the first trust declared of the term of 300 years, it is plain that unless we hold that the eldest daughter, Martha Richards, was to be excluded from sharing in the sum of 3,000*l.*, Elizabeth Richards was only entitled to 1,500*l.*, as the 3,000*l.* was to be raised and divided equally amongst the daughters, in

case there should be more than one daughter of the marriage. The only way to reconcile these diverse constructions is, to hold that Elizabeth Richards was entitled to 2,000*l.* under that settlement, as the appellant does not seek to reduce the charge below that amount. That being so, the petition in this case was filed, claiming the sum of 3,000*l.* as being due under the decree of 1818, and this court is now called upon to affirm the construction put upon the settlement of 1776 by that decree, as if we could not go behind it. I pass by that argument for the present, as the petition does not rely upon the decree as an estoppel, nor does it plead the decree; but what the petitioners rely upon is, acquiescence by the respondent and his mother for fifty years in the terms of that decree. They rely upon it, not as being a good decree, but as evidence of acquiescence. The petitioners might have filed a supplemental petition to carry out that decree, and make it binding upon the present tenant in tail of the lands; but nothing of the kind is done; they merely call the decree to their aid as showing acquiescence. Acquiescence by whom? By minors, represented by Count Stirum, a person who had adverse interests to them (but I am not to be understood as saying anything against him). But I think it would be going very far to say, that acquiescence by a minor, through a guardian who is interested adversely to him, is entitled to much weight. If any such family arrangement as that suggested by the counsel for the petitioner had ever existed, the Countess Elizabeth Stirum, who is still alive, must have been cognizant of it, yet she has not told us a word from which any assent by her sister could be proved to any such arrangement, if it existed. The petition, too, is wholly silent on that subject. There is no evidence of her assent, except the payment of interest, and that payment was made, in ignorance, under an erroneous decree, which put an erroneous construction on the settlement of 1776. The decree of 1818 was bad in law, as well as informal. I am of opinion, therefore, that the order below was incorrect, so far as it declared that 3,000*l.* was charged on the estate under the settlement of 1776.

*Declare the sum of 2,000*l.* well charged on the estate. Each party to bear his own costs up to the appeal. No costs of appeal.*

[BEFORE THE LORD CHANCELLOR].*

SPREAD V. NEWE AND ANOTHER.—Dec. 17.

Practice—Costs pending an appeal to the House of Lords.

Where the Court of Appeal in Chancery reverses a decree of the Court of Chancery, dismissing a petition with costs, it will not restrain the respondent from levying his costs, pending an appeal to the House of Lords, even upon security for them being given, save under very peculiar circumstances. The court will not regard the solvency of the parties. M'Carthy v. M'Carthy (11 Ir. Eq. 399) distinguished.

A PETITION was filed against Frederick Newe, who

* The Lord Justice of Appeal was absent from illness.

had been appointed trustees of certain lands by the will of William Spread, deceased, and Eliza O'Sullivan, an annuitant and devisee in remainder under the will. The petition sought a declaration of this court that the testator, by reason of an election to be made in his lifetime, had such an estate in certain lands as would pass by a devise under his will. By a decree of the Court of Appeal in Chancery, made on the 8th December, 1859, reversing a decree of the Court of Chancery, made 7th February, 1859, it was ordered that the petition should be dismissed with costs, to be paid by the petitioner to the respondent. In Feb. 1861, the petitioner presented a petition of appeal to the House of Lords from the decree of the Court of Appeal in Chancery. The respondents proceeded to have their costs taxed under the decree of the 8th Dec. 1859. The petitioner now moved that the said respondents should be restrained from levying the amount of the costs until the appeal to the House of Lords should be disposed of, upon the terms of the petitioner, within one month after the costs should be certified, giving security for payment with interest, or transferring stock equivalent to the amount of the costs. It was alleged by the petitioner, and denied by the respondents, that the respondents were not sufficiently solvent to answer the amount of the costs in case the decree should be reversed on the appeal. The application was first made to the Master of the Rolls, who declined to entertain the question of restraining the execution of a decree of the Court of Appeal in Chancery.

A. Brewster, Q.C. (with him *Finch White*) for the petitioner, relied on the cases of *Smith v. Clarke* (3 Dru. and War. 347, and 5 Ir. Eq. R. 426); *McCarthy v. McCarthy* (11 Ir. Eq. 399.)

Serjt. Sullivan (with him *Chas. Andrews, Q.C.*) for the respondents, referred to *Smith's Chan. Prac.* 466, *Danl. C.P.* 3rd ed. 1116; *Archer v. Hudson* (8 Beav. 321) as showing that it is the uniform practice in the Court of Chancery in England not to stay execution of a decree of dismissal with costs, or mere decree for money payments. The practice in Ireland is similar—*Blackham's Chan. Prac.* 275. As to *McCarthy v. McCarthy*, the defendants would have had difficulty in levying the costs from the plaintiffs, who had taken a vow of poverty, and were placed in a better position by getting security for the costs. The case may be different when, from the nature of the decree, there would be irreparable damage—*Walbourn v. Inghlyb* (1 M. & K. 84).

THE LORD CHANCELLOR.—This is not a case in which I can exercise the jurisdiction of this court in the manner which the petitioners desire. *McCarthy v. McCarthy* (*sup.*) was a very peculiar case; there would have been great difficulty in recovering the costs from the parties in that case, therefore that case cannot be used as a precedent for what the petitioner calls upon me to do. The case of *Archer v. Hudson* is not so fully reported as I could wish. The petitioner is sworn to be possessed of so much property, but I cannot sit here to judge of the solvency of parties. It would require a very strong case indeed to make me make the order sought by the petitioner. ~~Dismiss~~ the petition with costs.

C. Andrews, Q.C., asked for the costs of the motion in the Rolls Court.

THE LORD CHANCELLOR.—I will say nothing about those costs. I will only dismiss the petition with costs.

Court of Chancery.

Reported by Charles H. Foot, Esq., Barrister at Law.

IRVINE v. FREW AND OTHERS.—Nov. 13; Dec. 9.

Annuity—Sequestration—Right of prior incumbrancer to rents collected by a puisne sequestration judgment creditor.

By a deed dated the 4th of November, 1858, the incumbent of a parish granted an annuity to A, payable on the 1st of May and the 1st of November, charged upon the tithe rent-charge, and the rents of the glebe land; the deed contained a power of entry and distress in case any half yearly gale of the annuity should be 21 days in arrear. On foot of a judgment obtained against the incumbent in Hilary Term, 1861, a sequestration was issued against him on the 19th of April in the same year. The sequestrator collected the rents and tithe rent-charge due on the 1st of May then ensuing. Held, that the grantee of the annuity was entitled to the monies collected by the sequestrator; and that the annuitant's rights were in nowise impaired by the fact of the half yearly gale not being 21 days in arrear at the time of the filing of his cause petition.

Semble, that when "the matter of defence" relied on by a respondent, is matter of law, and not of fact, the respondent may raise his objections at the hearing of the cause, without filing an answering affidavit, pursuant to the 4th General Order, 1857.

But if the petitioner charge, that he is taken by surprise by the defence raised, he will be directed to file an answering affidavit.

THIS was a cause petition, filed on the 2nd of May last, praying that a sequestrator on foot of a judgment, might be declared puisne to the grantee of an annuity out of the same glebe lands. The following were the facts of the case. The Rev. J. Frew, being seised in possession of the rectory of Ballysounon, by deed, dated the 4th of November, 1858, in consideration of the sum of £2,000, granted to H. Irvine, the petitioner, an annuity of £202 during the grantor's life, charged upon the glebe lands and tithe rent-charge belonging to the above rectory. The deed contained a covenant of entry and distress in case the half yearly gales of the annuity should be 21 days in arrear after the gale days, which were the 1st of May and 1st of November. In addition to the creation of a term of 100 years, pursuant to a warrant of attorney, judgment was entered at the same time upon a bond for £4,000, conditioned for the punctual payment of the above annuity. By a power of attorney of the same date, the Rev. J. Frew empowered the petitioner to receive the rents of the glebe lands and the tithe rent-charge payable by the persons specified in a schedule thereto. In the month of June, 1860, the petitioner advanced a further sum of £300, and in consideration thereof a further annuity of £36 was granted to the

petitioner by endorsement upon the former deed. On and previous to the 16th of April, 1861, the petitioner served notice upon the tithe rent-charge payers named in the schedule to the power of attorney, calling on them to pay the accruing gale of tithe rent-charge to him alone. On the 19th of April, in the same year, a writ of sequestration was issued against the Rev. J. Frew on foot of a judgment obtained against him by B. Humphrey in Hilary Term, 1861. A. Humphrey was appointed sequestrator, and collected the tithe rent-charge due upon the 1st of May, 1861, out of the rectory of Ballysonnon. The petitioner charged constructive notice as well as notice in writing to the sequestrator, of the priority of his demand, and prayed that the sequestrator be removed, and that the money received by him might be handed over to the petitioner. The respondent, B. Humphrey, in his answering affidavit, demurred to the petition, inasmuch as at the time of the issuing of the writ of sequestration, the petitioner was not in possession of the glebe lands, or property affected by that writ. 2nd.—That the prayer of the petition was erroneous in asking that the annuity be declared well charged upon the glebe lands, as these lands could not be aliened or charged for more than one year, pursuant to the 14 & 15 Vict., cap. 74, s. 57; that the deed creating the annuity had not been executed as prescribed by the 14 & 15 Vict., cap. 74, s. 57; that it lay on the petitioner to show that the above glebe lands could not be built upon or used as a residence, and could be alienated.

At the first hearing of the cause, *D. McCausland, Q.C.*, (with him *J. Adair*) for the petitioner, contended that the respondents could not be heard, as they had filed no answering affidavit (4th General Order, 1857).*

A. Brewster, Q.C., (with him *F. Faulkner*) for the respondents, contended, that as the respondents relied upon the invalidity of the annuity under the 14 & 15 Vict., cap. 73, section 57 (Napier's Act), and not upon any matter of fact, they were entitled to raise their objection *ore tenus* by way of demurrer. It did not appear from the petition that a fit and convenient residence could not be built upon the glebe lands in question, consequently every alienation of them for more than one year was null and void under the above statute. The "matter of defence" mentioned in the 4th General Order of 1857, clearly refers only to a matter of fact.

His Lordship intimated that such was his view of the 4th General Order; but as the petitioner's counsel stated that they were taken by surprise by the defence raised, his Lordship allowed the case to stand over, the respondents to file an answering affidavit, raising the defence above stated.

Nov. 13.—*D. McCausland, Q.C.*, (with him *J. Adair*) for the petitioner, contended, that the sequestrator, as agent for a puisne incumbrancer, held the tithe rent-charge collected by him, in trust for the pe-

tionner, a prior incumbrancer under the annuity deed. *Boyd v. Burke* (8 Ir. E., 660); *Whitworth v. Gainsain* (3 Hare, 416); *Battersby v. Homan* (2 Ir. Chan., 232); *Morrogh v. Hoare* (5 Ir. Eq., 195); *Salt v. Donegall* (Ll. & G., temp. Sugden, 82); *Walker v. Bell* (2 Madd., 21); *Tatham v. Parker* (1 Sm. & G., 506).

A. Brewster, Q.C., (with him *F. Faulkner*) for the respondent, B. Humphrey.—The petitioner is not entitled to the tithe rent-charge already received by the sequestrator. In analogy to the case of rents collected by a receiver obtained by a puisne creditor, but extended after their collection by a prior creditor.—*Abbott v. Stratton* (9 Ir. Eq., 232); *Thomas v. Brigstocke* (4 Russ., 64); *Morrogh v. Hoare* (5 Ir. Eq., 195). The grant of the annuity is void, under 14 & 15 Vict., cap. 73, sec. 57. The annuitant may distrain when the rents of the glebe lands are in arrear twenty-one days. That period had not elapsed when this petition was filed, nor could a receiver have been appointed at that time. The power of attorney is to be construed, as if contained in the annuity deed.

Adair in reply.

His Lordship observed that his present opinion was in favour of the petitioner. He was not inclined to extend the doctrine laid down in *Abbo v. Stratton* any further; but he would reserve his judgment.

December 9.—The LORD CHANCELLOR now delivered judgment.—This case turns on a very narrow point; but, having carefully considered all the authorities bearing on the subject, I now entertain no doubt as to the justice of the petitioner's claim. What are the facts of this case? This is the case of an annuitant under a deed by which Mr. Frew assigned to the petitioner two annuities arising out of his living in the county Kildare, of which he was beneficed clerk. As a further security Mr. Frew assigned to a trustee for the petitioner the benefice itself for a term of 100 years; the deed also contained a power of attorney to the petitioner to collect the tithe rent-charge and rents from the rent-charge payers and glebe tenants. Before the first of May, 1861, the petitioner served notice upon the last-mentioned latter parties desiring them to pay to him the sum of money due by them. Subsequently to that notice, and prior to the first of May, Mr. Humphrey issued a sequestration against Mr. Frew's benefice, on foot of a judgment obtained subsequently to the grant of the annuity. That sequestration is, of course, puisne to the annuity deed. The sequestrator collected all the tithe rent-charge and rents due on the first of May, and now contends that not only is he entitled to the rents already collected, but that he is entitled to subsequent gales in priority to the annuity-creditor. But the respondent Humphrey cannot make any such case, for these rents are not the debtor's property, having been assigned to a trustee for the annuitant; and that the respondent would have no defence at law to an action by the petitioner as assignee of these rents, is clear from the case of *Birch v. Wright* (1 Term, 378.) He is in the position of a tenant after notice by the reversioner. In fact it was not disputed at the bar, but on the contrary it was admitted, that the petitioner was entitled of these rents; but it was contended that the power of the annuitant over these rents was restricted to a

* The 4th General Order, 1857, declares, That (except in the case of infants, lunatics, or persons of unsound mind), the respondent to any cause petition shall not be entitled, at the hearing thereof, to rely on any matter of defence which shall not have been stated or relied on in his or her affidavit, filed by way of answer to the petition.

power of distress in case they were in arrear for twenty-one days after the gale day. I cannot acquiesce in that view of this case. The rents and tithe rent-charge were due to Mr. Frew on the 1st of May. On that day the annuitant had a clear right to them. It is impossible that the clause giving a power of distress at the end of twenty-one days, can effect the annuitant in the least degree. It has been said that the case of *Abbott v. Stratton*, *supra*, governs this case; but I am of the contrary opinion: neither does the case of *Morrogh v. Hoare*. It is perfectly true that this court will give the preference to whatever creditor first obtains a receiver, as the reward of his diligence; but that doctrine is confined to the cases of receivers, which are distinguished from sequestrations in the cases of *Morrogh v. Hoare (sup.)* and *Walker v. Bell (sup.)*. The power of attorney given to the annuitant cannot be distinguished from the usual power given to a trustee. As to the question whether this annuity can be legally charged upon the glebe lands in question, if respondents wish it, I shall direct an inquiry as to whether a fit and convenient residence can be built upon them—otherwise I shall declare the annuity void, as far as regards the glebe lands. The decree will be the same as that in *Wise v. Beresford* (3 Dru. & War., 276).

On a subsequent day, counsel for the petitioner asked for the costs of the day, on which the respondents were directed to put in an answer. The application was refused.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS v. ARCHBOLD.

Charging order—Debtor under a decree of Court of Chancery—Common Law Procedure Act, 1853, s. 135.

A debtor under a decree of the Court of Chancery is not one whose interest in a fund in the Landed Estates Court can be charged under section 135 of the Common Law Procedure Act (Ireland) 1853.

THIS was a motion on behalf of the defendant to shew cause against a conditional order made by Mr. Justice Hayes, charging the interest of the defendant in a fund in the Landed Estates Court under the following circumstances:—By a decretal order of the Lord Chancellor, bearing date the 17th June, 1861, made in the cause petition matter of the *Attorney General* at the relation of the *Commissioners of Charitable Donations and Bequests v. Archbold and others*, it was ordered that John Archbold should within one month invest in the purchase of Government 3 per cent. stock the sum of £4,863 7s. 9d., and transfer same when so purchased with the privity of the Accountant-General to the credit of the said matter. By a further order in the same matter dated the 19th July, 1861, it was ordered that the said John Archbold should within ten days after service of the order on him pay to the Commissioners or their attorney thereto lawfully authorized the said sum of £4,863 7s. 9d. Both these

orders were duly served, but the money was not invested or paid, and the order of the 19th July, 1861 was duly registered as a money order against the said John Archbold in the office for the registration of judgments in Ireland. By an order of the 20th July, 1861, made by Judge Hargreave in the Landed Estates Court, matter of *Scully, owner; Carrigan, petitioner*, a sum of £1225 8s. 2d., portion of a sum standing to the credit of that matter, was directed to be retained to meet a claim of the said John Archbold, and the said sum now stood in that court. On the 1st October, 1861, a writ of *fi. fa.* issued against the said John Archbold, on foot of the order of the 19th July, 1861. On the 29th October, 1861, Mr. Justice Hayes, upon an application by the Commissioners of Donations and Bequests, made an order that whatever interest the said John Archbold might have in the said sum of £1225 8s. 2d., so retained as above stated to meet the claim of the said John Archbold, should stand attached to answer in part payment of the sum of £4863 7s. 9d., until further order. Against this order the said John Archbold now shewed cause, and moved that the said order should be set aside with costs, on the grounds that the decree or order of the Court of Chancery, bearing date the 19th July, 1861, was not a judgment or in the nature of a judgment within the meaning of the Common Law Procedure Act, or of any statute enabling the court to make an order charging the funds in the Landed Estates Court. *Lawless, Q.C. and Pallett* for the defendant, to shew cause.

Lefroy, Q.C. and J. B. Murphy for the Commissioners.

The arguments appear sufficiently from the judgments of the learned judges. The following cases and statutes were cited:—*Sawyer v. Norris* (10 Ir. C. L. R., 168); *Carpenter v. Thornton* (3 B & Ald., 52); *Sheehy v. The Professional Insurance Company* (3 O. B., N.S., 597); *Henderson v. Henderson* (6 Q.B., 288); statute 3 & 4 Vic., c. 105, ss. 23, 27, 29; stat. 16 & 17 Vict., c. 113, s. 127 and following sections.

LEFROY, C.J.—This is an appeal from a conditional order, made by my brother Hayes, to attach and charge a fund in the Landed Estates Court to answer a money order made by the Court of Chancery against Mr. Archbold for a sum which he was decreed to pay in that court. The attachment order now before the court was made by my brother Hayes for the purpose of having a decision upon a question which now arises in this case for the first time; for, so far as appeared before us, there is no decision upon this question. It imports us to consider the several Acts of Parliament that have been made for the purpose of giving a more effectual remedy to creditors for the recovery, by way of execution, of the funds which theretofore were not the subject-matter of execution. It involves also a consideration of the additional remedies which were provided for suitors in courts which had not theretofore a species of execution which would enable them to reach the funds, which formerly were at all times the subject of execution by a writ of *fi. fa.*, or the additional funds that were made subject to that species of execution by the late Act of Parliament. By what is called Pigot's Act (3 & 4 Vict. c. 105),

property which theretofore was not the subject of execution was brought within the scope of an execution by writ of *fi. fa.* Theretofore, property consisting of monies alone could not be taken in execution under a writ of *fi. fa.* But a party might have a right to money alone, or he might have a right to other species of property representing money, such as public funds. His money might be in the hands of trustees. He might have been the proprietor of property represented by the public funds, or by shares in public companies; but such property would not be reached by an execution. There was another defect with respect to the remedies for creditors to enforce their demands. When these demands arose in a court of equity, a court of equity had no authority to issue an execution. Well, these defects in the law were, to a certain extent, remedied by Pigot's Act. The several species of property to which I have alluded were made the subject-matter of an execution; and furthermore, courts of equity had given to them a remedy, by way of execution, to enforce their own decrees for money. They were enabled to issue a writ of *fi. fa.* or the other species of executions to which, in a court of common law, a judgment creditor had a right; and accordingly they framed and formed these different writs of execution for the purpose of carrying out their own decrees. Things remained in that state when, I suppose encouraged by the useful results of those alterations in the law, a further progress was made with respect to matters which might be made the subject of execution. Accordingly, by the 16 & 17 Vict. c. 113, a further progress was made by including other species of property, by extending, in short, the remedies against property which was a representative of money. By that Act, a person who had obtained a judgment or order for money was made liable to have that right attached by a charging order, as it was called, which might be made upon property of that description, such as moneys in the hands of a master of a court of law, or standing in the name of the Accountant-General of the Court of Chancery, (section 135). But that jurisdiction was given, for the first time, by the Common Law Procedure Act, 1853. Before, however, I come to deal with that Act I should observe that, in consequence of the former proceedings of the Legislature, every remedy, which a judgment creditor under a common law judgment had got, was by Pigot's Act given to a creditor by decree of a court of equity. In other words, *in ipso terminis*, a creditor by the decree of a court of equity was put on the footing of a judgment creditor at common law, so far, however, and these are important words to attend to, so far as came within the meaning of that Act, that is to say, so far as that Act gave a remedy against species of property which theretofore had not been liable to execution. It might, therefore, very well have been expected that, when the Legislature enlarged the species of remedy for judgment creditors at common law, it would equally have enlarged that same species of remedy on behalf of creditors under a decree of a court of equity; that, as, in the first instance, they had put creditors under decrees of a court of equity on the footing of a judgment creditor at common law in regard to all the advanced remedies by way of execution, so, when they

enhanced these remedies in favour of the latter, they would also enhance them in favour of creditors under decrees of a court of equity. *A priori*, therefore, one might have expected that that would have been the course of legislation. Furthermore, it was a very reasonable expectation to be entertained that, in construing the last Act, (16 & 17 Vict. c. 113), a very slight indication of such an intention—if by any reasonable interpretation of the language of that Act it could be worked out that the increased remedies should embrace a creditor under a decree of a court of equity—it would have been, not only a reasonable expectation, but it would have been the duty of the court to endeavour to work out that intention so indicated. However, upon a careful examination of the provisions of that Act, it is utterly impossible, consistently with the language of the several sections, which have in succession followed, the one upon the other, to carry further the advanced legislation in favour of creditors by decrees of a court of equity. It is impossible, consistently with any fair substantial, solid interpretation of the language and sections of this Act, to attain that object. It is to be regretted that either from the want of full consideration, or on account of the language of the Act being of the kind it is, that cannot be carried out. For the result of this Act plainly is nothing more than the giving to judgment creditors at common law the benefits of the advanced legislation introduced by this Act in respect of the remedy by way of execution. Now the demand upon which the Commissioners have sued in the present case is a demand under a money order of the Court of Chancery against Mr. Archbold, who has been ordered thereby to pay to them a certain sum of money. An execution has been issued thereon out of the Court of Chancery, ineffectually. They went as far as the law would allow them to go, by the use of the process of their own court, and the sheriff returned to the writ of *fi. fa.*, *nulla bona*. The only remaining effort they could make, therefore, was to endeavour to attach the money which was in the Landed Estate Court. But, as I have said, the terms of this Act do not allow a creditor under a money order of the Court of Chancery to avail himself of the remedies given by this Act which must, upon a sound interpretation of it, be confined to judgment creditors at common law. I do not go further into the several sections of the Act which demonstrate this. They have been before the court, and we have considered them and found that it would be impossible to give effect to them so as to redress the mischief which now, from the want of a remedy, this party must remain subject to. We, therefore, must allow the cause shown and discharge the conditional order.

O'BRIEN, J.—I quite concur in the judgment that this conditional order must be discharged. Mr. Lefroy, in his able argument, pressed us to sustain the order upon the construction of Pigot's Act, and upon the power, which he maintained that we have, to incorporate its provisions of the Common Law Procedure Act, 1853, from which he argued that it was the manifest intention of the Legislature to extend the remedies thereby given to creditors under decrees of the Court of Chancery. If that had been the intention of the Legislature, one section—and a very short

one—would have put the matter beyond all doubt. But while we desire to carry the remedial provisions of this Act as far as possible, there is certainly nothing in the Act to authorise us to do it. The 135th section, under which alone money can be attached, uses the phrase “such debtor,” which necessarily refers to the 132nd section, because it gives to the judgment creditor, in respect to money in the hands of trustees, the same remedy as he would have had under the 132nd section, in respect to stock in the hands of trustees. Now, the 132nd section, by using the word “aforesaid,” can only mean a judgment regularly obtained in one of the various ways sanctioned by the common law, and by the previous sections of the Act. But it does not rest even there. The section uses the words “such judgment,” referring back to the previous sections (127, 128), which manifestly refer to proceedings at common law, speaking, as they do, of the venue being laid, and allowing the writs to be directed to the sheriff of any county, and of the parties obtaining a verdict or non-suit. It is manifest, therefore, that nothing is included in them except judgments of the superior courts of common law. It is very questionable whether persons having obtained a “judgment or order” of a court of common law, can enforce it by attachment, because the remedy is given in the 129th section to the person who has obtained a “judgment or order,” and the word “order” is dropped in the 132nd section, the remedies given by which seem to apply only to persons who have obtained “judgments.” That being the case under the Act of 1853, is there anything further in the Act of 1849 (12 & 13 Vict., c. 95), to import claims of this description—namely, money orders of a court of equity, into this recent Act? Until Pigot’s Act became law, the Court of Chancery had no power to proceed by way of execution against stock. That Act gave courts of equity a power to proceed by execution against stock; and one section of it says that persons who had obtained decrees or money orders from the Court of Chancery should be deemed judgment creditors within the meaning of that Act. But it only gave the power of enforcing its own decrees by execution to the very court which made them. However, it is not necessary to decide the question, whether this court can enforce the decree of a court of equity, because the creditors who obtain such decrees are to be deemed judgment creditors only for the purposes of that Act. Then, in respect to the 12 & 13 Vict., c. 95, I pass by Mr. Palles’s answer to Mr. Lefroy—namely, that that Act related only to one particular class of judgments—those under £150. But then as to its 7th section, that could not bind the Legislature to give, until they repealed that section, to creditors by decree or money order of a court of equity, the same remedies and every remedy which might by any subsequent Act be given to judgment creditors at common law. And is it then to be said, that a court of common law has more power—and this construction of the Act would give it a greater power—to enforce the decrees of the Court of Chancery, than the Court of Chancery itself possesses? That argument does not appear to me to be well-founded; and, upon the whole, I am of opinion that this conditional order must be discharged.

HAYES, J.—When the attachment motion was made before me in Chamber, I told Mr. Lefroy that I entertained very considerable doubts of his right to the order. But as it was pressed on me that irreparable mischief might be done if I refused it, I thought it best to surrender my own opinion. Further discussion has only served to confirm my first impression. The short reasons upon which I rest my opinion are these: The 3 & 4 Vict., c. 105, s. 27, enacted that all decrees of the Court of Chancery, and money orders, should have the effect of judgments in the superior courts of common law, so as to be (*inter alia*) an actual charge on the debtor’s lands; and that the persons to whom the same should be payable should be deemed judgment creditors “within the meaning of that Act.” Having given to the courts of equity, with respect to their decrees and money orders, all the powers and remedies of a court of common law with respect to judgments, the statute proceeds, in the 29th section, specially to authorise courts of equity to frame and issue new writs of execution, so that, by the combined operation of that and the 23rd section, the suitor might have complete justice done him in the court of equity in which he had obtained his decree or money order. So things stood until the passing of the Common Law Procedure Act, 1853, the object of which was the improvement of procedure in the courts of common law. But that Act did not in anywise interfere with, affect, or come in aid of the powers and jurisdiction of a court of equity. Affecting to deal only with the party entitled or subject to execution in a court of common law, it proceeds to give to judgment creditors, properly so called, several remedies by way of execution. These are set forth in sections 127 to 135; and I find no words in those sections which would authorise us in imparting to creditors of the Court of Chancery, by decree or money order, benefits which, in my opinion, were intended only for the creditors by judgments. In fact, the Legislature seems to have excluded all that, and to have left the courts of equity precisely as they had been left by the 3 & 4 Vict., c. 105. Accordingly, when enumerating the sections of that Act which it intends to repeal, the words “save as to courts of equity” are inserted. That expression seems very pregnant to shew that courts of equity were entirely excluded from the operation of the Procedure Act, and were left with the powers previously given them to execute their own decrees and orders. Not being able to give to the word “judgment,” as used in the Common Law Procedure Act, 1853, the interpretation of “judgment, decree, or money order of the Court of Chancery,” I am of opinion that this attachment order cannot be sustained, and that the cause shewn must be allowed.

FITZGERALD, J., stated that, being himself one of the Commissioners of Charitable Donations and Bequests, he had not been present during the argument, and, of course took no part in the judgment.

[CROWN SIDE.]

IN THE MATTER OF WILLIAM JONES ARMSTRONG.
Nov. 12, 16.

Mandamus—Quarter Sessions—Indictment for libel.

The court refused to grant a writ of mandamus to justices at Quarter Sessions, commanding them to charge the grand jury with, and to try an indictment for libel.

THIS was an application on behalf of William Jones Armstrong, Esq., justice of the peace and deputy lieutenant in and for the County of Armagh, for a writ of mandamus to be directed to Hans Henry Hamilton, Esq., Q.C., Chairman of her Majesty's Court of Quarter Sessions in and for the County of Armagh, and to the others the keepers of the Queen's peace, and her Majesty's justices assigned in and throughout her Majesty's said County of Armagh, to inquire by the oath of good and lawful men of said county of all and all manner of treasons, murders, felonies, trespasses, and misdeeds, done or perpetrated in said county, and to hear and determine the matters aforesaid (treason excepted), commanding them at their next general Quarter Sessions of the peace in and for said county, to charge the good and lawful men who should be then empannelled and sworn as a grand jury, to inquire and make true presentment of certain false and malicious libels written, composed, and published in said County of Armagh by the Rev. John Quinn, of and concerning said William Jones Armstrong as is alleged, and to charge said grand jury with, and to try before them, or permit and suffer to be laid before them such bill of indictment as might be tendered to them, charging said John Quinn with composing, writing, and publishing said libels, and to inquire by them concerning the truth thereof, that the costs of the motion, writ, and mandamus, and the proceedings thereunder should be paid by said Hans Henry Hamilton, and by William Moore Millar, William Paton, Andrew Craig, Joseph Kidd, John G. Winder, John Hancock, and Hugh Boyle, esquires, the said persons aforesaid being justices assigned as aforesaid, and who, being assembled at Armagh at a general Quarter Sessions of the peace for said County on the 19th day of October last, and a grand jury being then and there empannelled and sworn to inquire as aforesaid, before said jury were discharged, were called on to charge said grand jury with, and lay before them a certain bill of indictment, charging the matters aforesaid, said bill being then and there tendered and shewn to them for the purpose, and the justices aforesaid then and there refused to do so, and to inquire by said grand jury of the truth of the matters in and by said bill alleged, contrary to common right and the general law of the land. The facts upon which the motion was grounded appeared by the affidavit of Mr. Armstrong, and were as follows. A letter was published in several newspapers in March last, charging Mr. Armstrong with oppressive conduct as a landlord towards some of his tenants. Thereupon Mr. Armstrong brought actions against the proprietors of the newspapers. These actions resulted in apologies by the proprietors,

in the payment of sums of money by them to Mr. Armstrong, and in the delivery up to him of the manuscript of the letter in question. Mr. Armstrong then having reason to believe that the letter was written by the Rev. Mr. Quinn, obtained on the 7th October, a summons against that gentleman, requiring him to appear at Petty Sessions at Armagh on the 11th of October to answer Mr. Armstrong's complaint for the composing and publishing said letter. The parties attended, and the matter having been gone into, counsel on behalf of Mr. Armstrong asked the magistrates to take the informations of certain parties who had been examined, and to bind the Rev. Mr. Quinn in his own recognizance to attend and take his trial at the ensuing Quarter Sessions at Armagh. This, Mr. Armstrong in his affidavit stated was done, in order that, as the defendant proposed to prove the truth of the libel, a trial should be had without delay, and because Mr. Armstrong believed, as he further stated in his affidavit, that serious inconvenience would result to himself and to the public from a postponement to the Assizes. The magistrates, however, declared that they would return the case for trial to the Assizes, whereupon Mr. Armstrong's counsel said that he would withdraw the case, and prefer a bill of indictment before the magistrates at the ensuing Quarter Sessions at Armagh, and ask them to lay it before the grand jury. Accordingly, at the next Quarter Sessions at Armagh, which was held by and before Hans Henry Hamilton, Esq., Q.C., chairman of Quarter Sessions, and certain other justices (being the same whose names have been already given above), counsel on behalf of Mr. Armstrong requested the said chairman and other justices to charge the grand jury with a bill of indictment, which he then tendered for the purpose to said justices, charging the said Rev. Peter Quinn with the writing, composing, and publishing the libel complained of. The chairman, in the name and presence of the other justices, refused to receive the bill and charge the grand jury therewith, and directed the acting clerk of the peace not to receive it. This occurred on the 19th of October last. Mr. Armstrong now asked for a mandamus as above stated, undertaking to prefer his bill of indictment at the next Quarter Sessions for the said County of Armagh. The notice of motion was served upon Mr. Hamilton and the other justices whose names have been already given, and against whom the costs of the motion were sought.

Armstrong, Serjeant, (with him *M. Meenan*) in support of the application, urged that the justices had full power to entertain an indictment for libel, and that the words of their commission required them to do so. They cited *Rex v. Mullaney* (6th C. & P., 96); stat. 4 & 5 Wm. 4, c. 76; *Hawkins' P. C.*, book 2, c. 1, s. 6; stat. 5 & 6 Wm. 4, c. 33; stat. 11 & 12 Vict., c. 42. *Rex v. Barker* (1st Wm. BL 352); sec. 38 of C. L. P. Act, 1856.

LEFROY, C.J.—We are all satisfied that there is so much novelty in this application, that we feel bound to consider attentively whether we should make a precedent, and whether there is a foundation for making a precedent. No case has been cited either in England or in Ireland in which such an order has been made, and it therefore becomes us to consider

very attentively before we make a precedent for the order. At present we say no more than that we wish to consider the case.

Nov. 16.—The court now delivered judgment.

LEFFROY, C.J.—This is an application which came before the court a few days ago for a conditional order for a *mandamus*, to compel the Court of Quarter Sessions of the County of Armagh to receive and entertain a bill of indictment for a libel, and to proceed to try and determine the case. This is, at all events, as we intimated at the time, a rare and novel application, and notwithstanding the light which was thrown upon the case by the industry and learning of the counsel who moved it, we are not relieved from the consideration of its being novel and rare; for not a single instance was produced, although a very wide range of knowledge was taken of a similar case having come under the view of the court, or of a case having existed, where the jurisdiction which we were called upon to exercise was asserted. But it is not necessary in this case, nor are we about to state anything upon the abstract principle, because whether or not by possibility a case may not arise in which such an application might be entertained, it is perfectly clear that in this case it cannot be entertained, and I have only to state the facts of this case to demonstrate that. In this case, then, informations were taken for libel by the magistrates at Petty Sessions, and they, in their discretion, and in the exercise of the judgment which belongs to them, offered to return them to the Assizes and then the party who claims now here withdrew, and he applied to the Quarter Sessions for that which he now applies to this court. I may observe that the Court of Quarter Sessions is not a court of appeal for this purpose from the Court of Petty Sessions. If, in the exercise of their judicial and magisterial discretion, they think it right to send informations before them to the Quarter Sessions, the Court of Quarter Sessions has no right to refuse that exercise of the magisterial discretion of the Petty Sessions. But in this case the application was made directly to the Court of Quarter Sessions. The prosecutor applied to that court for leave to send up a bill to the grand jury. The court heard the application, considered the matter, and, in the exercise of their magisterial discretion, decided that they would not entertain the jurisdiction. If they had thought fit to receive the bill, they might in their discretion have sent it for trial at the Assizes. They, however, refused to entertain the case, and then the present application was made to this court. We come now to deal with the case as it has come before us, under very peculiar circumstances. It is a case in which the magistrates having heard the application, in the exercise of their magisterial discretion declined to exercise the jurisdiction, which, it must be admitted, on the face of the authority under which they act, they possess, although, as I have already said, no instance has been shewn in which they exercised it, that, namely, of entertaining a case for libel. They, therefore, refused to entertain the case, and left the party to make the application which he has made to us. If we were now to grant this application to direct the Sessions to receive this bill, and proceed to dispose of it and try it, we should be doing an illegal act, for we

should be depriving them of a magisterial discretion which they are authorised to exercise—namely, that of sending cases of this sort to be tried at the Assizes. It would, therefore, be objectionable on that ground, and illegal to make this order, and it would be in vain to make it, for, as it must go to them subject to the exercise of their discretion, if they should even receive this bill, they have already decided that in their judgment it is not a fit and proper case for them to proceed upon, and that it is a case which they think should be tried at the Assizes. We should be doing an illegal act if we attempted to restrain the exercise of their discretion, and we should be doing a nugatory act if we thought that in the exercise of their discretion, they would not proceed to try the case. Under those circumstances we must refuse the application.

O'BRIEN, J.—I concur in the judgment of my Lord Chief Justice that the application is a novel one; but I was struck by this circumstance:—Great research has been displayed by the counsel who made the application in finding authorities on the subject; but the legal arguments which were deduced from those authorities would equally apply to cases as to which it would be impossible for us to lay down that they ought to be tried at Quarter Sessions. The words of the commission given to the justices are very ample. They include not only cases of libel, but also cases of murder; and the legal argument addressed to us upon those words would shew that a *mandamus* should issue to compel the Quarter Sessions to receive as well a bill of indictment for murder as for libel. Then no precedent has been shown for our interfering with the Quarter Sessions in a case of this description. There are many cases in which a party would have no other remedy open to him, if the Quarter Sessions refused to entertain his application, and there are cases of that kind in which this court has interfered; but this is not a case of that kind. One of the principles on which this court grants the writ of *mandamus* is, that if it is not granted, the subject is without any remedy. But here the court of preliminary investigation intimated that the case was one which ought to go to the Assizes, and the party is, therefore, not in the position of being without any other remedy than that which he would have at the Quarter Sessions. Then the Lord Chief Justice has alluded to the discretion which the magistrates at Quarter Sessions have of transmitting to the Assizes cases in which bills have been found before them. Writs of *mandamus* are not granted where they would be nugatory, or where to grant them would be interfering with the discretion of the court below. Suppose that the application had been simply for a *mandamus* to compel them to receive the case, what would be the object of a *mandamus* which would leave them to the discretion which they have already stated most strongly they would exercise in a particular way? My Lord Chief Justice has stated all the circumstances of the case, and I quite concur with him in all that he has said.

HAYES, J.—This is an application by Mr. William Jones Armstrong for a *mandamus* to the magistrates of the County of Armagh assembled at Quarter Sessions, to command them to take cognizance of a charge of libel which Mr. Armstrong professes himself ready to make before that tribunal. This I take

to be the substance, though not the exact words of the application; and as the application has at least the distinct feature of novelty, and as I have not been able to discover that such an application was ever before made, it may not be amiss to discuss it in somewhat of detail. On the 11th October in this year, Mr. Armstrong came before the magistrates at Petty Sessions, and there complained that he had been made the object of libellous attacks in newspapers, in the course of which he had been denounced as an exterminator of the people; he stated that he had discovered the author of these attacks, and prayed the magistrates to make that gentleman amenable, giving the magistrates to understand that until the prosecution should be brought to a close, he would not himself act in his position as a justice of the peace of the county. The magistrates professed themselves ready to receive depositions for the next Assizes. Mr. Armstrong said that no opportunity should be lost in bringing the matter to a determination, and therefore he insisted that the informations should be returned to the next Quarter Sessions. This the magistrates refused to do, and he withdrew, and so the proceedings at Petty Sessions were brought to a close. Then he goes to the Quarter Sessions; he produces his bill of indictment, charging the Rev. Mr. Quinn with libel, and calls upon that court to permit him, without any informations, to have the bill of indictment laid before the grand jury there, so that if the bill was found the case might be discussed. The court came to the conclusion that his application ought to be refused, and then Mr. Armstrong comes here with the present motion. A good deal of argument was expended by counsel to shew that the Court of Quarter Sessions had jurisdiction to try a case of libel. That they have legal authority to do so, is a point which has not been contradicted for the last two centuries. It was decided in Error in the case of *Rex v. Summers* (1st Lev. 139). That is still the law of Ireland, and there is no question of that. But the difficulty which Mr. Armstrong had to cope with is, to shew that the Court of Quarter Sessions, having jurisdiction, was bound to exercise it. When a charge of an indictable offence is made before justices of the peace, and it appears that the case is one which ought to be prosecuted by indictment, the law has fixed in them a discretion as to the tribunal to which they are to send it, and this discretion they are to exercise according to the true spirit of their commission; for that instrument which has been in the same form for the last two hundred and fifty years, after giving them power to inquire into a number of offences, "and to hear and determine all and singular the matters aforesaid (treason excepted), according to the laws and statutes of our kingdom of Ireland, as in the like case has been used, and ought to be done," proceeds, by way of proviso, to command them "that if a case of difficulty upon the determination of any of the premises shall happen to arise before you, or any two or more of you, then do not you, or any two or more of you, proceed to give judgment thereon, except it be in the presence of one of our justices of one or other bench, or one of the barons of our Exchequer, or one of our counsel learned in the law." The practical interpretation of this is, that all the less weighty offences are sent to the Quarter Ses-

sions, but that the more serious offences are sent to the Assizes; and notwithstanding that the stat. 1st and 2nd Ph. & Mar., c. 13 (England), and 10th Car. 1st, sess. 2, c. 18 (Irish), have directed the justices, in cases of felony, to certify the examination taken by them to the next general gaol delivery, yet in the exercise of a sound discretion the committing magistrate has been in the habit of sending the offenders, in cases of petty larcenies and small felonies, for trial to the Quarter Sessions, and of certifying the examinations thither. Dalton, in his work on Justices of the Peace, lays that down as the practice in his time, and cites the Act of 3 Henry 7, c. 3, as his authority. That Act was in force in Ireland until the passing of the statute 9th Geo. 4, c. 54, and the doctrine as stated by Clitty is that that Act orders the magistrates to bind the witnesses to appear at the next court at which the trial of the affair is to be had. I am of opinion that the magistrates had a discretion to send the case before them either to the quarter sessions or to the assizes, and taking all the circumstances into consideration, I am of opinion that the magistrates exercised their discretion soundly in not yielding to the prosecutor, and insisting that the case should go to the Assizes. But not satisfied with this determination of the Justices in Petty Sessions, Mr. Armstrong brought the matter before the Quarter Sessions, and he insists that that court was bound to take cognizance of the case by sending it to the grand jury, and his counsel insisted that if a bill were found, the case should then go before a petty jury. Now, I say that I apprehend that in insisting that for the asking the Court of Quarter Sessions was bound to accede to his request, he is wrong. The words of the commission, providing for cases of difficulty, apply as much to the justices at Quarter Sessions as to magistrates at the Petty Sessions; and this may have occurred to the magistrates that if they permitted a bill to be found, and a trial to be had without informations herein sworn, such a practice would infringe very seriously on the rights which every accused person has since the passing of the Prisoner's Counsel Act. His Lordship then referred to *King v. Wetherell* (R. & R. 381), and continued:—I am of opinion then not only that the magistrates at Quarter Sessions, like those at Petty Sessions, were at liberty, but that it was their duty to exercise their discretion, and I think the discretion was soundly and wisely exercised in the present case. Is it not then against the first principles of madamus law to accede to this application? Generally speaking the writ is granted to enforce a right or duty, when the party has no other remedy. But here the party has another remedy, and the magistrates are willing to give him the benefit of that remedy. Again, why should we grant the writ, when our doing so, though the indictment were found, could not prevent the magistrates from sending the case, as one of difficulty, to the Assizes? We are not a Court of Appeal from the Quarter Sessions; we are only an authority to make them do their duty. We are not prepared to say that they have not acted rightly in this case, and we do not think that we ought to grant even a conditional order.

FITZGERALD, J.—My Lord Chief Justice and my brothers have so exhausted the subject that I do not

profess to add anything to what they have said, especially after the very full exposition of the law by my brother Hayes. But there is one point upon which I may be permitted to say a few words. As I understand the application it was one which Mr. Armstrong claimed to have granted as a right, alleging as a matter of right that it was his client's right to present the bill of indictment at the Quarter Sessions, and that that court was bound to receive it, and that if the grand jury had found it they were deprived of any discretion, and they must go on and hear the case. That was the application, and that involves two principles, namely, that it was a matter of right in the prosecutor to have his bill received at the Quarter Sessions, and that on the bill being found the court was deprived of any discretion to refuse to try the case. I recollect asking whether in fact a more speedy trial could not take place at the assizes, even if the order sought for was made, and the answer was that the Quarter Sessions would be bound to issue a bench warrant to bring in the defendant, and then to put him on his trial. The opinion which I have arrived at is, that the court of Quarter Sessions had a discretion as to the reception of this indictment, and if that court was not vested with a judicial discretion, I cannot understand why the application was made to them at all, and why the prosecutor was not entitled to go straight to the grand jury-room, and call on the grand jury to receive the indictment without going to the court at all. Assuming the discretion to exist, I think it was wisely exercised. We are not to come to the conclusion that it was unwisely exercised, and again I agree in the proposition that if the court below had entertained the bill by sending it before the grand jury, and the grand jury had found it, still there was a discretion in the court to decline to have the case tried at sessions by a petty jury, and to transmit it to the assizes, and have it more solemnly decided there, and that upon the ground that it was a case of difficulty. It has been urged that because the chairman of the court was a Queen's Counsel, the discretion of the court was taken away. That argument comes to this absurdity, that if the chairman happened to be a stuff gown, the court over which he presided had a discretion; but, that if he happened to be a silk gown, or was made a silk gown pending the discussion of the application, the discretion was removed. Let us now see if this was a case of difficulty. During the course of the argument I asked why this gentleman was so anxious to have his case tried at the sessions, for it struck me that a person would wish to have a case like this tried in a grave and solemn manner. The answer I received was, that by this indictment the anxiety of the prosecutor was to clear his character, and to have an opportunity to try the truth of the matters alleged in the libel, which, he told us, the reverend defendant stated he was prepared to prove. Upon this arises the question, whether, having reference to the maxim which says that the greater the truth the greater is the libel, you can on an ordinary indictment for libel try the truth of the matters contained in the libel. If the real object of this gentleman had been to try the truth of these matters and clear his character, there were two courses open to him. He might have come to this court and

applied for a criminal information, and one of the advantages of that course is, that by adopting it the prosecutor has the earliest possible opportunity of coming here and, by his affidavit telling the truth and the whole truth, of showing that there was no ground for the accusation made against him in the libel. Again, he had the course open to him of bringing an action for libel, and in that action the question of the truth or falsehood of the libel might be put in issue. But when you come to discuss the question of truth on an indictment for libel, the defendant is bound to show not merely that the libel was true, but also that it was for the public advantage that the truth should be known. Let us see what are the provisions or the statute 6 & 7 Vict., c. 96, under which alone the truth of a libel can be investigated in a proceeding of this kind. They are contained in the sixth section of that Act, which enacts that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as thereafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the matters charged should be public; and that to entitle the defendant to give evidence of the truth of the matters charged as a defence to such indictment or information, it shall be necessary for the defendant in pleading to the indictment or information to allege the truth of the matters charged in the manner required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that those matters should be published, to which plea the prosecutor is to be at liberty to reply, generally denying the whole thereof. That is not all. If after the plea the defendant shall be convicted on such indictment or information, it shall be competent to the court in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it. Let us now suppose that the object of having this case tried at the sessions was to have the truth or falsity of the libel investigated at the earliest opportunity. Can anyone hearing the provisions of that statute read, under which alone the truth of the libel can be investigated, fail to see that this presented a case of difficulty which was not fit to be tried at Quarter Sessions? Why, you have a course of pleading marked out by the statute of the nicest and most difficult description; and it is said that the Court of Quarter Sessions is to put in motion this complicated system of practice, first to make the defendant amenable by a bench warrant, then it was to rule him to plead, and finally, if there was a conviction, to determine whether the defendant's guilt was aggravated or mitigated by the plea and the evidence. All this is to be done, and with all this to be done it is said that the case involving it all is one fit to be tried at Quarter Sessions. It is plain that the desire to have the truth speedily investigated is not the true motive in this case. What the motive was it is not for us to consider. We cannot say that the discretion of the justices was unsoundly exercised, but we can say that if they had entertained the case it is one which would

perhaps have been removed from their jurisdiction by *certiorari*. In conclusion, I have only to say that I concur in the judgment of my brother Hayes, and that it would be a perfect de'usion to send the case to the Quarter Sessions with a view of having a speedy decision on it, as no trial could take place there, at least until the April Sessions. *Rule refused.*

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

GARDINER v. GARDINER.—Nov. 5.

Covenant by assignees—Creditors.

A covenant by the assignee of a term of years to pay the rent reserved in the original lease, and to indemnify the assignor against its other covenants, does not amount to a consideration in law which will support the assignment against creditors, and exclude the operation of the statute against Fraudulent Conveyances (10 Chas. 1, sess. 2, c. 3.)

FRANCIS GARDINER being possessed of interests in certain lands for long terms of years, under leases bearing date respectively 1810, 1810, and 1849, (and having sublet the said lands) by deed of January, 1857, conveyed his reversion in the same to his son Matthew Gardiner, in consideration of the love and affection which he bore to the said Matthew Gardiner, and in consideration of ten shillings. The assignment recited the three deeds of 1810 and 1849, and contained a covenant by Matthew Gardiner to pay the rents reserved and keep the covenants contained in the said three leases. In the year 1860 Francis Gardiner executed another assignment of the same interests he had already conveyed to his son Matthew Gardiner. The plaintiff claimed under the conveyance of January, 1857; the defendant under that of 1860. This case came before the court upon demurrer and cross-demurrer, and upon pleadings of a protracted and complicated character, but the material question in dispute was this: whether the covenant to indemnify by Matthew Gardiner in the conveyance of January, 1857, could be pleaded as a legal consideration sufficient to support the deed against creditors, and exclude the operation of the statute against Fraudulent Conveyances.

Serjeant Armstrong (with him *Palles*) for the plaintiff.—If the grant was the consideration for the covenants, the covenants must be the consideration for the grant. The burden taken with the property is a consideration. It was so held in *Cheale v. Kenworth* (3 De G. & Jones, 27), where an agreement to accept a transfer of railway shares on which nothing had been paid was denied to be *nudum pactum*, and Lord Chelmsford, in giving judgment, said, that it had been objected to decreeing performance that it would be creating a consideration for a transfer out of part of the thing itself, which was the subject-matter of the gift, and that the consideration must be something *dehors* the subject-matter of the contract, and adds, "I cannot, however, say that I perfectly understand this argument," and he decreed specific performance of the agreement. In *Moore v. Crofton* (3 Jones & La Touche, 438) the continuance of the rent which was reserved by the former lease was held a valuable

consideration for the promise to grant the lease in reversion. The agreement for a lease had, in this case, been made between consins, and Lord Chancellor Brady said, the court was not to shut its eyes to the fact that a near relationship existed between the parties, and although it would not execute a merely voluntary contract, yet it would execute one for valuable consideration, and would not weigh in very nice scales the amount of the consideration where it had been reduced fairly by reason of the relationship of the parties. *Scot v. Bell* (2 Levinz. 70) is an authority to show that the court will gather a consideration from the instrument though it be not expressed in the consideration clauses. To the same effect is *Fitzmaurice v. Sadleir* (9 Ir. Eq. R. 595); also *Blake v. French* (5 Ir. Chan. R. 246); *Thomas v. Thomas* (2 Q. B. 851). The covenant to pay rent in an ordinary lease makes the lessee a purchaser for value. If a father conveyed to his son, in consideration of love and affection, an estate subject to a small quit rent, and the son covenanted to pay the quit rent, a court of equity would compel specific performance of the covenant.

Heron, Q.C. (with him *Phillips*) for the defendant.—It has never been decided that a covenant to indemnify constitutes, by itself, a sufficient consideration, irrespective of the value of the premises. There could, in that case, be no such thing as a voluntary conveyance. No amount of consideration, however small, could be disputed, but it must be expressed to be the consideration. A court of equity will compel the insertion of a covenant to indemnify on the part of a lessee, and it does so on the principle, *qui commodum sentit onus sentire debet*—*Staines v. Morris* (1 Ves. & Beames, 8); *Platt on Covenants*, pp. 177, 178; 7 Bythewood's Conveyancing, 487. The case of *Thomas v. Thomas* does not apply here; there there was something else stipulated besides the payment of the rent. In fact, there is little or no land in Ireland which is not held under some rent—quit rent, for example.

Nov. 25.—MONAHAN, C.J.—I regret that this case is so framed upon the pleadings that ultimately it may not be disposed of on the present question. It comes before us upon demurrer by the defendant to the plaintiff's replications, and upon cross-demurrers which include other questions, but the substantial one turns upon the covenant to indemnify contained in the assignment of January, 1857. Upon the merits the case amounts to this: a party possessed for a long term of years makes a lease reserving the rent of £200 a year, and then assigns his reversion to his son in consideration of natural love and affection, and his conveyance contains a covenant by the son to indemnify the father against the rent reserved in the original lease, and against its other covenants. Does this covenant to indemnify constitute a valuable consideration so as to prevent the statute against Fraudulent Conveyances (10 Chas. 1, s. 2, c. 3) from applying? *Burnett v. Lynch* (5 Barn. & Cres. 589) decided that if premises had been assigned by a deed poll which was not executed by the assignee, an action would lie against the assignee for not performing the covenants in the deed. This decision has been followed in a case which was argued by myself, but which I cannot find. Premises had been assigned, and by my advice an action was

brought against the assignee for money paid. In the light of the decision in *Staines v. Morris* we think the covenant before us was nothing more than the assignee was bound to enter into. Does this covenant, then, make a valuable consideration? The point has not been precisely decided by any case; but *Thomas v. Thomas* seems to come near doing so. It differs, however, from the present. In giving judgment, Lord Denman says, "the stipulation for the payment of the rent is not a mere proviso, but an express agreement," and adds, "the obligation to repair is one which might impose charges heavier than the value of the life estate." *Thomas v. Thomas* is not an authority to make the covenant before us a valuable consideration, because in it the rent was reserved in favour of the signor personally; it was not an incident of the assignment. If the views of the plaintiff's counsel were to govern us here, there could then be no assignment of fee-farm tenancies tangible by the statute against Fraudulent Conveyances. We are not deciding that such a covenant might not be a consideration in point of fact if submitted to a jury, but it does not so appear upon the pleadings. We do decide that it is not a consideration in law, and therefore that, upon the merits, judgment must be given for the defendant.

CHRISTIAN, J.—The ground upon which Lord Chelmsford reversed the decision of the Master of the Rolls in *Cheale v. Kenworth* was this, that the alleged consideration had been made matter of express contract. The covenant in this instance, similarly, might be held a valuable consideration if the undertaking to indemnify was matter of express contract.

BALL, J., said he had been presiding at the Commission when the case was argued.

KEOGH, J., was absent, but had authorised MONAHAN, C.J., to express his concurrence.

Judgment for the defendant.

RYAN v. REYNOLDS.—Nov. 7.

Practice—Garnishee Order.

Where a garnishee order has been obtained upon a judgment entered on a bond, which is not an ordinary pecuniary bond, and its nature withheld from the judge at the time, the court will set aside the order.

THE plaintiff had obtained from a judge in chamber an order attaching a debt due to the defendant by one Mensell Worrall, to answer his judgment for £100, upon which he alleged in his affidavit there was then due to him £32.

DOWSE for the defendant Edward Reynolds showed cause why the court should set aside the order. By the affidavit of the latter it appears that the debt sought to be made available is a sum of £36, which the Insolvent Court had, in the matter of the said Edward Reynolds, ordered to be paid to him by the garnishee, Mensell Worrall, being the amount of a taxed bill of costs, and due to Reynolds for work and labour as an attorney. This fact was not stated in the plaintiff's affidavit upon which he got the order. The defendant's affidavit further alleges that the bond on which the plaintiff entered judgment was in the

condition of insuring his, the defendant's life for a certain sum; that the insurance was accordingly effected, and the plaintiff apprized of it; that a defeasance had been promised by the plaintiff and never given; that subsequently an offer was made to the plaintiff to sign a proposal on the defendant's life, which he refused to do, and, in reply, wrote that he had a bond and warrant, and must have the security of the defendant's son. I admit there is some dispute as to whether or not the letter of defeasance was agreed to be given before any payments should be made in respect of the policy of insurance. The money is now in the hands of the Insolvent Court, and, I submit, is incapable of being attached by a garnishee order, because it is a sum of money payable under an order of a court. *Grant v. Haending* (4 Darn. & East. Term R., 313, note) is an authority to this effect. It is laid down in Chitty's *Archbold's Practice*, p. 670, that to entitle a plaintiff to a garnishee order he must be in a position to issue execution, and that to sue on his judgment in the county court is sufficient to prevent his obtaining it. A material suppression before the judge in chamber will alone induce the court to discharge the order. If for any reason a court of law would set aside this judgment, then, I contend, this attaching order cannot be sustained.

Sidney for the plaintiff, argued that the promise to give a letter of defeasance was a subsequent and independent bargain.

THE COURT.—We must set aside this order with costs on the ground that the application to the judge in chamber should never have been made, because this was not an ordinary pecuniary bond on which the plaintiff entered judgment, and on the ground that material facts were suppressed from the judge at the time.

Order set aside with costs.

COPLAND v. ARMSTRONG.—Jan. 13.

Practice—Summary Bills of Exchange Act—Costs of action brought to recover less than £20.

The 97th section of the *Common Law Procedure Act, 1856*, will apply to actions of contract brought under the *Summary Bills of Exchange Act, 24 & 25 Vict., c. 43*, so as to deprive a plaintiff of costs when the sum recovered is less than £20.

Money paid within six days from the service of a summons and plaint issued under the *Summary Bills of Exchange Act* is money "recovered" within the meaning of the 97th Section of the *Common Law Procedure Act, 1856*.

THE plaintiff was the public officer of the Royal Bank of Ireland. The defendant was sued as acceptor of a bill of exchange for a smaller sum than £20. The summons and plaint was issued under the recent *Summary Bills of Exchange Act, 24 & 25 Vict., c. 43*, and contained the notice given in the schedule to that Act. After its service and within six days the defendant paid the amount of the bill, and was asked

for £1 5s., the usual costs in such cases. He paid this sum under protest.

Henry Fitzgibbon for the defendant, applied to the court for an order, that the plaintiff refund to the defendant the sum of £1 5s., paid under protest. The defendant had made an affidavit, detailing the facts as given above, and adding that 10s. 6d. of the sum paid had been claimed as the costs of a preliminary letter written by the attorney, which letter was not written, because, as the plaintiff alleged, the defendant had previously stated his dislike to receiving attorneys' letters in such cases. The affidavit further stated that the business offices of the plaintiff and defendant were both within the city, and their domiciles both within the county of Dublin. The Summary Bills of Exchange Act was passed to facilitate the recovery of debts due to the holders of dishonored bills, but there is nothing which makes it imperative on a plaintiff to proceed under it. The first section enacts that "All actions upon bills of exchange or promissory notes commenced, &c., may, in case the plaintiff shall desire to proceed under this Act be commenced," &c. The sixth section incorporates with this act the two Common Law Procedure Acts, and all rules made under or by virtue of them. The ninety-seventh section of the Common Law Procedure Act, 1856, expressly deprives a plaintiff of costs in an action of contract, where the sum recovered is less than £20. That section must govern actions brought under the Summary Bills of Exchange Act. The plaintiff's proper course was by Civil Bill; or if he chose to come to the superior courts, he did it at the risk of losing his costs by the contingencies specified in the ninety-seventh section. He cannot have them unless a judge certifies for them.—Counsel was proceeding to quote from *Wilson v. Keogh* (9 Ir. Com. Law Rep., App. xlviii), when he was interrupted by *Christian, J.*, who said, "That case is quite misreported; I have a distinct recollection of it, and I remember my Lord Chief Justice saying, 'he still entertained great doubts, but would yield to the opinion of the other members of the court.'"

Exham for the plaintiff.—The service of a summons and plaint appears a summary step to take in the first instance, but the defendant was himself the cause of this, as he objected to receiving attorneys' letters. There is a material question here. [*Mona-ham, C. J.*—The material question is whether you are to keep this sum of £1 5s.] By the Schedule of Fees in such cases, a plaintiff is entitled to charge 10s. 6d. for an attorney's letter. [*Keogh, J.*—Certainly not before action brought.] The ninety-seventh section of the Common Law Procedure Act, 1856, concludes by saying that no suggestion need be entered to deprive the plaintiff of his costs, showing that it contemplated a state of things in which the plaintiff should be in motion. Here it is the defendant who moves. There are two distinct grounds on which I claim the right to retain this sum. The fifth section of the Summary Bills of Exchange Act, gives the expenses of noting to the plaintiff. It is the better opinion, that ordinarily the expenses of noting cannot be recovered.—*Byles on Bills*, last ed., p. 223. Therefore, he recovers here what he could

not recover in the Civil Bill Court; and that is an answer to the defendant's argument, that the proper process was by Civil Bill. The legislature must have intended otherwise, else, why did they give this additional power? By the ninety-seventh section, the judge is to certify that the case was properly brought in the superior court, though brought for less than £20, and here he could do so; for the expenses of noting can only be recovered thus. But, secondly, this ninety-seventh section speaks of sums recovered under £20. The amount of this Bill of Exchange was not recovered at all within the meaning of that section. Let me refer you to the case of *Chambers v. Wiles* (1 Jurist, N. S., 475). That was an action brought in one of the Superior Courts in England for a sum exceeding £20, and the defendant paid £7 1s. into court, and the plaintiff took it out in full satisfaction of his claim, and on an argument whether he was entitled to costs, *Coleridge, J.* said—"The 11th section of the 13th & 14th Vict. c. 61, says that if in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding £20, the plaintiff shall have judgment to recover such sum only and no costs. And if the learned judges had held that in this case, within the meaning of the 11th section, the plaintiff had recovered, this would have been within that section; but comparing the language used in the 11th section with the language used in the 12th and 13th, they were of opinion that taking the money out of court was not a recovery within the meaning of the Act of Parliament. If it stood only on the authority of those four judges, sitting here alone, I should feel bound so to determine; but I am of opinion, independently of that, that they have come to the right conclusion, and that, upon the whole, a different construction might lead to mischievous consequences." There is no judgment here, and the costs paid by the defendant may be looked on as a premium on exemption from that terrible black list. [*Keogh, J.*—Do the words "or in case there shall be no trial," which occur in the ninety-seventh section of the Irish Act, occur in the English Act quoted by *Coleridge, J.*?] I admit they do not. True, there is the notice on this summons and plaint given by the Summary Bills of Exchange Act in its schedule; but there is also the notice authorized by the order of the 22nd of January, 1856, which tells the defendant that if the amount sought to be recovered be settled within six days, the costs shall be as follows—if settled by a payment of under £20, and above £5, £1 5s. The Common Law Procedure Acts, and the rules under them, are, as has been alleged on the other side, incorporated with the Summary Bills of Exchange Act. This is one of them—this rule which entitles the plaintiff to £1 5s., the sum paid in this instance. [*Keogh, J.*—If there were a judgment by default, the plaintiff could recover no costs in this case.] I repeat that the notice fixing the costs of settlement, is a notice authorized by the rule of the judges. Why is it there? Is it to mislead the parties? The plaintiff could not proceed under the Summary Bills of Exchange Act in the Civil Bill Court. [*Keogh, J.*—You might as well say that previously to its being passed, he could not

have proceeded in the Civil Bill Court by a summons and plaint.]

MONAHAN, C.J.—We shall not allow this case to stand over, because we entertain not a shadow of doubt but that the ninety-seventh section of the Common Law Procedure Act, 1856, must be incorporated with the Summary Bills of Exchange Act; and therefore the plaintiff must repay to the defendant this sum of £1 5s., and must pay the costs of this motion.

Rule accordingly.

Court of Exchequer.

[Reported by I. S. Heazle, Esq., Barrister-at-Law.]

FLEMING v. SMITH.

Trespass quare clausum fregit—Plea—Felony—Replication—Remission—Demurrer—5th Geo. 4, ch. 84, sec. 26.

In an action of trespass quare clausum fregit, a plea that before the cause of action arose, plaintiff was convicted of felony and sentenced to six years' penal servitude is a good plea in bar of the action. Also where the cause of action arose after conviction, a replication of remission in answer to a plea of felony pleaded to a demand for a liquidated debt is not sufficient to enable plaintiff to maintain his action under the 5th Geo. 4, ch. 84, sec. 26.

THIS was an action for trespass and for £26 money had and received. The summons and plaint contained five counts: that on a certain day before the commencement of this action to wit, the 14th of July, 1856, defendant, without the consent and against the will of the plaintiff did wrongfully enter upon certain lands held by the plaintiff as tenant to defendant, to wit, part of the lands of Castleraghan, in the county Cavan, and evicted plaintiff from the possession, use, and occupation thereof, and kept the plaintiff so evicted to plaintiff's damage of £80. That defendant broke and entered certain lands of plaintiff, to wit, part of the lands of Castleraghan, in the county of Cavan to plaintiff's damage of £80. Said plaintiff complains that the defendant is indebted to plaintiff in the sum of £26 payable to plaintiff by the defendant for money had and received for the use of the plaintiff. For money paid by plaintiff for defendant at his request. For money found to be due on an account stated. To this defendant pleaded as to the first count, a traverse, leave, and licence, and a traverse of plaintiff's possession at the time of committing the alleged grievances. As to the second count similarly a traverse, leave, and licence, and a traverse of plaintiff's possession. And for a further defence to the first and second counts, defendant by leave of the court said, that at the Commission of Oyer and Terminer and General Gaol Delivery, held at Trim in and for the county of Meath to wit, on the 26th February, 1856, by the Right Honorable T. Lefroy, then being Chief Justice of her Majesty's Court of Queen's Bench in Ireland, and the Right Honorable J. H. Monahan, then being Chief Justice of her Majesty's Court of Common Pleas in Ireland, Lefroy and J. H. Monahan, then and there

being justices of our Lady the Queen, assigned to preside at and hold the said commission and to deliver the said gaol of the persons therein being, the jurors of our said Lady the Queen, then and there being sworn and charged to inquire for our said Lady the Queen and the body of said county of Meath, did upon their oaths, present that the plaintiff and one T. Fleming on the 24th day of January, 1856, feloniously did steal, take, and lead away one colt, of the goods and chattels of one Edward Murphy, against the form of the statute in such case made and provided, upon which said indictment plaintiff was then and there arraigned and tried by a jury of said county and was convicted, and he was sentenced to six years' penal servitude, and alleged that the grievances complained of in said first count and the trespass complained of in the second count were committed after the conviction and before he had endured the punishment, and that by reason of said conviction, the rights of action were forfeited to the Queen. Defendant further traversed the third, fourth, and fifth counts, and further pleaded the conviction. The defence was filed the 21st of June, 1861, and plaintiff on the following 26th of June filed a replication, viz., that the felony was not punishable with death, and that plaintiff before the commencement of this action endured the punishment adjudged for the same in this, to wit, that after sentence pronounced and before it expired, to wit, on the 7th January, 1861, the Lords Justices of Ireland according to law and the custom of the realm commuted said sentence and punishment, and that the plaintiff has, therefore, endured the full term. Plaintiff replied the same to the additional plea of conviction to the third, fourth, and fifth counts. To this replication defendant demurred, because it did not show restitution of the rights by the crown to the plaintiff; secondly, because these rights having been vested in the Queen were not restored by reason of plaintiff's having endured the punishment; thirdly, because the rights were not restored; fourthly, because the replication was uncertain; and fifthly, because it was bad in substance. The points submitted to the court were, that it did not appear by the replication that there was any restoration by the Crown of the right of action in respect of the matters complained of, after the same had been forfeited by reason of the plaintiff's conviction for felony, and before the commencement of his suit. Secondly, that the said rights of action having been forfeited as aforesaid, were not restored to the plaintiff when he endured or by reason of his having endured the punishment to which he was adjudged for felony. Thirdly, that the said rights of action having been forfeited as aforesaid, were not restored to plaintiff when he endured or by reason of his having endured the commuted punishment in the replication mentioned.

Brooke, Q.C., (with him *Lowry*), for the defendant.—Transportation does not mean the conveying the felon to the place of transportation merely, but also his remaining there during the term of transportation. A felon attainted is not restored to his civil rights till the term expires. By attainder, all personal property and rights of action in respect of property accruing to an attainted felon before or after

attainder are vested in the Crown; and therefore, attainder may be well pleaded in bar to an action, viz., on a bill of exchange endorsed to plaintiff after attainder. *Bullock v. Dodds* (2nd B. & Ald. 258); *Hawkins Pl. of the Cr.*, Book 2, ch. 49, sec. 9; *Bracton*, Book 3, ch. 14, sec. 12; *Roberts v. Walker* (1 Russ. & Mylne, 752); where a legatee was convicted of felony and suffered the punishment before the legacy was to vest in him, heid entitled thereto, under 9th Geo. 4, ch. 32, sec. 3. *Stokes v. Holden* (1st Keene, 145). *Toomes v. Etherington* (1st Saunders, 353). *Doe v. Evans* (5 B. and C. 584); the replication here is bad, because there was no restitution of civil rights by the Crown. Counsel further referred to *Stannuford's Pleas of the Crown*, B. 3, p. 185.

Heron, Q.C., (with him *Boston*), *contra* for plaintiff.—A debt due by specialty is forfeited by outlawry or attainder, but unliquidated demands are not. *Batty v. Fay* (Irish Term, Rep., 511). Outlawry is pleadable only in abatement, where the damages are uncertain. *Comyn's Dig.*, tit. Abatement, E. 2., and in bar where the cause of action is forfeited by the outlawry, *Co. Litt.* 128, b. By the 9th Geo. 4, ch. 32, sec. 3, and 9th Geo. 4, ch. 54, sec. 33, the commutation of the sentence entitles plaintiff to all the rights of a pardon under the great seal. A pardon under the sign manual has not that effect. Felons whose sentences have been remitted by the Governor of the Penal Colony, who have subsequently acquired property by their own industry or otherwise, are protected by 5th Geo. 4, ch. 84, sec. 26. The latter statutes are the 16th & 17th Vic. ch. 99, & 20th & 21st Vic. ch. 3, sects. 3 & 6; these statutes *mutatis mutandis* keep alive the operation of the 5th Geo. 4th, and give a remission of punishment, the effect of enabling a plaintiff to maintain an action for damage to property. Where a convict receives a conditional free pardon, and subsequently becomes entitled as one of a class not previously ascertainable to a share of personality, under a will made before conviction, he is entitled as against the Crown to the share—*Gough v. Davies* (2nd Kay. & Johnson, 622).

PER CURIAM.—This action was instituted to recover damages from the defendant for trespass committed by him in July, 1856, in entering and evicting plaintiff from the lands of Castleraghan, in the county of Cavan. The two first counts in the summons and plaint were for trespass *quare clausum fregit*; the first count alleged the trespass to have been committed on land held by plaintiff as tenant of defendant; the second count was for breaking and entering same, and the three following were the usual money counts, (the court here stated the pleadings which are given above). Respecting the replication to the two first counts, they are both in trespass, *quare clausum fregit*, and they appear to be within the principle of the authorities, some of which were referred to at the bar, and in none of which is the law more clearly laid down than in 1st Co. Litt., 128, b. "If the ground," he says, "or cause of the action be forfeited by the outlawry, then may the outlawry be pleaded in bar of the action; as in an action of debt detainue, &c. But in real actions or in personal, where damages be uncertain (as in trespass

of battery, of goods, of breaking his close, and the like), and are not fortified by the outlawry, there the outlawry must be pleaded in abatement. That doctrine is adopted in *Comyn's Dig.*, Abatement, E. 2. In *Lutwyche*, part 2, 1510, in the case of *Clerke and wife*, against *Annus Scroggs*, executrix of *Sir William Scroggs*, which was an action for breach of covenant in an indenture, outlawry of the plaintiff was pleaded in bar to the whole declaration; plaintiffs counsel took exception to this plea, on the ground that the damages to be recovered for breach in not repairing the premises were uncertain. On the other side, it was said that the rent reserved was forfeited to the King by plaintiff's outlawry; the court, however, held, that the plea was bad as to part, and so as to the whole. In that case they take notice of *Webb & Moore*, 2nd Ven., and said that in that the duty was the foundation of the action, and the Lord Chancellor in the case in *Irish Term*, Rep. 514, takes a distinction between actions in contract, though sounding in damages and actions founded on a mere personal injury. As to these two counts, therefore, defendant is entitled to our judgment. As to the other three, the question turns on the construction of the Act of Parliament for the relief of convicts in Australia. Although this party was convicted in Ireland and sentenced to six years' penal servitude, and part of the sentence was remitted, he is within the provisions of the former Act of Parliament. Now, the former Act of Parliament, the 5th Geo. 4th, ch. 84, sec. 26, recites that "It often happens that felons, under sentence or order of transportation in New-South Wales and the island adjacent, have received from the Governor or Lieutenant-Governor thereof, remissions, either absolute or conditional of the whole or some part of the term of their transportation, and have by their industry acquired property, in the enjoyment whereof it is expedient to protect them, and the like may happen in future in the same colony, and in others to which felons may be transported under this Act." It then provides that it may be lawful for a felon under sentence of transportation, who has received remission from the governor or lieutenant-governor of New South Wales, or from the governor or lieutenant-governor of any other colony authorised to grant the same, while such felon shall reside in a place where he lawfully may, &c., to maintain any action or suit for the recovery of any property, real, personal, or mixed, acquired by such felon since his or her conviction, and for any damages or injury sustained by such felon since his or her conviction, not only in the courts of the colony where such felon may lawfully reside, but also in the courts of this kingdom, and of all other his Majesty's dominions, and if the defendant shall plead the conviction, the plaintiff may reply the remission, and have judgment. Now, it is argued for the plaintiff that the chose in action was forfeited to the Crown, but that by this Act of Parliament it is divested out of the Crown, and therefore he is entitled to sue. In the first place, see whether the words carry the application of the statute the way the plaintiff claims; it is that where a convict is sentenced to transportation, and shall have received remission, such a person may maintain an action for any property acquired since his

conviction. No property, such as a chose in action, could have been acquired after his conviction, but here the cause of action arose subsequent to the conviction and before the remission; there is not acquisition under this statute, nor damage or injury. Damage can be held to arise on account of money paid or received, but putting aside verbal distinctions, what is the object of the Act? To encourage industry, that when they are permitted to act for themselves they may be able to acquire property. There is a very old rule of construing these Acts of Parliament, viz., the Crown must be treated as interested, unless it appears otherwise by necessary implication. Now, consider whether there is anything in the section of the Act of Parliament to force on us the case of the defendant. It is for the recovery of any property acquired since conviction by the person to whom the remission has been granted: he must come within the description of one who has been convicted, received remission, and acquired the property subsequent to the remission. But if the case is doubtful, we must consider the reference to the interests of the Crown, where they may most seriously affect the subject. By the forfeiture before remission the chose in action was vested in the Crown; the Crown may have received it, and may have been paid. Is the plaintiff to bring an action against the person who has already paid the Crown? If the Crown gave the chose in action to the person from whom this felon stole the property, if it was sued for by the grantee of the Crown according to the plaintiff's argument, the felon, after remission of his sentence, might have brought his action against the grantee, and recovered from the person who was thus indemnified by the Crown. We must, therefore, hold, that here the plaintiff is not entitled to sue on the grounds on which he relies in his replication.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

IN THE GOODS OF MARY FITZPATRICK, WIDOW—Jan. 13

Assignment of administration bond to a petitioner in Chancery—Sanction of Master necessary—Or consent of all parties interested.

The court will not, without the sanction of the Master in Chancery, or the consent of the several parties interested in the fund, order an assignment of an administration bond to a person who is a petitioner in a petition in Chancery, and also entitled to a share of the assets of the deceased, the petition being for the administration of such assets, and the respondent being the administrator, and a final order having found a sum due by him which could not otherwise be made available.

Doctor Gibbon, on behalf of John Ryan, moved that the bond executed by Wm. Wall, the administrator and his sureties, and dated the 9th June, 1858, in the district registry at Kilkenny, should be assigned to the said John Ryan, in order to put the same in suit against the sureties, pursuant to the 88th section of the Probate Act, 20 & 21 Vict., c. 79. It appeared from the affidavit of the solicitor for the ap-

plicant that a petition under the 15th section of the Chancery Regulation Act, to administer the assets of Mary Fitzpatrick, had been filed in Chancery by Ryan against the administrator, in which a final order, dated the 4th March, 1861, had been made by Master Brooke, whereby he found that the sum of £134 10s. 3d. was still due by the respondent as such administrator, and he ordered that the sum of £100, part thereof should be forthwith lodged by him in court. The debts due by the deceased, it appeared, were all paid, and the remaining funds were divisible amongst the petitioner and the other next of kin of the said deceased. No application had been made to the Master for his direction to make the present application, but it was contended that it was the duty of the petitioner to endeavour to realize the assets for the parties entitled, and if the bond were assigned to him, he would be a trustee of the money recovered, and bound to lodge the money recovered in court.

KEATINGE, J.—If I order an assignment of this bond to the applicant, he will be legally entitled to receive the entire amount of it, though he is himself only entitled to a portion of it. Am I to do that without the sanction of the Master, who perhaps would require (as in the case of receivers) security for the due application of the money recovered? You must either get the sanction of the Master, or the consent of all the other persons who are interested in the assets, before I make the order.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., Barrister-at-Law, and H. Fawcett, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF JOHN O'CALLAGHAN, OWNER, JAS. REEVES AND WIFE, PETITIONER.

Solicitor having carriage of the proceedings—Solicitor for purchaser—Compensation.

The solicitor having the carriage of the proceedings cannot act as solicitor for the purchaser in a claim for compensation against the funds, because his duty in the one capacity is inconsistent with his duty in the other. As solicitor having the carriage of the proceedings, it is his duty to protect the estate from claims to compensation, and all similar demands, and consequently he cannot be allowed to make or support such claims.

In this matter a motion for compensation was made by the purchaser on the ground that certain trees upon the lands purchased had been cut down immediately before the sale. The trees were felled by one of the tenants on the estate after the purchaser had viewed the lands, but before the sale. The purchaser made a case that these trees surrounded and formed a kind of shelter to a house upon the estate; and he valued the injury sustained by reason of the trees being cut at £150. But it appeared from the evidence that the house was, in fact, merely a farm house, and that the trees cut, eighteen in number, did not serve any useful purpose, and accordingly the injury sustained was trifling. This motion was brought forward by

the solicitor having the carriage of the proceedings, though not in that capacity, but as solicitor for the purchaser.

Mr. Brereton for the purchaser.

Mr. Flanagan for the owner.

JUDGE HARGREAVE in ruling the motion said.—The purchaser has reason to complain of any meddling with or alteration of the property, however trifling, pending the sale, and he is entitled to some compensation; but the injury in this case was so trivial that the difficulty is to ascertain whether it was sufficient to warrant a motion for compensation. And this clearly shews that there has been some miscarriage in this case. The notice of motion, I perceive, is served on behalf of the purchaser by the solicitor who has the carriage of the proceedings in the matter. This is undoubtedly contrary to the practice of the court. The solicitor who has the carriage of the proceedings has no right to accept the trust of solicitor for the purchaser; his duty in one capacity is wholly inconsistent with his duty in the other. As solicitor having the carriage of the proceedings, it is primarily his duty to investigate all claims to compensation, and to protect the estate from demands of this nature. In fact, this is so much his duty, that the court will not allow any other party to assume it or to intervene, without obtaining the leave of the court. If the solicitor having the carriage of the proceedings had done his duty in this case, this claim for compensation would have been amicably and easily settled. The solicitor would have investigated the claim, and, with the sanction of the court, offered a small sum for compensation, which would most probably have been readily accepted, and the estate not burdened with the costs of a compensation motion. [*The Solicitor having the carriage of the proceedings.*—I did not think that I was at all neglecting my duty in bringing forward this motion. I looked upon my duties as solicitor having the carriage of the proceedings as virtually discharged and at an end. The final schedule has been settled, and the fund which remains in court is the surplus subject only to the claims of certain tenants and the annuitant.] I certainly cannot look upon this case as closed yet; the duties of the solicitor having the carriage of the proceedings cannot be regarded as altogether ceasing until the matter is finally wound up. The order I must make on the motion will be to declare the purchaser entitled to £15 compensation, but no costs, inasmuch as the estate would not have been burdened with any costs if the claim for compensation had been made to the solicitor having the carriage of the proceedings acting in his proper capacity.

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF LOFTUS A. TOTTENHAM, OWNER;
EX PARTE THOMAS GOODIESON, PETITIONER.

Practice—Motion by the owner for the carriage of the proceedings, the order for sale not being made absolute, and a large arrear of interest being due to the petitioner.

A motion for the carriage of the proceedings cannot be made before the order for sale has been made absolute.

The court will not transfer the carriage of the pro-

ceedings to the owner where there is a large arrear of interest due on the petitioner's demand.

The court will not grant any indulgence to the owner, as against the petitioner, where the interest on the petitioner's demand is in arrear.

THIS was a motion by the owner that the carriage of the proceedings should be given to him on the grounds which are stated in the argument. The petitioner was a puisne incumbrancer of the owners, his demand being No. 18 in the schedule of incumbrances attached to the petition. The demand of the petitioner was based upon a judgment recovered by him against the owner in 1852, but it did not appear to have been registered as a mortgage until 1861. And from the petition it appeared that a large arrear of interest, amounting to £261 18s. 8d., was due on the judgment, the principal sum being £421 15s. 1d.

Mr. Pilkington (with him *Mr. Levinge*) for the owner.—The debts upon this estate have been chiefly created by the present owner, who being tenant in tail in remainder, during his father's lifetime, was under the necessity of raising money, and had recourse to persons in London for that purpose. In some instances, he gave security for three times the amount he actually received. In fact, there is a suit now pending before Vice Chancellor Wood to impeach the principal incumbrance on this ground. It is, therefore, evident that the owner has a peculiar interest in the management of the sale in this case. The estates lie in four different counties, and the title to each estate is distinct. The title deeds and leases are in the owner's possession; his solicitor has investigated the title, made searches, and to some extent prepared an abstract of the title. He has also peculiar information, which would enable him to carry on the sale advantageously, acquired in a negotiation for a loan. There will be a considerable surplus even making the calculation as the charges now stand in the schedule to the petition, but we shall greatly reduce those charges. There can be no doubt the petitioner will be paid. The petition has not been carefully prepared; it has been put hastily on the file. It is stated in the petition that the owner is seized in fee of the lands. This is an error; he is only tenant in tail. It is not necessary to refer the court to authorities to establish that the court is in the habit of giving the carriage of the proceedings to the owner, where he has peculiar advantages enabling him to conduct the proceedings speedily to a sale, and where there will be a surplus. This proposition, however, is clearly established by the cases collected in Macnevin's Practice, pp. 90, 99.

Mr. Warren (with *Mr. Tandy*) for the petitioner.—This motion is altogether irregular. The conditional order for sale has not been made absolute yet.

JUDGE HARGREAVE.—If the order for sale has not been made absolute, the motion is certainly premature. Cause may yet be shown against the order for sale, and the petition be dismissed. Besides the owner by bringing forward his motion at so early a stage, deprives the court of the means of deciding who is the proper party to have the carriage of the proceedings if it is to be taken from the petitioner. It gives the owner an unfair advantage over his creditors,—for no appearances have yet been entered in the matter. The court discourages parties entering appearances before the order for sale is made absolute. The most-

gagagee may wish to have the carriage of the proceedings; I could not give it to the owner behind his back. The mortgagee may have possession of the title deeds—the owner says not, but the mortgagee is not here to make his case. I find also on looking at the petition that there is a large arrear of interest due to the petitioner. The court certainly will not take the carriage of the proceedings from the petitioner where there is a large arrear of interest due to him. I would suggest to the owner that he had better pay the arrear of interest due to the petitioner before the motion is brought forward again.*

Order—No rule; the motion not to be re-entered until a week after the order for sale has been made absolute; and notice of the motion, if re-entered, to be given to all parties who shall have entered appearances in the matter. The owner to pay the costs of this day.

IN RE THE ASSIGNEES OF JOHN FREWEN, OR WILLIAM AND MARY FREWEN, OWNERS; MATTHEW CONOLLY AND ANOTHER, PETITIONERS.

Practice—Costs given personally against the solicitor of parties moving.

Where the solicitor for the owners, not having the carriage of the proceedings, filed an objection impeaching certain tenants' leases, without the leave of the court, and served a notice of motion that the objection be allowed, and the leases set aside accordingly; and it appearing, the objection having been overruled on the merits, that the owners were unable to pay the costs incurred by the tenants, the court made the solicitor personally liable for the costs, as this was a proceeding clearly contrary to the practice of the court.

The solicitor having the carriage of the proceedings is the only person who can take any active steps towards the sale in a matter, unless the court, in any particular case, shall otherwise direct.

In this matter the final notice to tenants was duly served by the solicitor having the carriage of the proceedings, and certain leases were returned therein as valid, and affecting the lands. These leases were made by John Frewen, whose assignees are named as owners in the alternative with William Frewen and Mary Frewen. William Frewen and Mary Frewen filed an objection, which, in form, was an objection to the final notice, impeaching these leases, on the ground that they were made by John Frewen in derogation

of the power of leasing given him by the settlement under which he derived his interest in the lands, and objecting to the final notice on certain other grounds. This objection was filed without obtaining the leave of the court for that purpose, notwithstanding that such a course was plainly usurping the functions of the solicitor having the carriage of the proceedings—in fact, not only usurping his functions, but taking quite an opposite course of proceeding to him. For the petitioner's solicitor, had, no doubt, ascertained that the leases were valid and existing leases on the lands, or he would not have returned them as such in the final notice. Other objections, not material to the present case, were filed by tenants objecting to the statement of their tenancies as set out in the final notice. The matter was entered in the list by the solicitor having the carriage of the proceedings, in the usual course, to dispose of the tenants' objections preliminary to the settlement of the rental. The solicitor for the owners, William and Mary Frewen, seems further to have misapprehended the practice of the court, for he appears to have thought that the court would dispose of the objections filed by him in the absence of the tenants, whose leases he sought to impeach. The owners' solicitor, however, having obtained the opinion of the court on this point, and the case having been adjourned for a few days, the matter finally came on for hearing on the 18th of November last; and the objections having been opened, and counsel for the tenants heard in support of their leases as returned upon the final notice, the objections were found to be wholly untenable. It then appeared that William and Mary Frewen were unable to pay the costs incurred by the tenants consequent on this objection.

Mr. D. C. Heron (with Mr. Neligan) for the owners.

Mr. Charles Barry for the petitioners.

Mr. Murphy for the tenants.

JUDGE HARGREAVE, in giving judgment said—These objections have been filed by the owners in contravention to the well-established practice of the court. It is well known that no active steps can be taken in the proceedings in a matter by anyone except the solicitor having the carriage of the proceedings, unless the leave of the court be first obtained. If the court allowed third parties to interfere, at their own pleasure, in the proceedings, it would be almost impossible to proceed to a sale at all. We might have the owner taking one course, and the petitioner another, as in fact happens in this case. If, in a particular case, it appears advisable that the owner, or any other party, should intervene in the proceedings, the court will give him leave to do so, on a proper application being made for the purpose. Moreover, it is quite clear that if the owners in this case had applied for liberty to file objections to the final notice, the court would have put them under terms to give security for costs, probably requiring a sum of money to be lodged in court. As these objections were filed by the solicitor for the owners, without obtaining the leave of the court, contrary to the practice of the court, I must make him personally liable for the costs. Accordingly, the order will be to overrule the objections with costs to the tenants to be paid by the solicitor for the owners. The petitioner's costs to be costs in the matter.

* It may perhaps be useful to observe here that the court will not grant any favor to the owner as against the petitioner, where the interest on the petitioner's demand is in arrear.

In John James Redmond's Estate, the owner brought forward a motion to stay the proceedings for two months, on an undertaking to pay, in the meantime, the amount of the petitioner's demand. This motion was instituted with a view of dismissing the petition. In ruling the motion, Judge Hargreave said, "It appears from the petition that there is an arrear of interest due on the petitioner's mortgage. This arrear of interest must be paid before the court will stay the proceedings. The mortgage is put in settlement, and possibly the interest forms the income of the parties, on which they depend for their existence. I may say it has now become the practice of the court never to grant any indulgence to the owner where he has allowed the interest to run into arrear. If the owner will now undertake to pay this arrear of interest within ten days, the motion may be granted, but on no other condition."

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

ALEXANDER v. ALEXANDER.—Jan. 12, 13.*Executors—Arrears of rent—Sale of.*

A, being tenant for life, with remainder to B for life of certain estates, by his will empowered his executors "to pay and satisfy any debts owing or claimed to be owing by or from the testator or his estate, and any liability to which he or his estate ought to be subject, and to accept any composition, or any security, real or personal, for any debt or debts owing to him or his estates, and to allow such time for the payment of any such debts, or composition for a debt, either with or without taking security for the same, as should be reasonable, and also to compromise and compound, or submit to arbitration and settle, all debts, accounts, transactions, matters, and things which should be owing from or to him or his estate, or be depending or otherwise between the testator or his executors and any other person or persons, and generally to act in relation to the premises in such manner as they should think expedient, without being liable for any loss which might be occasioned thereby." The executors of A sold arrears of rent, amounting to £45,000, to B, the incoming tenant for life of the estate, for £20,000. Held, that under the above clause the executors were not empowered to sell arrears of rent.

That under the circumstances they had not exercised proper deliberation, nor made sufficient investigation into the condition of the estate.

That they were doubly bound to have exercised caution in the sale, from the fact of the legatees of the arrears being minors and wards of court.

And that as all the arrears were collected by one of the executors who had been appointed agent to B, the only measure of the executors' liability was the difference between the amount actually collected and the price at which the arrears had been sold.

THIS case came before the court upon cross appeals under the following circumstances:—Bruce Richard Viscount O'Neill (deceased), under the wills of John Viscount O'Neill, his father, and Charles St. John Earl O'Neill, his brother, was entitled to large estates in the County of Antrim, for his life, with remainder to his first and other sons in tail, with remainder to the Rev. William Chichester, now the Rev. William Chichester O'Neill, for his life, with remainder to his first and other sons in tail, with remainders over. Bruce Richard Viscount O'Neill was never married, and on the 9th of February, 1854, he made his last will, and thereby after divers bequests "he gave and bequeathed all the rest, residue and remainder of all his property and effects, real and personal of every kind and description, including therein all timber and trees to which he was entitled, and all rents and arrears of rent which might be due to him at the time of his decease, unto Henry Alexander (one of the respondents), upon trust to sell, call in, and convert the same into money, and pay thereout his funeral and

testamentary expenses and debts, and the pecuniary legacies therein before bequeathed, and after such payments to stand and be possessed of and interested in the residue of such money upon trust for Robert Jackson Alexander and John Staples Alexander (the petitioners), in equal shares." The testator appointed the respondents, Henry Alexander and Henry Stanley M'Clintock, executors, and Henry Alexander the trustee of his will. He further authorized his executors, "to pay and satisfy any debts owing or claimed to be owing by or from him or his estate, and any liability to which he or his estate ought to be subject, and to accept any composition, or any security real or personal for any debt or debts owing to him or his estates, and to allow such time for the payment of any such debts, or composition for a debt, either with or without taking security for the same as should be reasonable, and also to compromise and compound or submit to arbitration, and settle all debts, accounts, transactions, matters and things which should be owing from or to him or his estate, or be depending or otherwise between him or his executors, and any other person or persons, and generally to act in relation to the premises in such manner as he or they should think expedient, without being liable for any loss which might be occasioned thereby." Viscount O'Neill died on the 12th of February, 1855, and on his death the Rev. William Chichester O'Neill became entitled to all his estates as tenant for life. Henry Stanley M'Clintock had been the land agent of the testator from April, 1851, down to the time of his death, and shortly afterwards was appointed agent to the Rev. William C. O'Neill. Shortly after the death of Viscount O'Neill, Henry Alexander came to Shane's Castle, and with the privy of Henry Stanley M'Clintock, entered into a negotiation with the solicitor of William Chichester O'Neill, for the sale to him of all the rent and arrears of rent due to Viscount O'Neill or his executors upon the estates. On the 28th of March, 1855, a deed was executed between Henry Alexander and Henry Stanley M'Clintock, therein described as the executors of Viscount O'Neill, of the one part, and the Rev. William Chichester O'Neill of the other part. By which after reciting that Viscount O'Neill had been tenant for life of certain estates to which William Chichester O'Neill was then entitled for his life, and that at the time of the death of the Viscount, there were due to him arrears of rents, amounting to the sum £45,379 7s. 6d., the particulars of which were set forth in the schedule thereto, exclusive of the apportionment of the accruing gales to which the Viscount was also entitled; and reciting the will of Viscount O'Neill; and that Henry Alexander, and Henry Stanley M'Clintock, as such executors, and in pursuance of the powers given them by the will, had agreed with William Chichester O'Neill for the sale to him of all the arrears of rent so due up to the 1st of November, 1854, together with the apportioned part of the rents, with all the remedies or powers which the executors might have claimed or exercised for the recovery thereof, for the price or sum of £20,000, to be paid by such instalments as were therein mentioned; but without interest in the meantime, except in case of default of payment, as therein provided. It was witnessed, that in con-

deration of the sum of £20,000, Henry Alexander, and Henry Stanley M'Clintock, as such executors, and in pursuance of the powers for that purpose given to them by the will, granted and assigned to William Chichester O'Neill, all the arrears of rent of all the estates, due up to the 1st of November, 1854, particularly described in a schedule to the deed, together with all the apportioned rent; and in consideration thereof William Chichester O'Neill covenanted to pay the executors the said sum of £20,000, by six instalments, viz:—3,000*l.* on the 1st day of March, 1856; 3,000*l.* on the 1st day of March, 1857; 3,000*l.* on the 1st day of March, 1858; 3,000*l.* on the 1st day of March, 1859; 4,000*l.* on the 1st day of March, 1860; 4,000*l.* on the 1st day of March, 1861; but without interest, unless any instalment should remain unpaid for the space of one month after the day of payment, in which case it was provided such instalment should bear interest from the day of such intended payment at 5 per cent. And after providing for the payment of the instalments in case of the death of Mr. O'Neill, the executors constituted William Chichester O'Neill, their attorney, to sue for and recover the arrears. By the schedule to the deed it appears, that up to the 1st of November, 1853, there were arrears due on the estates amounting to £14,128 3*s.* 11*d.*; that the gross year's rent up to the 1st of November, 1854, amounted to £39,132 7*s.* 11*d.*, of which there had been recovered £7,350 9*s.* 2*d.*; and that after that sum and all deductions, there remained for the year's rent ending 1st of November, 1854, the balance of £31,251 3*s.* 7*d.*, which with the arrear of £14,128 3*s.* 11*d.*, made a total of £45,379 7*s.* 6*d.*, exclusive of the apportioned part of the rents for the period which elapsed from the 1st of November, 1854, up to the 12th of February, 1855. On the 30th of April, 1858, the respondents, as executors of Viscount O'Neill, filed their cause petition in the Court of Chancery against the petitioners, who are the sons of Nathaniel Alexander (deceased), and minor wards of the Court of Chancery, praying for an administration of the testator's estate, under the direction of the court; on the 14th of May, 1858, the petition was referred to Master Brooke. Edmund Francis Leslie and William Fitzwilliam Lenox Conyngnam, the guardians of the minors, were appointed guardians *ad litem*. On the 3rd of December, 1858, the executors filed a charge stating (among other things) that the arrears amounted to £45,379 7*s.* 6*d.*, and that they had assigned the same, together with the apportioned rents to William Chichester O'Neill, and that three of the instalments had been paid. On the 7th of January, 1859, a discharge was filed by the minors petitioners, in which they charged that the executors had no power to make such assignment, and submitted that they ought to be charged with the whole amount of such arrears and apportioned rents, or with so much thereof as without their wilful fault they could have received. On the 2nd of November, 1859, the Master ruled that without an independent suit or cross petition filed for the purpose of charging the executors with wilful default, it was not competent for him to adjudicate on the case made by the minors in the pending suit. On the 3rd of January, 1860, Robert Jackson and John

Staples Alexander filed their petition; and charged that the sale of the rents was invalid, improvident, and injurious to the petitioners as residuary legatees of Viscount O'Neill, and that the respondents, if they used due diligence, might have recovered the whole of the rents and arrears of rents. And having stated their willingness to adopt the general account taken in the administration suit, they prayed that an account might be taken of Viscount O'Neill's real and personal estate, and in particular an account of the arrears and apportioned gale: that it might be declared that respondents were not authorized to sell arrears, and that they might be charged with the full amount, or so much as without wilful default they could have collected. The respondents on the 30th of April, 1860, filed their first answering affidavit to the petition; and thereby they stated (amongst other things), that after the death of Viscount O'Neill, Henry Stanley M'Clintock caused to be made out for Henry Alexander, a statement of the arrears of rent due at the death of the Viscount, and that the arrears amounted to £45,379 7*s.* 6*d.*, of which the sum of £14,128 3*s.* 11*d.*, consisted of an arrear due up to the 1st of November, 1853; that the tenancies which appeared on the rent books of the estates, amounted to 2,526 in number, and that in many instances three or four holdings were entered as one tenancy on the books. They stated that of the 2,528 tenancies, above 900 were held at rents less than £10 a-year, more than 1,000 were held at rents between £10 and £20 a-year, more than 300 at rents between £20 and £30 a-year, and the residue at rents above £30 a-year. And they stated that after the death of Viscount O'Neill, Henry Alexander remained for a fortnight at Shane's Castle, and that the negotiation then took place between Henry Alexander, as such trustee and executor, with Mr. Leonard Dobbin, as solicitor for the Rev. Wm. Chichester O'Neill, and that the respondents, during such negotiation, were fully convinced that they, both as executors, and Henry Alexander, as trustees under the provisions of the will, were authorized to sell the arrears to William Chichester O'Neill, and they stated their conviction, that having regard to the difficulty of collecting any considerable portion, and the impossibility of realizing the greater portion thereof, and the expenses connected with any proceedings to collect the same, a judicious sale thereof, to William Chichester O'Neill, was the most expedient course for them to adopt. They also stated that Mr. Leonard Dobbin at first offered 5*s.* in the pound for the arrears, which offer was declined; that after considerable negotiation, Dobbin offered £18,000 which was also declined, and that eventually Henry Alexander agreed to accept £20,000, payable by instalments, for the arrears together with the proportion of the current gale, the sum of £20,000 being intended to cover the said proportioned part; and the respondent Henry Alexander thereby stated (the respondent Henry Stanley M'Clintock believing it to be true), that at the time of such arrangement he did not know the exact amount of the proportion of the current gale, but the said sum of £20,000 was accepted for the same, William Chichester O'Neill undertaking to keep down all charges on the estates for the current half-year;

they also stated that the former agent of the O'Neill estates, the Hon. George Handcock, had recommended Henry Alexander to accept the sum of £20,000; and that they believed the said sum of £20,000 was more than they themselves could have collected, taking into account the difficulty and expense of such collection, and the obstacles which the landlord of the estate was able to throw in the way of the respondents in such collection, by enforcing payment of the rents due to him as landlord, and otherwise; that the legal estate was outstanding in mortgagees, who, as the respondents believed, would have taken steps by the appointment of a receiver, or otherwise to cause the rents of the estate to be paid to them, in case the respondents had endeavoured to collect the arrears; that the Rev. William Chichester O'Neill had possession of the leases and rent-books, and other evidence of the tenancies, and that the legal and other difficulties arising from these several circumstances would have presented obstacles of the most serious description to the collecting any portion of the said arrears. The respondents also declared, that in making this sale they were guided by a knowledge of what had occurred in connection with the arrears on the Mountcashel estate, which adjoined the O'Neill estate; upon the sale of the former estates, in the Incumbered Estates Court, in 1850, the arrears were sold for 8s. in the pound, but, notwithstanding every legal effort, no more than 2s. in the pound had been recovered. Also, that at the death of John Earl O'Neill in 1841, there was an arrear of £51,119 7s. 1d. due on the O'Neill estate, and that in a certain suit of *Godley v. O'Neill*, which was instituted for the administration of the Earl's estate, it had been reported by the Master that such an arrear was irrecoverable, that that report was confirmed by the Lord Chancellor, and that Henry Alexander knew of and was influenced by that fact. The said respondents also charged that there existed a spirit of combination among the tenantry of the O'Neill estates, which would have rendered it difficult to recover, in respect of the arrears, a sum equal to that received from the said William O'Neill, and that the tenantry expected these arrears to be forgiven, as they were before. They also submitted, that in this sale they had exercised the discretion which they possessed *bona fide* and judiciously, and for the benefit of the petitioners, and that they believed they could not themselves have collected so large a sum as they would receive under the agreement. Several affidavits were made on both sides by persons who were acquainted with the condition of the O'Neill estates and the tenantry thereon. The Hon. George Handcock made an affidavit in the administration suit, in which he deposed that he had been agent of the O'Neill estates for nearly twenty years, down to the year 1850, when he was succeeded by Henry Stanley M'Clintock; that shortly after the death of Viscount O'Neill in 1855, he was informed by Henry Alexander, that a negotiation was pending between him and Mr. Leonard Dobbin, as the solicitor of the Rev. William Chichester O'Neill, for the sale of the arrears of rents due by the tenants on the estates, of the amount of which arrears Henry Alexander informed deponent, and that Leonard Dobbin had ultimately offered

£20,000 for the arrears; that Henry Alexander consulted deponent as to the propriety of his accepting the offer, and that deponent informed him he considered such sum the full and fair value of the arrears, and recommended its acceptance. That from his knowledge of the estate and the circumstances connected therewith, and the disposition and means of the tenants, and the difficulties and obstacles which would have arisen in any attempt by the executors to collect such arrears, and deponent was fully convinced that the arrangement so made was beneficial to the minors, and that he would himself have gladly accepted it had he been entitled to the arrears; and he deposed that the greater number of the holdings on the estates were small, and the tenants thereof held jointly with other occupants who were jointly liable for the rent, and from his knowledge of the estates, and the means and circumstances of the tenants, he believed and was convinced it would have been impossible for Henry Alexander to have collected the arrears. The respondent Henry Stanley M'Clintock was examined *viva voce* before Master Brooke, and deposed (among other things) that in the year 1855 there was received from the tenants on the O'Neill estates the sum of £51,700, and in the year 1856 the sum of £45,494; the rent-books of the estates were produced and examined before the Master, and it was admitted that the whole of the arrears, had been received by Henry Stanley M'Clintock, as the land agent of William Chichester O'Neill, during the period intervening between the sale and the hearing of the suit. Master Brooke made his decretal order, on the 23rd of January, 1861, whereby he declared that the respondents were not by the will of the testator empowered to sell the rents and arrears of rent; and that the respondents were chargeable with all the rents and arrears of rent due to 1st November, 1854, which, but for their own wilful default they might have received; amounting, after deducting £900, which could not be recovered, receiver's fees, poor rate, &c., to £42,087, together with the apportioned rents, which amounted to upwards of £7,500, making altogether after allowing certain credits, £33,709 9s. 6d. From the whole of this order Henry Alexander and Henry Stanley M'Clintock, appealed. The minors, Robert J. Alexander and John Staples Alexander, appealed from that portion of it which allowed certain credits to the respondents. On the 23rd of May, 1861, His Honor the Master of the Rolls directed that the Hon. George Handcock should be examined *viva voce* before him; and on the 30th of May, Mr. Handcock stated that he was grand uncle to the petitioners, and had been their guardian; that Mr. Henry Alexander told him that the arrears of rent amounted to some £36,000: that he considered the sale a very proper one to make under the circumstances, and would have made the same himself, if in the position of the executors. On the 5th of July, 1861, the Master of the Rolls by his decretal order declared "that the minor petitioners were not bound by the sale by the respondents, of the arrears of rent in the petition mentioned, in the month of March, 1855, to the Rev. Chichester O'Neill, and which arrears formed part of the assets of the late Viscount O'Neill, be-

queathed to the minors by Viscount O'Neill, the sale having been made by the respondents without the sanction of the court in the minor matter then depending, in which the minor petitioners were the minors, but the court doth declare that in the opinion of the court, the entire amount of arrears, or any greater sum than £25 000, could not have been recovered by the respondents, if the arrears had not been sold to Mr. Chichester O'Neill, having regard to the legal difficulties in the way of the respondents as executors of Viscount O'Neill, who was tenant for life, recovering the arrears of rent, and also having regard to the difficulty of recovering such arrears from tenants of the class who were in occupation at the death of Viscount O'Neill, in case Mr. Chichester O'Neill, who was entitled to the rents which accrued after the death of Viscount O'Neill, had taken concurrent proceedings with the respondents, and having regard also to the facts given in evidence on the part of the respondents; and the court doth declare that if an application had been made to the court in the minor matter, in the month of March, 1855, when the arrears of rent were sold by the respondents to Mr. Chichester O'Neill, the court would have considered it for the benefit of the minor petitioners, that such arrears should have been sold to Mr. Chichester O'Neill, who, from being entitled to the accruing rents, could have recovered arrears from the tenants, which would have been irrecoverable if the tenants had been concurrently sued or distrained by the respondents, and by Mr. Chichester O'Neill; and the court doth declare that it would, in the opinion of the court, have been very much for the benefit of the said minors to have sold such arrears in March, 1855, having regard to all the circumstances, for the sum of £25,000; and the court being of opinion that the respondents acted *bona fide* and under the opinion, although mistaken, that they had authority to sell such arrears under the will of Viscount O'Neill, and that the respondents acted as they believed for the benefit of the minors, the court doth declare that the respondents ought not to be charged with the sum of £33,709 9s. 6d. in the Master's said order, mentioned over and above the sum of £16,000, which at the time of the Master's order had been paid by Mr. Chichester O'Neill, and invested to the credit of the minors, but which sum of £33,709 9s. 6d. has been reduced by the payment by Mr. Chichester O'Neill since the date of such order, of the sum of £4,000, the final instalment of the £20,000 for which the arrears were so sold by the respondents to Mr. Chichester O'Neill; and the court doth declare the respondents ought only to be charged with the sum of £5,000, which with the sum of £20,000 paid by Mr. Chichester O'Neill, and which had been lodged to the credit of the minors, makes up the said sum of £25,000, and accordingly it is further ordered that the respondents do invest in the purchase of Government New Three per Cent. Stock, the said sum of £5,000, and transfer such stock to the credit of this matter with the privity of the Accountant-General of this court, before the 1st day of December next; and it is further ordered that the Master's order be set aside, so far as it charges the respondents with any other or greater sum, and it is

further ordered that the parties do abide their own costs of this appeal; and it is further ordered that the deposit lodged with the registrars by the said respondents be returned, and the court doth declare that in the opinion of the court the suit is imperfect, Mr. Chichester O'Neill not having been made a party respondent, but the petitioners not having made any application to the court to set aside the Master's order with the view of having the record set right, although the attention of the petitioners' counsel was called by the court to the objection, on the second day of these sittings, and the respondents' counsel not having objected before the Master of the court, that the suit was imperfect on that ground, and the counsel on each side requiring of the court to make an order without regard to said objection, the court doth make this order accordingly; and the court does not decide as to what the extent of liability of Mr. Chichester O'Neill or the respondents would have been if Mr. Chichester O'Neill had been made a party to this suit; and the court is pleased to make no rule on the cross notice of the said petitioners, and doth order that the deposit lodged with the registrars by the said petitioners be returned." From this order also, both the petitioner and respondents now appealed.

The Solicitor-General (with him *Serjeant Sullivan, H. Law, Q.C., and G. May*) for the petitioners and appellants.—The arrears were sold by the executors without any foresight or caution. The real amounts, both of the arrears and of the apportioned rents, were unknown to the executors when they sold them. No doubt, executors may exercise a discretion with regard to arrears of rent; they may forgive them to a bankrupt tenant, and even give him a sum of money to get rid of him off an estate—*Blue v. Marshall* (3 P. Wms., 381)—or compromise a debt with an insolvent creditor of the testator—*Pennington v. Healey* (1 Crompt. & M., 402). In both these cases the acts of the executors benefited the estate. But where executors are guilty of negligence with regard to arrears of rent, they will be held accountable—*Tebbs v. Carpenter* (1 Madd., 290). Mr. M'Clinck put himself in the position of both vendor and purchaser; he was the executor of Viscount O'Neill, and about to become land agent to the Rev. W. C. O'Neill. There is no reliable evidence of any combination amongst the tenantry of the O'Neill estates against paying these arrears. The executors could have distrained for these arrears, before Mr. O'Neill could have taken any step to collect the current half-year. The only test of how much of the arrears could have been collected is, how much of them has been collected; therefore, the respondents should be held responsible for the whole amount, deducting the £900 which could not be collected. There is no power to sell arrears given by the will to the executors. This court does not approve of the sale of arrears of rent unless under very peculiar circumstances.—*Hoops v. Lord Kingston* (5 Ir. Jur., 333); *Carroll v. Darcy* (3 Ir. Jur., 322). The original petition was rightly framed against the executors alone, without joining Mr. O'Neill.—*Rowlan v. Witherden* (3 M.N. & Gor., 563).

A. Brewster, Q.C., (with him *J. E. Walsh, Q.C., and Harrison*) for the respondents.—This case turns

on two questions—first, had the executors power to sell the arrears? secondly, did they exercise that power judiciously? This court will protect trustees or executors, even when they have acted beyond their powers, if they have acted *bona fide*.—*Lee v. Brown* (4 Ves., 368). The cases cited by the other side all go to prove that executors have a discretion with regard to arrears. [*The Lord Chancellor*.—Yes; a discretion to be exercised after circumspection and deliberation what is the best course to take under all the circumstances.] Tenants always pay rent more willingly to their immediate landlord than to executors. If the respondents had not sold these arrears, they would not have collected as much as £20,000 by this time. [*The Lord Chancellor*.—Where is the line to be drawn in such cases as this? These arrears are proved by the event to have been capable of collection.] For the measure of an executor's liability—*Clark v. Holland* (19 Beav., 271). As to the apportionment of the rents—*Cattley v. Arnold* (5 Jur., N.S., 361); *Greekie v. Browne* (1 Car. & Kir., 307); and 4 & 5 Will. 4, c. 22, and 23 & 24 Geo. 3, c. 6.

Jan. 13.—THE LORD CHANCELLOR.—This case has been discussed at very great length, but not in the least degree beyond what was befitting the importance of the case, as regards all those who are invested with the administration of property, and who are, at the same time, liable to the control of this court in that administration. A very considerable loss must fall on some of the parties to this suit; but we cannot take that question into consideration in forming our judgment. The principles which ought to guide us are plain, and we are bound to regard them, and them alone, in arriving at our decision. Let us see what are the facts of the case. Upon the decease of the late Viscount O'Neill, there were arrears of rent due upon his estates, amounting in the whole, including a small sum which must be apportioned, to upwards of £55,000. The executors of Viscount O'Neill had the control over the general fund, incident to the ordinary administration of the assets of a deceased testator; but in addition to those ordinary powers which devolve upon executors, a special power was given by the will of Viscount O'Neill to one of his executors, Mr. Alexander, making him trustee of the fund for the minor petitioners and appellants. The executors had power, by law, to call in the fund, and they were bound to do so. This appears, at all events, what the testator intended the trustee to perform. The will contained special directions, which were all to be carried out. This being so, an agreement is entered into between the executors and the present proprietor of the O'Neill estates, whereby the latter agreed to purchase the arrears of rent from the executors. The executors had no general power given to them by law, to release or compound for desperate debts due to the testator, but they were invested with a discretion of the largest character, to compound debts in the way they should think most fit and beneficial in their character as executors. Master Brooke, before whom the case came first, was of opinion that the executors had no special power to compound debts. His Honor the Master of the Rolls was of the same opinion; and I am satisfied that no power of this nature was given to them which is not completely

under the control of this court. The words of Viscount O'Neill's will are, "And also to compromise and compound, or submit to arbitration, and settle all debts, accounts," &c.; and those words must be taken in their ordinary meaning, viz., to compound and settle the debts due to the testator in the best way, and for the largest amount possible, after a proper investigation and consideration of all the circumstances, if the executors were perfectly satisfied that they could not get in all the debts. Such being the case then, it is impossible to contend that a special power was given to the executors here to compound for the arrears of rent. We have been told, too, that those later clauses in the will do not refer, as they clearly do, to the devise in the early part of the will, of a house in Kildare-street. To me, however, it seems impossible to hold, but that Viscount O'Neill intended his executors to hold these arrears, without any special power bestowed upon them in reference thereto. The act which has been done by the executors must, therefore, be governed by the ordinary rules of this court, and construed with reference to the duties imposed upon persons filling that character. About three weeks after the death of Viscount O'Neill, we find the executors entering into an agreement to sell all the arrears, amounting to £55,000, for the sum of £20,000, to be paid in six instalments. It would appear that the actual amount of the arrears due was not ascertained, or known to either the executors or Mr. Handcock. Now, had the parties known the amount of arrears due, there might be something said in their defence; but no inquiry was made as to the condition, solvency, or circumstances of a single tenant upon the estates, or as to the possibility of recovering the arrears. There was, it is true, a classification made of the tenants according to the amounts of their rent, but no other steps were taken. It is perfectly plain that nothing was further from the minds of all the parties concerned, than to do anything wrong; and it is that fact, along with the large amount which is at stake, which renders this case so exceedingly unpleasant. But it is right to observe, that Mr. M'Clintock, who filled two conflicting positions, was well acquainted with these estates and their capabilities, when he agreed to sell the arrears. Mr. M'Clintock was about to become the agent to the person who was interested adversely to the executors; therefore, when filling two conflicting characters, it was difficult for him to be quite free from embarrassment. His personal interests were on Mr. O'Neill's side, and his sense of duty inclined him to favour the executors. Still, let us not be understood as implying that anything immoral for a moment occupied his mind. The executors were not provided with proper information; the testator's will was not proved, and a large amount of legacy duty was thus saved, as the probate duty was not paid until some days after this arrangement had been entered into. Had matters remained thus, the question would have been, how much of the arrears the minors could have got in at the time of the sale? But the difficulty of that question is greatly increased by the fact, that all the arrears have been collected by Mr. M'Clintock, in his own person, for the executors, and upon their receipts. The amount collected is not the sole test by which the liability of the executors may

be calculated: This fact, also, is plain, viz., that all the has been collected in a year. Then we are told that arrears have been got in in less than a year; that £51,000 this is no test of the rights of the petitioners, and of the liability of the respondents. I could understand this argument, if it had been proved that the tenants had struggled against the payment of these arrears, or that they entered into a combination to oppose the payment, but nothing of the kind is proved. The preceding facts are sought to be encountered by circumstances to which, I think, too much weight is attributed by the counsel for the executors. No doubt the collection of arrears, by any one who is not the dominus of the estate, is attended with some little extra-trouble; but I cannot regard the other considerations upon which the counsel for the respondents dwelt so much. There may be a pauper tenant here and there on the estate; there may be some tenants with but few stock, and, if the executors had raised the arrears, this class of tenants might have been involved in difficulties. The executors wanted no additional powers to raise the arrears; they could distrain the tenants. It is said that that would have been very inefficacious. I cannot say how far that is true; the majority of the tenants must have had some money in the bank. It is perfectly impossible to say, by his appearance, what any tenant is worth in this country, as many a peasant may be seen in any fair, apparently not worth a shilling, and yet he may have plenty of money in a bank. It is said, again, that the tenants, on these estates, were determined not to pay these arrears, as they had been forgiven their arrears upon the death of a Viscount O'Neill, some ten years previously to the year 1855; well, that statement turns out to be slightly coloured, as the Master found in the former suit, that there were some arrears, but that they were old arrears, and incapable of being collected, and that, consequently, the late Viscount O'Neill was exonerated from their collection; he did, I believe, get in some small portion of them. Why the arrears in this case were given up, without an effort to collect them, I cannot see. It has also been contended that the tenants would have combined to resist the payment of these arrears, and no doubt they might, if so minded, have given a great deal of trouble; but there is no evidence of any such fact, and Mr. O'Neill got in every farthing of these very arrears. It was also contended that these arrears could not have been collected if Mr. O'Neill put his legal rights in force to obtain his rents also. I cannot understand this argument; I could understand the argument being used to exonerate the executors from the collection of the arrears, if there existed such a combination, as used formerly undoubtedly exist, against the payment of arrears of tithes, at the period known as "the tithe war." But the difficulty of this case is, that, with the directions of the testator's will before them, the executors chose to act upon mere suggestions of a state of things of the existence of which we have no evidence. No doubt there would have been conflicting claims upon the tenants, but here the executors have now got part of the arrears; they have authorised receipts to be given for the arrears, in their names, which prevents us from testing the truth of the facts alleged. These,

then, are the difficulties which prevent me from coming to the conclusion that this court can sanction this compromise. His Honor the Master of the Rolls, although anxious to relieve the respondents, was of the same opinion. He seems to have thought that this court would have sanctioned a compromise for the sum of 25,000*l.* Well, the Lord Chancellor, or the Master of the Rolls, of the day, might have sanctioned the acceptance of the sum of 25,000*l.*; but I cannot feel that I would be resting on a sure and safe basis if I were to say that that sum would have been a proper compromise. That is his view of the question; but, although I entertain the highest respect for his judgment, and am convinced he considered all the parties in this case were acting *bona fide*, I cannot agree with him. What, then, is this court to do? The executors have put it out of their power to get in the whole arrear, even if the compromise was a proper one. Here are tenants who must pay a certain sum; they have paid it through the hands of one executor, under the authority of both. This appeal must be sustained. The judgment of Master Brooke was the only one which could be given, under all the circumstances of the case.

THE LORD JUSTICE OF APPEAL.—I concur in the conclusion arrived at by the Lord Chancellor, and I am of opinion that it is perfectly clear none other can be entertained. The Master of the Rolls in the commencement says, that the petitioners were minors, and wards of this court, and entitled to its protection. That view of the case is perfectly right, but what follows is at variance with the practice and principles of this court. The petitioners being minors, and legattees of the arrears of rent upon the O'Neill estates, file their cause petition against the executors of the late Viscount O'Neill, and to recover these arrears. The first fact in the case is, that the arrears have all been received by one of the executors, through his title, as executor, and whether he was the agent of Mr. O'Neill, or not, it was as executor of Viscount O'Neill that he collected the arrears. That specific fund then has come into his hands. Then it is said that there were difficulties in the way of the executors collecting the whole of the arrears, and that, therefore, they sold them for the best price obtainable. As to the question of there being a power to sell them, I think there is no pretence for holding that there was one, but I think that, after due consideration, the executors might have sold them to any other party. But let us see under what circumstances these arrears were disposed of. Before the executors sold 51,000*l.*, for 20,000*l.*, the onus of vindicating themselves, in every part of the transaction, lay upon the executors. What have they done? From the fact of all the arrears having been received, it is clear that this arrangement was not founded on a clear basis, and that they could have recovered the whole arrear, or the greater part of it. It would be difficult for the executors to show that there was any investigation or consideration exercised in this arrangement, or that they acted on anything save mere conjecture, or that the arrears could not have been recovered by any person. It is idle to say that Mr. O'Neill could have given any opposition to them; they had independent substantive powers over the

arrears of rent. I cannot find any reason why the executors should have sold 51,000*l.* for 20,000*l.*, and we are bound to hold them answerable.

Appeal affirmed, without costs. Respondents appeal dismissed.

Court of Chancery.

EX PARTE TUFNELL.*

IN THE MATTER OF THE ACT, 11 & 12 VICT. c. 68; AND IN THE MATTER OF THE TRUSTS OF THE MARRIAGE SETTLEMENT OF ROBERT FANNIN, JUN., DECEASED; AND ACT, 23 & 24 VICT. c. 38, s. 10.

Investment of Settled Funds—Bank Stock.

Transfer of a Fund settled in New 3 Per Cent. Stock, to Bank of Ireland Stock, where the petitioner was a widow, entitled to the income for her life, with remainder to her children, the court, by the order, directing the petitioner to be liable to the costs of the petition, and of the transfer of the stock.

THE petition stated that, by the settlement, dated the 14th day of May, 1839, a sum of 6,000*l.* was conveyed to trustees, after the solemnization of the marriage, to pay to the husband of the petitioner; after the solemnization of said marriage the interest and dividends thereof for his life, and, after his death, to the petitioner, should she survive him, to pay petitioner and her assigns, for her life, to her separate estate; and, in case there should be one or more children of said marriage living after the survivor of said husband and wife, that said 6,000*l.* should be divided between them, share and share. There was, at the time of the presentation of this petition, two daughters alive. The 6,000*l.* was invested in Government 3 per Cent. Stock. The husband died in the month of November, 1840, intestate. The trustees, of the settlement of 1839, having declined to act in the trusts of it, and new trustees were appointed under the provisions contained in the settlement, who transferred that stock under the provisions of the Trustee Act, 11 & 12 Vict. c. 68, to the matter of the trusts of the settlement of 1839, that stock being converted by the Accountant General into New 3 per Cent. Stock, producing the sum of 5,954*l.* 6*s.* 8*d.* The petition referred to the Act 23 & 24 Vict. c. 38, s. 10, and to the order of the Court of Chancery in Ireland, dated 24th May, 1861; and stated that petitioner was desirous of having the sum of 5,954*l.* 6*s.* 8*d.*, Government New 3 per Cent. Stock, transferred to the Stock of the Bank of Ireland, inasmuch as the yearly dividend on said New 3 per Cent. Stock, after deducting income-tax, amounted only to the sum of 171*l.*; and that if said stock were invested in said Bank Stock, it would produce the annual sum of 202*l.*, or thereabouts, without income-tax. It prayed that the said sum (stating the investment, and the title of the matter to the credit of which it had been brought in to court) might be transferred to the Chancery broker, on his transferring, to the credit of said matter of the settlement of 1839, so much stock of the Bank of Ireland

as would be equivalent to the sum produced by the sale of the New 3 per Cent. Stock, and that petitioner should be paid the interest which had accrued due since the 5th day of April last to day of transfer, and be declared entitled to the costs of this petition.

General Order, 24th May,* 1861.—First—Cash, under the control of the court, may be invested in Bank of Ireland Stock, and upon mortgage of freehold and copyhold estates, respectively in Ireland, as well as in Government New 3 per Cent. Stock, and Consolidated 3 per Cent. Stock. Second—Every petition, for the purpose of conversion of any Government New 3 per Cent. Stock, or Consolidated 3 per Cent. Stock, into any other of stocks, funds, or securities, hereinbefore-mentioned, shall be served upon the trustees of any of such 3 per Cent. Stock, and upon such other persons as the court shall think fit.—Upon the presentation of the petition to the Lord Chancellor, he held that a notice of the hearing should be served on all parties concerned, the order was served on John Hazlett, and one of the daughters of petitioner, who had attained 21, and the trustees of the settlement.

Rogers, Q.C., (with him Cathway), moved the petition before the Chancellor, citing the *Equitable Assurance Company v. Fuller* (7 Jur. N. S., 307.)†

LORD CHANCELLOR, made an order as prayed by the petition directing that the petitioner should abide his own costs‡ of the petition and of said transfer.

SPREAD V. NEWE.—Jan. 20.

Reported by Charles H. Foot, Esq., Barrister at Law.

The Court of Chancery will not refuse permission to enrol decrees, or put the party seeking to enrol them under terms, when an appeal to the House of Lords has been lodged on a decree, against which the decrees sought to be enrolled would be evidence.

THIS was an application for leave to the respondents to enrol a decree, taken by consent, in the cause of *New v. Spread*, in 1852, and a decree of the Court of Chancery, in *Spread v. Morgan* (5 Ir. Jur., N. S. 45), in the Court of Appeal in Chancery, 1859, also an order made by the Master of the Rolls, in 1860, wherein he refused leave to Spread, the petitioner, to file a supplemental petition in the

* English Order, 6th February, 1861.—Cash, under the control of, may be vested in Bank Stock, East-India Stock, Exchequer Bills, and Two-and-a-half per Cent. Annuities, and upon mortgage of lands in England and Wales, as well as in 3 per Cent. Consolidated Annuities, Reduced Three per Cent. Annuities, and New Three per Cent. Annuities.

† This case will be found reported 1 Jon. & Hem. 379, and 4 L. T. N. S. 50.

‡ Upon an application which came before Kindersley, V.C., under the provisions of the statute, he decided that the applicant for the transfer of the fund was entitled to her costs—*Bishop v. Bishop* (4 L. T. N. S. 850). The applicant was a married lady who was entitled under the will of her father to a less estate in a fund invested in consols with remainder to her children, the trustees were empowered to invest in government or real securities. The V.C. made an order that a portion of the fund in court should be invested in East India stock or bank stock, and declared her entitled to the costs of the application. The same rule as to costs was made in *Peilon v. Brooking* (4 L. T. N. S. 781); and in *R. Cooburn v. Peal* (4 L. T. N. S. 781).

* *Ex relations* John Blackham, Esq., Barrister at Law.

nature of a bill of review of the decree of 1852. Spread had lodged an appeal in the House of Lords against the decree of the Court of Appeal in Chancery, 1859.

Charles Andrews, Q.C., in support of the application for the respondents, cited *Andrews v. Walton* (8 Cl. & F. 457); *Broadhurst v. Tunnicliff* (9 Cl. & F. 71).

A. Brewster, Q.C. (with him *F. White*), *contra* relied upon the 103rd General Order, 1843. There has been such delay here as to disentitle the respondents to enrol the decrees; *Kay v. Smith* (7 Da. G. M. & G. 383). The petitioner ought, at least, to be allowed to amend his petition of appeal to the House of Lords. By the delay of the respondents he will be put to great expense.

His Lordship refused to embarrass the case by any special order, and made the ordinary order giving permission to enrol.

Court of Queen's Bench.

[Reported by Charles H. Foot and William Woodlock, Esqrs.,
Barristers-at-Law.]

IN RE THE COUNTY MAYO PRESENTMENTS, 1861.

Nov. 12; Dec. 24.

Arrears of County Cess—Representments—6 & 7 Will., 4 c. 116, s. 145; 7 Will. 4, c. 2, s. 15; 16 & 17 Vic., c. 136; 19 & 20 Vic., s. 63—Presentments by instalments, and for costs—Certiorari—Laches.

A very large amount of County Cess was in arrear in several of the baronies of the County Mayo, and many of the former collectors had left this country. The Grand Jury, at the Spring Assizes, 1861, represented a portion of those arrears upon the county at large, other portions upon every barony: all these re-presentments were entitled, "pursuant to 7 Will. 4, c. 2, sec. 15," and the respective sums were presented to be levied by twenty instalments.

The Grand Jury also presented the sum of £500 to be paid to Mr. D., the solicitor to the Grand Jury, on account of the expenses of soliciting a private Act of Parliament in relation to those arrears of cess; this presentment was entitled, "pursuant to 6 & 7 Will. 4, cap. 116." No objection was made to the above presentments at the Spring Assizes, 1861, and they were duly stated by the Judge. On the 12th of June, in the same year, a conditional order for a writ of certiorari was applied for, and obtained by a cess-payer of the County Mayo, to quash the above presentments upon the grounds of their illegality, and of the absence of jurisdiction in the grand jury. Upon motion to make absolute the conditional order,

Held That all the above presentments were illegal, and bad primâ facie.

That they all were wrongly entitled, nor was the error a technical one, as the provisions of neither the 6 & 7 Will., 4, c. 116, s. 145, nor of the 19 & 20 Vic., c. 63, s. 6, had been complied with.

That the representments of arrears of county cess should have been made under the 19 & 20 Vic., c. 63, s. 6.

(Per O'Brien, J.) That the operation of that section is not limited to those counties only in which the general valuation has been completed.

That arrears of county cess cannot be represented by instalments: nor can the arrears of one barony be represented upon the county at large, or upon any other barony.

That a presentment for costs can be made only, after taxation, under the 16 & 17 Vic., c. 136, s. 6.

That the granting of the writ of certiorari is not of right, but is within the discretion of the court, when satisfied that there are strong grounds for its issue.

That although the court refuses to go behind a presentment to see whether it has been properly obtained, yet it will grant a certiorari when there is primâ facie error on the face of it, and in the very source from which all presentments derive their efficacy.

That although, in the case of an individual, his not objecting at the assizes, or his subsequent laches, will be construed most strongly against him, yet that the court will overlook delay, where the objection to the presentment is not one which could have been rectified by the judge of assize, or where the applicant for a writ of certiorari complains of an injury inflicted upon the public.

THIS was a motion to show cause against making absolute a conditional order for the issuing of a writ of certiorari, under the following circumstances. Between the years 1848 and the year 1859, upwards of £11,623 arrears of County Cess accrued due in the County Mayo, in consequence of the impoverished condition of the county, ensuing upon the potato famine, and the insolvency of some of the collectors and their securities. In the year 1859, the grand jury appointed and empowered a committee of their body to obtain a private Act of Parliament to enable them to represent the arrears of county Cess upon the whole County Mayo; but certain cesspayers having notified their intention to oppose it in the House of Commons it was not proceeded with, and as very large sums were due to the contractors for the various public works in the county, the grand jury at the Spring Assizes, 1861, made the following presentments, which were not traversed, and were stated by the judge of assize, Deasy, B.:—"County of Mayo. To wit. Pursuant to 7 Will. 4, c. 2, s. 15. By the grand jury at the Spring Assizes, 1861, assembled. We represent that the sum of £5936 7s. 3d. be raised off the county at-large, being so much county cess unpaid and in arrear out of said county at large, to be levied in 20 instalments; first instalment, £296 16s. 4d." They also made seven presentments with a view to raise the balance of the arrears due by the respective baronies, in the following form:—"County of Mayo. To wit. Pursuant to 7 Will. 4, c. 2, s. 15. By the grand jury at the Spring Assizes, 1861, assembled. We represent that the sum of £2,521 17s. 0½d., be raised off the barony of Kilmain, arrears to be paid to our treasurer, being so much county cess unpaid or in arrear out of said barony, and to be levied by twenty instalments. First instalment, £126 1s. 10½d." "County of Mayo. To wit. Pursuant to 6 & 7 Will. 4, cap. 116. By the grand jury at the Spring Assizes, 1861, assembled. We present that the sum of £500 be raised off the county at large and paid to our treasurer and by him to Neal Davis, grand

jury solicitor, to meet the expenses of the bill now before parliament in relation to the arrears of county cess." A presentment to J. Bole, headed 6 & 7 Will. 4, c. 116, s. 47, for £14, for printing notices of the above bill, also notices to contractors, was also included in the conditional order, but as no objections were pressed against that presentment, it is not necessary to allude further to it. The conditional order had been obtained upon the 12th of June, 1861, on the affidavit of Mr. David Ruttledge, who denied the jurisdiction of the grand jury to make the above presentments; and also stated that no person attended at the assizes to traverse the presentments, as it was not known that they would then be brought forward. The facts of the case appear in the judgments of the court.

Serjeant Armstrong (with him *P. Blake, Q.C.*), now applied to have the conditional order made absolute.—The representements of arrears of cess are *prima facie* bad. They purport to be made under the 7 of Will. 4, c. 2, s. 15; that section enacts "That it shall be lawful for any grand jury to represent any such sums of money as now are or at any time hereafter shall be unpaid or in arrear out of any denomination, barony, county of a city or town, to be raised and levied on such denomination, barony, county of a city or town, or on any part or portion thereof, upon which the same was originally required by the treasurer's warrant to be levied: and such sums of money so represented shall be levied in the same manner, and subject to the same rules, regulations, provisions, and powers, as any other sums of money presented by any grand jury." With the addition of the words "or on any part or portion thereof," that section is a re-enactment of the first part of the 6 & 7 Will. 4, c. 116, s. 145, which empowered the grand jury to represent arrears of county cess upon the barony or denomination out of which they were unpaid. But the conclusion of that last section provides, "that before it shall be lawful for any grand jury to represent any sum of money as unpaid or in arrear out of any county or barony or denomination to be raised and levied on such county or barony or denomination, it shall be made to appear, by affidavit of the collector, to such grand jury, that such sum is actually in arrear and unpaid by such county or barony or denomination respectively, and that it could not have been levied from the persons, or out of the lands charged with or liable to pay the same." It is sworn by Mr. Ruttledge that no affidavits, as required by this section were, made by any of the late barony collectors. That is the first objection, as the two statutes above mentioned are concurrent. The second objection is that assuming these presentments to be in other respects good, they do not contain the statute and section under which they would be authorized to be made, pursuant to the 6 & 7 Will. 4, c. 116, s. 127: *In re Forth* (2 C. & D. C. 469); *In re Newton* (Ir. Cir. R., 554). The tenement valuation has been completed in the County of Mayo, and the statute which empowers grand juries to represent arrears of county cess, in all counties in which that valuation has been completed, is the 19 & 20 Vic., c. 63, s. 6.* There is a judicial decision

by Mr. Sergeant Howley, at the Leitrim Summer Assizes, 1860, that all representements should now be made under this Act; *Keane, appellant, Lawder, respondent* (Foot's Grand Jury Laws, 395.) The third objection to these presentments is, that they provide for the levy of those arrears of cess by instalments, a mode which is not given in any of the statutes or sections relating to either county cess or representements of arrears of it. The presentment of £500 to Mr. Davis, as solicitor's costs, is indefensible: it does not purport to be made under any section of the 6 & 7 Will. 4, c. 116. The only statute under which the costs incurred by the solicitor of a grand jury can be presented is the 16 & 17 Vic., c. 136, s. 6. It is quite true that this court has refused by *certiorari* to go behind a presentment to see if it has been properly obtained, *In re Quinn* (9 Ir. Law 160); *Ex parte Henn* (6 Ir. Com. L. 244); but those cases were very different from the present. There the grand jury had passed presentments which had first been approved of at presentment sessions, when some step had been omitted: it was for the grand jury in those cases to decide whether they would overlook the defect below or not, and approve or disapprove of the presentment; and this court held that the grand jury having exercised their statutable jurisdiction it would not go behind presentments which were good *prima facie*. But here, the grand jury, by whom alone these representements for arrears could be made, exercised their jurisdiction in a manner manifestly at variance with their statutable powers. Error is apparent upon the face of those presentments, therefore this court will review their acts and grant a writ of *certiorari*.

tements, and where, owing to the alteration of boundaries or other causes it has been or may be found impossible to collect the sums appletted on any such houses, tenements, or hereditaments respectively, or the occupiers thereof, it shall be lawful for the grand jury, without any previous application to presentment sessions, to represent all such sums so remaining unpaid to be paid by the several and respective townlands, baronies, and half-baronies within which the houses, tenements, or hereditaments on which or in respect whereof the sums remaining unpaid have been or shall hereafter be so appletted as aforesaid, shall be situated. Provided always that in all cases where the houses, tenements, or hereditaments so charged as aforesaid can be traced out or identified, such sums so remaining due on such houses, tenements, or hereditaments shall be represented thereon. Provided also, that no such representation shall in any case be made by the said grand jury without previous examination on oath (which oath may be administered by the foreman of the said grand jury), as to the inability of the collector to levy same, owing to the insolvency of the parties chargeable therewith, or to the difficulty of tracing out or identifying such houses, tenements, or hereditaments, or other sufficient cause, notwithstanding all reasonable exertions having been made by the collector of such arrears to enforce payments thereof, and also that a list or schedule of such arrears, and of the houses, tenements or hereditaments upon which or in respect whereof the sums remaining unpaid have been appletted, and of the names of the parties chargeable therewith, has been duly posted by such collector at the usual place for posting notices for presentments within the barony, division, or other district, within which such collector shall be authorized to collect grand jury or county cess, ten days at least previous to the first day of the assizes at which the said sums are intended to be represented: and it shall be competent for any parties interested to object to the representation of such sums or any part thereof, and the grand jury shall hear the objections of such parties upon their applying to be heard before the representation is made."

* The 19 & 20 Vic., c. 63, s. 6, enacts that "where sums have been or shall hereafter be presented by any grand jury in Ireland, and appletted on any houses, tenements, or heredi-

A. Brewster, Q.C. (with him *Serjeant Sullivan, M. Morris, and R. Buchanan*), for the grand jury of the County Mayo.—Mr. Ruttledge, and the cess-payers with whom he is acting, are not entitled to be heard. They have been guilty of laches. Not merely did they suffer these presentments to be flated by the judge at the Spring Assizes, 1861, but they lay by for two Terms. The treasurer of the county issued his warrants for the collection of these instalments, and large sums have been already levied. What is to be done then, if these presentments are quashed? When one instalment of a presentment is untraversed, a traverse does not lie to any subsequent instalment.—*Jebb. Cas. Rea.* 20. As to the presentments being wrongly entitled, the 19 & 20 Vic., c. 63, is concurrent with, and does not repeal, the 7 Will. 4, c. 2, under which the presentments are made. The 16 & 17 Vic., c. 136, s. 6, does not apply to a presentment for such costs as those of Mr. Davis. Unless error is apparent upon the face of a presentment this court will not go behind a presentment; it must be presumed that affidavits were made by the collectors before the representmets were made. It is to be remembered, that this presentment was flated by the judge of assize, no objection to it having been made by any person, therefore a *certiorari* ought not to be granted in this case, in analogy to the case of an indictment. The Court of Queen's Bench, in England, refused to grant a *certiorari* to remove an indictment for not repairing a bridge, from the Quarter Sessions, after judgment had been pronounced there; *R. v. the inhabitants of Pennegoes* (1 B. & C. 142). This court will not go behind presentments to see if every requisite of the presentment has been complied with.—*In re Quinn* (9 Ir. Law 160); *Ex parte Henh* (6 Ir. Com. L. 244); *Reg. v. McKay* (2 Ir. Law. 17). Unless these arrears are raised, the contractors for the public works of the County Mayo for many years past, will never be paid. If the grand jury had represented £11,000 at once, the cess-payers would have been ruined, and the arrears would not have been collected. By the 6 & 7 Will. 4, c. 116, s. 69, the grand jury may present a sum for the building or repairing of a court house or for any other public work, and may direct it to be levied by instalments. Surely this is an *a fortiori* case for a presentment by instalments; these presentments are *bona fide*; they were made by the grand jury with the view of keeping faith with the large number of contractors to whom they are indebted, and at the same time in the mode in which they would fall lightest upon the cess-payers. If this application had been *bona fide*, the parties seeking it would not have lain by so long.

P. Blake, Q.C., in reply.

Nov. 25.—This day, at the sitting of the court, their Lordship's stated that no argument had been addressed to them by either side relative to the validity of the representment of £3,936 7s. 3d., arrears of county cess upon the county at large. The court were willing to hear that point argued, if the counsel were so disposed. No further argument, however, took place.

Dec. 24.—*LORD, C.J.*—This case comes before this court, upon an application by Mr. David Ruttledge and other cesspayers of the County Mayo, that a writ of *certiorari* may issue, to remove certain presentments,

passed at the Spring Assizes of 1861, into this court, with a view to have them quashed. The case was very fully argued, but at no greater length than its importance deserved. A variety of topics were introduced into it, which, in my judgment, I do not think it is necessary to advert to. The presentments with which we are to deal may be divided into three classes. The first relates to the presentment of a sum of 500*l.* to be paid to the solicitor of the grand jury, for costs incurred in connexion with an endeavour to procure a private Act of Parliament. The other presentments are those which re-present large arrears upon the county at large, and further re-present arrears of baronial assessments. We are unanimously of opinion that the writ of *certiorari* is not to be granted by this court, *ex debito iustitie*, but at the judicial discretion of the court. Now, the action of the court is ascertained by the cases which have been referred to, founded upon the authorities in England, and it is, in fact, only applying to this species of cases that great common law principle, that *post judicium omnia presumuntur rite fuisse acta*—that, when a Court of Record gives a judgment, it is presumed that everything that is necessary preliminary to that judgment, and is essential to its foundation, has been done; and accordingly that principle is to be applied here to these presentments being the act of a court of record, having jurisdiction over the particular subject. With these preliminary observations, I will come to the classification, to dispose of the several presentments, taking them in the order which I have adverted to; and I think we shall be able to shew that though, in this instance, we grant the *certiorari*, we do so consistently with the rules which I have adverted to as the guides of the court; and that, in our doing so, upon a careful consideration of the facts relevant to the subject matter of the application, we are not infringing upon those rules. It is true, as I have stated, that, in the exercise of its judicial discretion, this court has occasionally had its attention directed to circumstances in the conduct of the party applying as a ground for withholding its action; and I must confess that, upon that ground, I did hesitate for some time on account of the delay which took place, from the time of the presentments being made to the application to the court. But on further consideration, and on looking more carefully into the cases in which the court has been induced, by circumstances, to withhold its action, there appears to me to be a solid distinction between those cases and the present. Here we have a great public question affecting the rights of a large body of persons, a large class of persons, whereas the other cases are cases of an individual coming to the court only to assert his own right; and vindicate his own private wrongs. It was in such cases that an over-readiness to grant this writ induced Lord Mansfield to say, that the frequency of these applications to the court had become such a nuisance, and had been made such a subject of oppression and litigation, that he thought it right to make a rule, that the parties applying should give security for the costs in case they should not succeed. But the case is very different in respect to the subject-matter of the present application. It involves a question seriously affecting the rights of a large body of persons;

it involves a great public question; and with respect to the delay which has taken place, the expression that what is every man's business is nobody's business, may, in some measure at least, do away with the fact of the *laches* which has occurred in coming to the court. The parties here come to redress, as we shall find as we go on, what would be not only a great inconvenience, but a great injustice to a large body of persons, if we were to suffer these presentments to stand. When I come to examine them, we shall find that a great practical injustice and a great inconvenience would be the result of allowing these presentments, and, therefore, it does appear to me that, with respect to the rules by which the court is guided in private cases, this case does not come within the principle upon which the court sometimes acts in refusing the relief which is sought. Now, then, to go through the grounds upon which, as it appears to me—and as I believe I may say to, if not all, at least to the majority of this court—the grounds upon which this court thinks it right to grant the *certiorari*:—The first is that which I have adverted to already, the importance of the question, and the extent to which it affects a large class of persons; but secondly the injustice—the manifest injustice—that must attend the suffering of these three presentments to stand, whether in respect to the county at large, or in respect to the baronies. Now, with respect to the presentments of baronial arrears upon the county, upon looking carefully into the case I find that there is really no jurisdiction; there is an absolute absence, a want of legislative jurisdiction for representing assessments. Before I advert to the statutes, I would say I would rather give a summary of the statutes, which are involved in the case, than go through the provisions of them, in every particular instance, in which they apply. There are four statutes involved in the consideration of the grounds upon which my judgment, and I believe that of all my brethren, is formed. The first is the statute 6 & 7 Wm. 4, c. 116; the second statute, 7 Wm. 4, c. 2; the third, is the 16 & 17 Vict. c. 136; and the fourth, 19 & 20 Vict. c. 63. Well, now, the sections which are involved in the questions arising in this case will be found in one or other of these statutes. Then, to come back to the presentments for the county; the statute which gives authority to represent does not embrace the representing of baronial assessments upon the county at large; and the injustice of a representment upon the county at large, when one considers the mode in which the original presentment is carried out, will shew the gross injustice it would work, to suffer a representment of the baronial assessments upon the county. The original presentments apportion amongst the baronies their several quotas to the county presentment at large, and that is raised, along with the baronial assessment, for its own purposes. Well, then, if there be a default, which, of course, is implied in a representment being made, (and these representments before us now are for defaults of necessity), and the representment will be just as the original presentments were, and then the baronies, that have paid their quotas to the county, will be subject again to this representment; having paid their quotas originally, they will have to pay for the defaulting baronies. There is, therefore, a manifest injustice in this, affecting a large class of persons,

and great inconvenience as well as injustice, and upon that ground it seems to be a case in which there is sufficient reason for the court interfering, notwithstanding there has been *laches* in coming to the court. It would be sanctioning, in a particular instance, that injustice, to allow these representments; and then there is another objection to these presentments. They are directed to be raised by instalments. Now, there is no express legislative authority for that. When we look to the origin of this right of presenting money for public purposes, especially for roads, the difference which exists between England and Ireland upon the subject is very remarkable. In England the road is kept in repair by the parish; and an indictment lies against the parish if it neglects to keep it in repair. In Ireland the grand jury have a legislative authority to raise money off each barony. This is, therefore, a mere legislative power, and can only go as far as the Legislature has permitted. Now, the circumstance that the Legislature has only allowed money to be raised in instalments, in particular instances, is a strong proof that it cannot be raised *proprio jure*. There, too, it is only a permission, not an order, that is given, and that shews that there is no original right; it is clear that the giving of a power of levying money, does not carry with it, *per se*, the power of levying it by instalments, and, upon that ground, it appears to me quite plain that this levying by instalments is illegal, and that there is an absolute want of jurisdiction to do it. Therefore, both with respect to the other ground, as well as this, we do not contravene the rule that says, we shall not go behind the presentment in order to invalidate it, because here, on the face of the presentment the want of jurisdiction appears. There is no legislative power to represent arrears upon the county at large, and there is no authority to present by instalments; and here, on the face of the presentments, the money is to be raised by instalments; and, therefore, we have on the face of these presentments, that which invalidates them. We are not going behind them to search out a ground of setting them aside. There is, also, this further objection, the ground of inconvenience—namely, that it would be doing, by a representment, what could not be done by an original presentment. These are the observations which occur to me, and, in my judgment, are the foundation to justify us in granting the *certiorari*, in this case. As to the presentment to Mr. Davis, the words of the 16 & 17 Victoria, c. 136, s. 6, are so express, power being given only to present for a taxed bill of costs, where the work has been done, and the public has actually had the benefit of it, that I ask how is it possible, under an authority of that sort, to justify an advance upon the trust that the work may be done, and yet it never may be done? That is what is done here, and the thing for which the presentment is made does not exist. The taxed bill of costs does not exist. The ratepayers should have some value for what they give, and should not be exposed to be called upon to make an advance of money, as here, before-hand. There is a presentment for printing; but, I believe as to that, the case is given up.

O'BRIEN, J.—I wish to state the grounds upon

which I concur in thinking that the writ of *certiorari* should issue as to all these presentments, except as to the small one for 14*l*. for printing. This is a peculiar case, and one which, probably, may not occur again; and there are so many principles involved in it, affecting the administration of the grand jury system, and the construction of the Acts of Parliament, and the power of the grand jury, that I think it advisable to refer to the several grounds which we proceed upon. It was stated that the arrears, for which the representations were made, accrued in 1849 and the subsequent years; that they accrued in several, but not all the baronies of the County Mayo; that large sums were due to Government and to contractors; and that, in the year 1856, a Bill was brought into Parliament, in order to enable the grand jury of the County Mayo, to raise so much as would be necessary. However, it was afterwards considered that the provisions sought for should not be introduced into a private Bill. The Bill, therefore, was withdrawn, and, in the next session, a Bill was introduced, confining the payment to the advances made by Government. At the Summer Assizes of 1859, the grand jury appointed a committee to carry out that object. Subsequently, an application was made to Parliament for a private Bill, to enable the grand jury to represent so large a sum as 11,000*l*., and upwards. A petition was presented to Parliament, and at the last Spring Assizes, the grand jury resolved that a Bill should be obtained, and steps were accordingly taken for that purpose. Now, the first presentment for 500*l*. is immediately connected with this proceeding, and it was passed, in the terms of the presentment, "to be paid to Mr. Davis, the solicitor of the grand jury of the County Mayo, to meet the expenses of the Bill then before Parliament, in relation to the arrear of county cess." The other presentments are for arrears of county cess—one on the county at large, the other on seven baronies. There are two questions, very different in their character, to be considered; the first, whether the presentments are illegal on any ground; the second, whether in the exercise of the discretion which this court exercises, there are, in this case, grounds that would warrant us in exercising the discretion of refusing the writ, even though we thought the presentments illegal. I concur, as to the illegality of the presentments, with my Lord Chief Justice, on the principle established by the cases of *In re Quinn* and *Ex parte Henn* (*ubi sup.*), namely, that the court should not go behind the presentment to ascertain whether all the necessary proceedings had been complied with; and, therefore, in considering this part of the case—namely, whether there are grounds for a *certiorari* at all, I put altogether out of consideration the statements in Mr. Rutledge's affidavit. As to the presentment for Mr. Davis it is open to two objections. First, the section of the Act of Parliament is not stated. The 127th section of the Grand Jury Act of 1836 (6 & 7 Wm. 4, c. 116), requires that every presentment shall contain a reference to the statute and section thereof under which it is made. Now, the only section that we have been referred to, which authorises the presentment in this case, is the 6th section of the 16 & 17 Vict. c. 136, and that re-

quires that the taxed bill should be produced before the grand jury, before they make such a presentment. The presentment in question appears to have been framed with a haste that the officers of the grand jury should not have allowed, for the presentment has left the section blank, and there is no section in the 6 & 7 Wm. 4, c. 116, authorising such a presentment. There is a second objection. The presentment is authorised only by the Act of 1853 (16 & 17 Vict. c. 136), which requires that the bill should be produced and taxed. It is manifest, looking at this presentment, that there was no such thing as a taxed bill in the case; and the sum is presented to meet the expenses of a bill before Parliament. It was a payment on account, one which the Legislature has taken express care to preclude the possibility of being made. The next is the presentment of 3,936*l*. out of the county at large. The Chief Justice has stated the grounds on which that presentment could not be supported. Whether the presentments were made under the Acts of 1836 and 1837, 6 & 7 Wm. 4, c. 136, and 7 Wm. 4, c. 2, or under the last Act of 1856 (19 & 20 Vict. c. 63), in none of them is such a power given as to represent for arrears on the county at large; and, considering the manner in which the arrears are distributed and arranged, it would be impossible, without injustice, to carry out the presentment. The express words of the 6 & 7 Wm. 4, c. 136, s. 145, are, "county of a city or town;" and there is no reference to the county at large; and the Act of 1856 says, that the arrears "may be represented, to be raised and levied on such denomination, barony, or county of a city or town, upon which the same was originally required by the treasurer's warrant to be levied." &c.; but there is no provision giving power to represent arrears upon the county at large. The amount to be raised off each barony is ascertained by the sum unpaid thereout. It is true that a portion of the sum, to be raised off each barony, is applicable to the payment of its proportion of the county presentments, and that a portion of the arrears may be applicable to the same object, but such portion may be looked upon as a debt due to the county at large, for which that barony alone is really liable. The effect of presenting on the county at large the sums due from the baronies would be, that the proportion of the defaulting baronies would be levied out of those which had paid, and it would be doing the injustice of making baronies, which are not in default at all, pay and bear a portion of the burden of other baronies, to answer the deficiencies of the latter. I may say that that ground of objection is singularly enough circumstanced; it was only suggested by the court itself at the end of the argument, and both sides were asked if they wished to add anything further to their arguments, but both sides declined. As to the baronial presentments, two grounds of objection will lie: first, that none of them set out accurately the section of the statute under which, if at all, they were authorised to be made; and, secondly, that the presentments were made payable by instalments. The first is one that I consider it important to consider, in some detail. I think it is under the statute of 1856, the 19 & 20 Vict. c. 63, s. 6, that representations should now be made. (His lordship here read the section.)

Now, certainly, it is enough to read the provisions of that Act to see that they are more appropriate than the provisions of the 6 & 7 Wm. 4, c. 116, s. 145; and one cannot but see that they are intended to replace the provisions of that Act, though without expressly repealing it, and that, accordingly, the 19 & 20 Vict. c. 63, is to be considered as the Act now authorising the representment of arrears. How it could be contended that the powers of the two statutes should co-exist I do not know; but it was contended that the powers of the 19 & 20 Vict. c. 63, apply only to those counties where the general valuation has been completed, which appears to be the case with the County of Mayo, and that it only applied in the case of confusion of boundaries. A reference to the statute will show that neither of the propositions can be maintained. With respect to the latter, namely, that the Act is to be used only in case of confusion of boundaries, the sixth section shews that it is to be used in all cases, and the subsequent clause of that section, as to the inability of the collector to levy, refers not only to boundaries, but also includes the insolvency of the parties and other matters. But it is said, also, that the sixth section applies only to those counties where there is a general valuation. It is true that the first five sections apply to counties where the valuation has been completed, but the 6th section is general in its terms, providing for representments, in all cases; and there is nothing in the subsequent provisions of the Act that shews any intention to restrict the general words, or that the completion of the valuation is necessary. I, therefore, upon this ground, think that these presentments are clearly erroneous. Now, the objection as to their being made payable by instalments, has been very fully gone into by my Lord Chief Justice. It is a power very serious in its results, if it exists. It was pressed in the argument, and I thought that there was some force in what was urged, that the general words of the 145th section of the 6 & 7 Wm. 4, c. 116, stating that the sums to be represented shall be levied in the same manner, and subject to the same rules, regulations, provisions and powers, as any money to be levied by virtue of that Act is to be subject to, sanctioned the representment by instalments. It was urged, and I thought very forcibly, that these words included the power of raising money by instalments, given by the 69th section of that Act; but, on the other hand, it appears to me that these words apply to the proceedings to be taken by the treasurer, and not to include a power of such importance as this. The power to levy money by instalments is given by the 69th section of the Act of 1856, and is there given expressly in the case of presentments for building, rebuilding, or repairing court-houses and session-houses, or for any other public works. It is hard to suppose that so important a power would be given by so ambiguous an expression as that in the 145th section; but we have a further illustration in the 183rd section of the same statute, that where Parliament intended to give the power, it was given by express words. This question is, perhaps, more a matter of speculation than otherwise, because, if I am right in thinking that all representments for arrears are properly made under the 19 &

20 Vict. c. 63, then there is nothing in that Act to give this power of making the representments payable by instalments, and, as my Lord Chief Justice has observed, it would be open to this absurdity:—a presentment can originally be made payable by instalments only for public works, and yet if a presentment for something else is in arrear, the arrears could be made payable by instalments. This disposes of the two objections which arise on the face of the baronial presentments. Now, where there are arrears so considerable, as in this case, some of the arrears being matter of substance, and the sums presented amounting to nearly 12,000*l.*, the question is whether, notwithstanding that the case is one of such magnitude and importance, there are circumstances to induce the court to refuse the *certiorari*. As to the general right of the court to do so, the cases of *Rez v. Bass* (5 T. R., 251), and other cases, shew that it is not in every case that the court will, as a matter of right, feel itself bound to grant a *certiorari*; but if the court has a discretion, that discretion should be exercised not capriciously; but, in a case like the present, we should be satisfied that there are strong grounds to warrant our refusing it. The circumstances relied upon here are, that the presentments were not objected to at the assizes; that Mr. Rutledge's non-attendance at the assizes was the reason of their being *fiated* without objection; that he was guilty of delay in coming to this court, and also that the treasurer's warrant was issued for the instalment of the arrears, and that great public inconvenience would arise from the arrangements entered into being disturbed. In estimating what effect Mr. Rutledge's omission to attend at the assizes, or his delay in coming here should have, we must consider the material difference between the cases where the party complains of an individual wrong to himself, and those in which the proceedings complained of affect the interests of a considerable body of persons. In the former class of cases, the court may have regard to the fact that the party had omitted previous opportunities of righting himself, but, in the present case, all the ratepayers are affected by the representments. One of these representments would have the effect of throwing on some of them part of the burden of the deficiencies of other baronies. All the representments would have the effect of throwing on the ratepayers, for the next ten years, nineteen-twentieths of the burden which, under the Act, should be borne by those who were ratepayers when the instalment was presented. How can they be affected by Mr. Rutledge's *laches*? There appears to me to be some doubt whether the case of the *County of Down* (Jebb's Cas. Res. 20), refers to that class of presentments at all. A great deal was said as to the hardship inflicted upon the contractors and Mr. Davis; but it appears to me that the grand jury have power, if they can bring themselves within the sixth section of the Act of 1856, to represent these arrears. As to the costs, where is the hardship? Let Mr. Davis get his bill taxed, and go before the grand jury, under the 6th section of the 16 & 17 Vict. c. 136, and he can have his rights settled. Then, as to the technical objection of the statute not being referred to, I would not be understood to say that if a presentment was in

other respects legal on the face of it, and the objection was one which, if it was made at the assizes, could be cured by the judge handing the presentment back to the grand jury, and telling them to correct it, I would be other than reluctant to entertain such an objection. But the objection here is different. The objection is one of substance, for the grand jury purport to do under one Act what under the other they have not power to do; and the objection is one which could not have been remedied at the assizes, and which would have been fatal to all these presentments. A reference to the statute, in the case of Mr. Davis's presentment, would have been fatal to it. A reference to the recent Act, in the case of the baronial presentments, would have been fatal, as it would have been seen that there was no preliminary notice; and though we cannot look beyond the presentment, still, if the error is apparent on the face of it, we may look at the surrounding circumstances to see if the case is one in which, in our discretion, we should refuse the *certiorari*. I think, therefore, that, as to these nine presentments, we should grant the *certiorari*.

HAYES, J.—I concur with my Lord Chief Justice and with my brother O'Brien, but upon grounds different from those relied upon by them. The presentments in question were made by the grand jury of the County of Mayo, at the Spring Assizes for 1861. Shortly afterwards the treasurer issued his warrant and levied the county cess for all the presentments made at that assizes, and while these sums were in course of collection, this court was called upon to grant a conditional order for a *certiorari* to remove the ten presentments and have them quashed. Upon the motion to make absolute this conditional order, several objections were made to the presentments which may be classed as follows:—First, that the presentment for Mr. Bole for printing, &c., was wrong; secondly, that that for Mr. Davis was wrong; thirdly, that several of the others were wrong, as the statute and section under which they were made, were not inserted as required by the 127th section of the 6 & 7 Will. 4, c. 116; fourthly, that money represented as unpaid arrears cannot be made payable by instalments; fifthly, that the grand jury have made presentment of the moneys without any affidavit, as required by the 145th section of the last mentioned Act; and lastly, an objection has suggested itself to a member of the bench, that money cannot be represented on the county at large, but only on some barony. I am far from thinking that the validity of these objections ought to rule the present motion, yet it is plainly of importance that the questions raised should be considered, as affording grounds for our interference by *certiorari*. The presentment to Mr. Bole being for a small sum has with good taste been faintly resisted. It is not worth while to give any opinion as to its strict legality. The presentment to Mr. Davis stands on a different footing. It is not for the purpose of reimbursing him for work done or money expended as a solicitor, or for money or costs incurred, but it is a round sum to be handed to him to meet expenses in Parliament when they might arise. In my opinion that cannot be sustained under the 16 & 17 Vic., c. 136, s. 6. It was wholly *extra vires* of the grand jury; they had no jurisdic-

tion to make the presentment. As to the non-insertion of the authorizing statutes, three statutes have been referred to, the 6 & 7 Will. 4 c. 116, the 7th Will. 4, c. 2, and the 19 & 20 Vic. c. 63. The first of these statutes deals with two classes of cases—those in which money has not been paid by the cess-payers to the collector, and those in which the money having been paid to him he is to pay it over to the treasurer. With this latter class we have nothing to do at present. The Act of the 7th Will. 4, c. 2, in enlarging the discretionary power of the grand jury enables them to raise the arrears of county cess off the whole barony, or any part of it upon which the cess was originally presented. And the statute 19 & 20 Vic., c. 63., while limiting the discretion of the grand jury, seems intended to carry out the policy of the 7th Will. 4, c. 2, and enacts that the cess shall be levied out of the defaulting townlands, baronies and half-baronies, and then that the representment shall follow the original presentment. The objects and policy then of the Legislature being so different in the several Acts, I am of opinion, that representments of money ought to be deemed as made under the last Act, and should be so marked and inscribed. The next question is, as to the authority of the grand jury to make a representment payable by instalments. The 69th section of the 6 & 7 Will. 4, c. 116, authorizes the grand jury to make presentments for certain public buildings and other works, payable by instalments; a very reasonable provision so that the expenses should be shared by those who are to share the benefit of the work; and it would not be unreasonable if in this case the Legislature were to authorize the levy of the arrears of the defaults of former rate-payers by gradual payments by instalments rather than by overwhelming the owners of property by one payment; but has the Legislature done so? The 145th section of the 6 & 7 Will. 4 c. 116, enacts that the grand jury may represent any such sums of money as shall be unpaid or in arrear out of any denomination, barony, or county of a city or town, to be raised and levied upon such denomination, &c., upon which the same was originally required to be levied. The 7th Will. 4. c. 2, s. 15, when speaking of representments, enacts that they shall be levied in the same manner as any other sums of money. There is no corresponding clause in the 19 & 20 Vic., c. 63, and as there was nothing in that Act contrary to the policy of the former, I am of opinion that the Legislature intended, that the provision of the former Act should not be interfered with, and that it remains in force, and that the presentments are unobjectionable on the ground suggested. This is in conformity with the principle, that where there are two statutory enactments on the same subject, the latter shall not repeal the former unless they cannot stand together. The next objection is, that the grand jury have represented without any of the affidavits required by the statute 6 & 7 Will. 4, c. 116, s. 145. Having intimated an opinion that it is under the Act 19 & 20 Vic., c. 63, that the presentments should properly have been made, I have further to observe that that Act has provided a *viva voce* examination of the collector, and this is in substitution of the previous machinery. But then comes the question as to the right of representing on the county at large. I think that cannot be done and

that that presentment cannot be made. The next question is whether we should issue our *certiorari* in respect of any and which of these objections. Now it is to be observed that the writ is not issuable as of right, but in the exercise of a sound discretion. Per Lord Denman, C.J., in *Regina v. Manchester and Leeds Railway Company*; so, if this court be of opinion that justice was done in the court below, the writ may be refused; so, the writ will not be granted to a party who has lain by, or has not availed himself of the proper tribunal. The presentments complained of were made by the grand jury after full discussion, in presence of the rate-payers, at the assizes. No objection was then made by Mr. Rutledge or any individual at all. On the opening of the commission the business of the presentments was taken up by the judge. All persons having objections were called upon to make them. No objection was made, and the presentments were fiatd, or, in other words, the court pronounced its judgment on each presentment, that the money should be raised and levied. It is a cardinal principle that every objection should be made at the earliest opportunity, and if it had been so made in this case, there is no doubt that the judge, on the objection being made, would have stayed his fiat. And what was the excuse suggested by Mr. Rutledge for not having made his objection at its proper time and place? He says that he was not at the assizes at all, and was not aware that the presentments were made, until after the assizes, and he further says that a report was circulated in the county that they were traversable at the next assizes. There is no suggestion that the grand jury misled Mr. Rutledge. If he had attended before the judge the defect could have been remedied. Mr. Rutledge ought not, therefore, in my opinion, to be allowed to insist on that objection, and to secure by his *laches* an advantage which he would not have had if due diligence had been used by him. But it may be said that granting that this is a good answer as to those defects which could have been cured at the assizes, it will not hold good as to those presentments to which the objections, if made at the assizes, would have been fatal. This, I take it, is conceded that while the 19 & 20 Vic., c. 63, was the statute under which these arrears should have been presented, there was no publication of the arrears prior to the assizes. I own at once the weight of this objection, for on referring to the statute, having regard to the unqualified words of the enactment, I think it plain, that if the lists were not published, the grand jury have no authority to entertain the matter, and have no more jurisdiction to present for arrears than this court has, or than a court, which has only appellate jurisdiction, would have to act originally. The present case differs from that of *Regina v. the Board of Works* (4 Jur. N. S., 25), where the Chief Justice says:—"This is not a case in which a preliminary fact is to be ascertained." Here there is a preliminary fact to be ascertained, and that preliminary fact here is the publication of the lists. It may be said that by maintaining this doctrine we are going behind the presentments. I only say that I think that rule does not extend to a matter which is the very foundation of jurisdiction. I think, therefore,

that the *certiorari* ought to go. As to Mr. Davis I have only to say that the presentment in his case was wholly unauthorized. The grand jury had no power to dispose of the public money for such a purpose. We are relieved from all formal questions in this branch of the case, and I think the *certiorari* should issue as well for this presentment as for the others.

FITZGERALD, J.—I concur with my Lord Chief Justice and my learned brethren, and I am in the position of being able to adopt the reasons of all of them. I can point this out that not only are we not infringing upon the rules which forbids us to go behind the presentments themselves, but that every ground, upon which we decide this case, is substantial, and goes to the merits of the case. We are giving no weight to any mere technicality, but are deciding upon the merits. As to the presentment for Mr. Davis, it is plain on the face of it that the grand jury had no authority to make it, and the omission of the proper reference to the statute and section is important, because, if they had been referred to the statute, even a grand juror would have been able to see that he had no jurisdiction to make a presentment until the production of the taxed bill of costs. Then, as to representing on the county at large for arrears, I hold that if we did not give force to the objection to it, it is a presentment that would work gross injustice. As to the validity of that objection I have no doubt, as the attention of the counsel for the grand jury was called to it at the close of the case, and they were offered an opportunity to argue it if they chose, and they declined to offer any suggestion against it. I also agree with the other members of the court that no authority to represent a sum to be levied by instalments exists. However it may be in many instances desirable that such an authority should exist, yet, as the authority of the grand jury is the creature of statute only, it must be found in the statutes, and I concur in the opinion that in none of the statutes is any such authority to be found. And then this authority is one that must be watched with jealousy, because it is one enabling the grand jury at any time instead of meeting immediately their own proper burden to cast a proportion of that burden upon posterity; as in this case, persons coming into the possession of property ten years hence, would be called on to pay instalments of a sum with which they had nothing to do. The omission of all mention of the statute and of the section of the statute under which the presentments are made, might, in many instances be a technical objection merely, and I would be disposed to give little force to it, if it was one that in the particular case was merely a matter of form, and the objection could have been remedied at the assizes. But here the objection seems to be one of a character going to the merits of the case; for if attention had been called at the assizes to the omission, it could not have been rectified. It is not merely an omission to refer to the statute, while making the presentment under it, but an omission of all reference to the 19 & 20 Vic., c. 63, under which alone this presentment could have been made; and it seems to me to be a substantial objection going to the merits, as the grand jury could not have rectified it, as, if it had been pointed out that the presentment was made un-

der the 19 & 20 of the Queen, c. 63, it would be wanting in the essential preliminary of the notice, enabling every ratepayer to come in and dispute the propriety of the presentment. The only other portion of this case upon which I wish to make an observation is this, with reference to the delay which has taken place. That delay is divisible into two periods; first the *laches* in not making the objection at the assizes; and secondly, when that had occurred, the *laches* in not bringing the application before this court until the last day of the term. My brother Hayes and I were so embarrassed on account of this delay when the *ex parte* application took place, that we hesitated before granting the conditional order. However, we did grant it. Now, as to the neglect to make the application at the assizes, I have the misfortune to differ with my brother Hayes, because it does not appear to me to be a well founded objection that the applicant was guilty of neglect at the assizes, for the whole conduct of the grand jury, in place of giving any intimation of their intention to represent these arrears, was such as to deceive and mislead the ratepayers. I do not of course mean to say, that these gentlemen intended or had any view to do so, but their course was such. At an early period the impracticability of representing the arrears at the proper time became obvious, and accordingly they applied to Parliament for the necessary powers. I presume they found that they were unable to prosecute the representments, and that they abandoned the idea of collecting the arrears under the existing law, and I remember the several bills which were before Parliament to give them authority to represent that which they could not enforce under the existing law. Then, in 1860, so far from there being any intimation given to the county, that it was intended to apply the amended law to that case, we find in spring, 1861, that there was a bill before the House of Commons, the object of which was to give additional powers to represent arrears, and we have at the Spring Assizes of 1861, a presentment passed of £500, to enable Mr. Davis to prosecute that bill. Thus, so far from any statutable notice having been given, we find, on the contrary, that they were looking for additional parliamentary powers. To be sure, an abstract of the presentments is read at the assizes, to give an opportunity to each ratepayer to come in and object; but if the abstract of these presentments was read one after the other, there was nothing in them to call the attention of any ratepayer, or to indicate that there was any intention to proceed with the collection of these arrears, and Mr. Rutledge swears, that he did not hear of the presentment till after the assizes were over. I therefore, do not think that the neglect to make the application at the assizes was of consequence. But there was considerable delay from the first day of Easter Term, when the application might have been made to this court, to the last day of Trinity Term, when it was made. If this had been a case in which Mr. Rutledge was the person alone affected; if he appeared here to defend his private right alone, and had been guilty of this delay, and sought to rectify himself by coming here, that would have been a ground on which we might have refused the application, though it seems to me that the writ of *certiorari* so nearly approaches the con-

finer of matter of right, that we might perhaps have granted it, even in that case. But this is a public case, involving thousands, and affecting posterity, affecting persons who are to come into the possession of property years hence; and it would be very strange, to say, that because there was that delay, from which no public injury could arise, we were to stay our hands. We did not do so therefore, and we, my brother Hayes and I, made the conditional order which was sought, and we are enabled now on substantial grounds to dispose of the objections which have been made to it.

No costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

FITZGERALD v. FITZGERALD. — Nov. 4.

Ejectment—Special Case—Cross-Remainders.

A testator devised all his estate and interest in the lands of D to A and B, one moiety to each for life, and from and after their decease to the sons of A and B and the heirs of their bodies, and in default of such issue, he devised the said lands to C. Held, that the terms of this devise implied cross-remainders.

Held also, per MONAHAN, C.J., (CHRISTIAN, J. dissentiente), that there is nothing to prevent the implication of successive cross-remainders between estates for life and estates tail in the same subject matter, where the phraseology of the will warrants the inference that the testator so intended.

THIS was an ejectment on the title, and a special case had been agreed on and submitted to the court, in order to determine the construction of the will of the late Sir Francis Fitzgerald, in which, after reciting the purchase by him of an island called Coney Island, he devised all his estates and interest in the said island to the plaintiff, Sir John Fitzgerald and his brother Charles, one moiety to each for life, and from and after their decease to the sons of the said John and Charles and the heirs of their bodies, and in default of such issue, he devised the said island to Henry Fitzgerald. Charles Fitzgerald had died without issue, subsequently to the testator's death: the plaintiff was living, but without issue to the present; the defendant was the devisee over, the Rev. Henry Fitzgerald.

Ball, Q.C., (with him Jellet), for the plaintiff.—The general rule regarding cross remainders in these cases will be found in 2 Jarman on Wills, 510.—“The principle has been long admitted that, wherever real estate is devised to several persons in tail, as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders in tail among themselves.” “Default of such issue” in the will before us means default of issue of all of them. The devise over is a devise of the whole island, therefore, cross-remainders must be implied.—*Phipard v. Mansfield*, (Cowper's Rep., 797); *Watson v. Foxon*, (2 East, 36); *Atherton v. Pys*, (4 Durnford & East's

Term Rep., 710); *Green v. Stephens*, (12 Vesey, 419); same case further reported in 17 Vesey, 64. The only distinction between the present case and those cited is this, that life estates are given first; but there may be cross-remainders between life-estates.—*Ashley v. Ashley*, (6 Simon, 358).

Warren, Q.C., (with him *Franks*), for the defendant.—There is no case to be found where cross-remainders have been implied under terms similar to the present. Indeed, they must be rather designated cross limitations than cross remainders. The words "such issue" will include the sons of John and Charles Fitzgerald, and cannot be restricted to the heirs of the bodies of their sons; and yet they would not have vested an estate tail in the plaintiff. I ask the court to read "island" in the will "moiety of the island."—*Gilbert v. Watty*, (Croke James, 655); *Vanderplank v. King*, (3 Hare 1), observations in Vice-Chancellor Wigram's judgment, at page 20; *Ewington v. Fenn*, (16 Jurist, 398). If the defendant's construction be not the true one, I see not how he derives under the will at all.

Cur. adv. vult.

The case stood over until the close of the Michaelmas Term, when judgment was given for the plaintiff. The only members of the court who expressed a decision being the CHIEF JUSTICE and CHRISTIAN, J. BALL, J. had been absent at the Commission when the question was argued, and KEogh, J. was presiding in the Consolidated Nisi Prius Court. The learned judges concurred in giving judgment for the plaintiff; but differed in the grounds of their decision.

MONAHAN, C. J., stated the facts and added:—This case has been got up in a praiseworthy manner, and with little expense to the parties concerned. I regret we have not more of the same kind. The question involved is an important one: the material words are, "in default of such issue." In terms the devise over is a devise of the whole island, for the word "moiety" is not made use of. The difference between the present case and every case to be found in the books is this, that an estate for life is given first, and estates tail afterward.—*Phipard v. Mansfield*, which has been cited by the plaintiff's counsel, decided that where there was a devise to A B and C in common in tail, and a devise over "for want of such issue," this implied cross remainders between A B and C. Now the antecedent life-estates make this case to differ from *Phipard v. Mansfield*. While either of them lasted there could not be a failure of issue. It never was intended that the sons of John and Charles Fitzgerald should take estates tail in the lifetime of their fathers. Can cross-remainders be implied between the life-estates themselves in the case before us? I believe they can. The case of *Ashley v. Ashley*, (in 6 Simon), extended the doctrine of cross-remainders to life estates. If this be so, and if cross-remainders may, by the ordinary rule, be implied between the subsequent estates tail, then, I ask, what is to prevent me from implying two sets of cross-remainders? As long as the judges held that cross-remainders might be implied between two devisees, but not between more than two, an objection to the course I have proposed to myself might stand.

But this doctrine is no longer law. If I can only come to the conclusion that this was what the testator intended, then what is to prevent me? Can I come to any other conclusion? Can I doubt that he did so intend? A dictum of Lord Mansfield has been referred to which might seem to stand in the way. He speaks of an absurdity, but I do not see it. Take the closing section of this chapter in Jarman on cross-remainders and read—5thly, "That it is no objection to the implication of cross-remainders, that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail." The foundation of this remark is the case of *Vanderplank v. King*, decided by Vice-Chancellor Wigram, and in the conclusion drawn by Mr. Jarman from the Vice-Chancellor's decision I concur. My brother Christain differs from me. That difference might have been concealed, had we prepared an elaborate judgment which should shirk the points at issue between us, but this is a course which we have not thought advisable.

CHRISTIAN, J.—The Lord Chief Justice and myself have arrived at the same conclusion, but have travelled to it by different roads. I concur with him in thinking that there should be no mental reservation in the expression of our opinions, and I concur in the construction of cross-remainders in the estates tail. I admit that cross-remainders may exist between tenants for life, but I will not admit that *Ashley v. Ashley* is an authority for going the length of implying cross-remainders here between the tenants for life, because I hold the words "default of such issue" to mean default of issue of the sons of John and Charles. Have we a right to go an iota beyond the testator's intentions in making out cross-remainders?—*Vanderplank v. King* does not militate against my view. I will seek to decide this question without impeaching the dictum of Lord Mansfield, which has been cited. I find enough in the foregoing words of the will to make me rule this case for the plaintiff. The defendant has failed to show any antecedent words of severance; and the rule on this subject is that words of severance in preceding limitations will not avail. Supposing there were no devise over, John and Charles would be joint tenants of the fee-simple expectant on a failure of issue: accordingly, John, the plaintiff, would now be tenant in fee-simple of the whole island, if there were no devise over. Will this clause deprive them of it? If not, there is an end of the case. This devise does nothing but cut down the estate in fee-simple to estates tail, and between these estates tail we have the ordinary cross-remainders.

Judgment for the plaintiff.

COYNE v. BRADY.—Jan. 17.

Cruelty to animals—Construction of the 12 & 13 Vic., c. 92—Judicial respect for English decisions. The penalties imposed by the 3rd section of 12 & 13 Vic., c. 92 on persons assisting at a cockfight are restricted to combats of that character conducted in a place particularly kept for this purpose.

THIS was a case stated by the Justices of the Peace

for the county of Dublin, assembled at Tallaght for the opinion of the court, pursuant to 20 & 21 Vic., c. 43, sec. 2. A summons in writing having been preferred by Thomas F. Brady, secretary to the society for the prevention of cruelty to animals, and John Harvey, a head constable, under sections 2 & 3 of 12 & 13 Vic., c. 92, John Coyne was on the 3rd of June, 1861, convicted by the said justices assembled at Tallaght, of having been unlawfully engaged in cockfighting on the morning of May, the 15th, 1861, upon the lands of Glassamucky and Kiltipper, contrary to the provisions of the 12 & 13 Vic., c. 92. The fact of the cockfight was proved to the satisfaction of the magistrates, and it was further proved that John Coyne was seen to win and lose money in betting, but there was no evidence of his having handled the birds. Within three days John Coyne applied in writing under 20 & 21 Vic., c. 43, section 2, requiring the justices to state a case for the opinion of the superior court.

J. A. Curran, jun., for the appellant.—This conviction is bad. There are two several grounds on which it will be sought to sustain it, and I shall deal with them in order. To encourage, aid, or assist at the fighting of cocks is not an offence within the intent or meaning of the 12 & 13 Vic., c. 92, sec. 3. There must be more than this. It must be done in a place so kept or used for the purpose of fighting cocks as to subject the keeper of it to the penalty imposed in the foregoing clause of the same section. That section enacts, "That every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding five pounds for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds for every such offence." The words "as aforesaid" mean in the way or manner aforesaid, i. e., in a place kept for fighting or baiting animals. This construction will make the section intelligible. It will be unintelligible otherwise. We cannot suppose the Legislature to have intended that the principals should be exempted from the penalty they were imposing on those who should encourage, aid, or assist. It is accessories they mean, accessories to the offence specified in the previous part of the same section. But the magistrates conceived that a fresh offence was created in this latter clause, and they convicted the appellant, who was only proved to have won and lost money by betting. This view of the meaning of the section will be confirmed by referring to the 5 & 6 W. 4., c. 59, sec. 3, for which the present enactment was substituted. The latter statute clearly affected those only who frequented such

places as I have mentioned. Indeed there is an express decision on the point.—In *Clarke v. Hague*, (8 Cox's Criminal Cases, 324), the full court of Queen's Bench in England held that, to constitute an offence within the meaning of the 12 & 13 Vic., c. 92, sec. 3, the assisting at the fighting or baiting must occur at a place kept for the purposes of fighting or baiting; and Blackburn, J., in giving the judgment of the court, reasons upon the statute as I have done. But, secondly, supposing this point decided in the appellant's favour, the magistrates will seek to shelter themselves under the more comprehensive verbiage of the second section. In their case they rely on this section, and profess to have convicted Coyne under and by virtue of it. It will be argued for them, that this appeal differs from *Clarke v. Hague*, because express notice was taken of the second section, and the magistrates availed themselves of it. That section enacts, "That if any person shall from and after the passing of this Act, cruelly beat, ill treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds." I submit that it is impossible for them thus to unite the two sections in order to support their own Act. But that section meant no such thing as to include a case of this kind; it applies only to cruelties caused by the immediate act of man, it does not contemplate cases where the animals themselves are the agents. If the fighting of cocks was meant to have been included in the 2nd section, then the concluding clause of the 3rd section becomes utterly useless; and this, whether it bear my construction or the construction which will be contended for upon the other side. Read the words, "as aforesaid" to mean, "whether of domestic or wild nature," and they will only have repeated an offence previously created, or read them to mean, in the precise manner in this section specified, and the Legislature will be punishing in a particular instance that to which, under the more general words of the second section they had already attached a penalty, and that penalty the same penalty.

Barry, Q.C., (with him *Purcell*), for the respondents.—The words, "as aforesaid" mean animals "whether of domestic or wild nature," &c. The distinction taken by the English Court of Queen's Bench, in *Clarke v. Hague*, between principals and accessories is fanciful. If this distinction be insisted on, then the cock is the principal in a cockfight, and all the people present, whether they handle the birds, or encourage them by shooting, or bet upon them, are accessories. [*Monahan, C.J.*—Did you ever hear of a cock being indicted?] I insist upon it that there is no difference between a man handling the birds and a man encouraging them to fight, such as that which exists between principals and accessories: the latter is no more an accessory than the former. If the appellant's construction of this section be supported, it follows that I may carry a bear with me about the country for the purposes of baiting or fighting with impunity, provided I keep him moving from spot to spot, and never repeat the offence in the same place. In *Clarke v. Hague* the respondents

were unrepresented: the appellant argued the case, and there was no appearance on the other side. But further, supposing this section be construed in the appellant's favour, the second section will sustain this conviction. Reads second section. *Clarke v. Hague*, is also reported in 29 Law Journal, N. S., 105, and there the following observations with which Blackburn, J. closed his judgment, are given:—"We do not wish to be understood as confirming the opinion that no penalty can be incurred unless the animals are baited in a place (to use the phrase in the case) regularly kept for that purpose, on this we pronounce no decision, as the justices have not found the fact to raise this point, nor asked us any questions upon it, the only question submitted to us being whether it is an offence to assist at cockfighting elsewhere than in such place, we think it is not, and therefore our judgment must be for the appellant."

MONAHAN, C. J.—The public are little able to appreciate the grounds of doubt in the breasts of different judges; and it naturally tends to bring the administration of the law into contempt, when they see before them conflicting interpretations of the same statute. This is a thing to be avoided where it can be. Every opinion of every judge is fallible; and this is a principle to be recognised in the expression of a decision. Did this 3rd sec. of the 12 & 13 Vic., c. 92, come before us for the first time, we must have taken a different view of it; we must have acquiesced in the respondent's reading and supported this conviction. But it has not so come; and this express decision of an English court we do not feel ourselves at liberty to overrule. Accordingly, this conviction must be quashed, but without costs.

Conviction quashed.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

MARY MAHONY, OTHERWISE DONOVAN, THE WIFE OF PATRICK MAHONY, PLAINTIFF; HONORIA SCULLY, OTHERWISE DONOVAN, THE WIFE OF C. SCULLY, DEFENDANT.

AND IN THE GOODS OF THE REV. JOHN DONOVAN, DECEASED.—*Jan. 25, 28.*

Right to administration—Majority of interests—Donatio mortis causa—Adverse interest—Parties—Husband and wife.

A next of kin, or a party entitled in distribution, seeking to establish his interest in the assets, either on the construction of the will, or by way of donatio mortis causa, to the exclusion of the other next of kin, must do so by affidavit clearly, and failing to do so to the satisfaction of the court, the general rule will prevail that the person having the majority of interests is preferred, and the person having an interest adverse to the assets is passed over.

Semble—In administration suits, brought by married women, their husbands should be parties.

Dr. Townsend (O'Brien with him) moved that the caveat lodged by the defendant should be set aside, and that the plaintiff might be at liberty to apply for letters of administration of the goods of the deceased,

with his will annexed, in common form. The deceased, by his will bearing date the 30th January, 1861, gave to the defendant, Honoria, "his house furniture, and all that was in his house, especially his car, horse, and inside car," and appointed a Mr. Arnold executor, but named no residuary legatee. The executor had renounced. At the time of making his will, the deceased had a sum of £1,080 in his house, but the defendant alleged that the deceased, 10 days before his death, gave her that money for herself, and that, after his death, she lodged £1,000, part of it in her own name, in the Provincial Bank, Fermoy, and gave the deposit receipt to the Rev. Mr. Kenefic. The deceased died on the 8th February, 1861, leaving surviving him Jeremiah Donovan, his brother, Mary Mahony, otherwise Donovan, his sister, his only next of kin, and a nephew and niece, the children of a deceased sister, Jane Collins, and another niece, the defendant, the daughter of a deceased brother, Cornelius Donovan, entitled also in distribution. Jeremiah Donovan, and the nephew Collins, who were abroad, authorized Mr. Kenefic, by a power of attorney, to consent to the plaintiff taking the administration. Counsel submitted no case was made out of a gift of the £1,080, and that the £1,080 should be considered assets of the deceased, and as the plaintiff had the clear majority of interests, and was herself in nearer degree of kindred than the defendant, the court should prefer her as administratrix.

Exham for the defendant.—The defendant, though not strictly a next of kin, has, in fact, a greater interest in the assets than anyone. She is legatee of everything in the will, and under the words giving her the house and all that was in it, a question will arise on the construction of the will, whether the £1,080 did not pass to the defendant. Besides, she claims that sum as a *donatio mortis causa*, or a gift *inter vivos*. Her affidavit stated that, ten days before the testator's death, he desired the Rev. Mr. Kenefic to give that money to the defendant, which he did, and that she lodged in her own name in the bank £1,000, part of it, and the remainder she paid to Mr. Kenefic for the funeral expenses, and she voluntarily gave the deposit receipt to him also, but not endorsed. The bank would not pay the money unless the receipt were endorsed, and the defendant, if she got the administration, offered to endorse the receipt, and let the money be lodged in the Court of Chancery, to abide the result of a cause petition, which the defendant would immediately file to establish her claims.

KEATINGE, J.—The will of the deceased, which all parties admit as valid, has disposed of all his property, except the sum of £1,080 cash, which the defendant says passed under the general words in the will, "my house, furniture, and all that is in my house." Now, it is not made out to my satisfaction that it does pass under those words, and indeed I did not understand counsel to argue it very strongly. But he relied on a case of *donatio mortis causa*, or a gift *inter vivos*. But upon the affidavits in the case (if there be nothing more) I am clear that it is not a good gift of that kind, and the affidavits should have made it out clearly. I, therefore, hold that it must be considered on this motion as a part of the assets, and there not being in the will any residuary clause, it would go to

the next of kin, and those representing them in distribution, as the deceased, as to that sum, died intestate, and as the plaintiff has the clear majority of interests, and it is the duty of the administrator to protect and make the assets as large as possible, and the defendant's interest evidently is the reverse. There is nothing to justify me in departing from the general rule, and I accordingly dismiss the caveat, and allow the plaintiff to apply for administration as asked for, she to have her costs, and she to extract within fourteen days. In default thereof I then give administration to the defendant. I give no costs to the defendant unless the plaintiff fails to extract, as the defendant did not make out her case as she was bound to do. Justifying security to be given.

NOTE.—His Lordship added that he doubted if the old practice in the Prerogative Court, of omitting to make parties in the cause the husbands of married women who were next of kin seeking administration, was correct. He thought they should be also parties, though they always join in executing the bond.

Court of Quarter Sessions.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

APPEALS FROM MAGISTRATES TO QUARTER SESSIONS.*

STEWART, APPELLANT, BIRNEY, RESPONDENT.—Jan. 6, 1862.

8 & 9 Vic. c. 64, s. 2.

The proprietor of a house licensed to retail spirits, is responsible for the non-admission of the constabulary into his house, in his absence.

THIS was an appeal from a conviction by the Justices at Lurgan Petty Sessions, on the 18th September, 1861, whereby the appellant, Charles Stewart, being licensed to retail spirits, to be consumed elsewhere than on the premises, was convicted, "for that complainant being a constable, then upon duty within the limits of his jurisdiction, demanded entrance into the appellant's house, kept by him for the sale of spirits, and the said appellant delayed to admit complainant therein for the space of half an hour." It appeared on the hearing of this appeal that Charles Stewart kept a grocer's shop, and held a license to retail spirits, under 8 & 9 Vic. c. 64, s. 1 & 2; and that on the 4th of September last, his wife was carrying on the business in the shop, when a boy who was on the road gave information that the police were coming, upon which the door was closed, and although the complainant, Robert Birney, who was acting as constable and one of the police force, knocked at the door and demanded admission, it was not opened for half-an-hour. There were two persons in the shop at the time who had got some spirits, which they were drinking, and who got away through the back part of the premises after the door was shut. It was proved that Charles Stewart was absent from home at the time."

It was objected on behalf of the appellant that he was not liable to be convicted of the offence charged for an act done *in his absence*. The statute 8 & 9 Vic. c. 64, repeals the part of 6 & 7 Will. 4,

* The above important decision was made by the Chairman of the County of Armagh, at the Lurgan Sessions, upon the 6th of January, 1862, upon appeal heard on the 14th of October, 1861.

c. 38, as to the granting of grocers' licenses, which are to be regulated by former Acts (6 Geo. 4, c. 81, s. 4 and others), and by s. 2 it enacts, that Justices of the Peace, constables, &c., may enter the houses of persons licensed to retail spirits (as appellant was), and if such retailer on demand of entrance opposes or obstructs entrance, or delays to admit, &c., he is subjected to a penalty of £2. and on conviction forfeits his license. The offences created by this statute arise out of acts done in the management of the house or place kept by the retailer for the retail of spirits under his license. The evidence clearly establishes that an offence under this Act was committed in the appellant's house where he was carrying on the business of the retail of spirits under his license, by the person employed by him in the conduct of that business. The act, therefore, was done by him according to the legal as well as ordinary and popular meaning of the language of this statute. It does not necessarily imply that the party licensed should do *in person* the act prohibited. If such were the construction of the words used, the provisions of the statute could be evaded with facility, by every retailer employing some other person, who could violate all the regulations of the retail trade in spirits without the risk of detection. Such a construction would be contrary to the intention of the Legislature, and also to the express terms of this section, 8 & 9 Vic. c. 64, s. 2, which obviously renders the retailer liable for his acts done in his house in the conduct of that licensed house, whether by himself in person or by those employed by him. Decisions enforcing penalties, as strong or stronger, have been frequently made under the Excise Acts, in applying their language against persons licensed. A retailer of beer was held guilty for having liquorice in his possession, contrary to 56 Geo. 3, c. 58, s. 2, prohibiting the possession of that article or any article for or as a substitute for malt or hops; 28lbs. of liquorice were found on defendant's premises, kept for the retail of beer under his license. Held that it was unnecessary to aver or prove that he had it in his possession to be used as a substitute for malt or hops or with any criminal intent—*Att.-Gen. v. Lockwood* (9 M. & W, 378). Under 5 & 6 Vic. c. 93, s. 3, a penalty is imposed on any retailer of tobacco for having in his possession adulterated tobacco. There was found in defendant's drawer, on his premises, 55lbs. of adulterated tobacco, but it was proved that he had bought it as genuine and had no guilty knowledge. He was held liable to the penalty—*Regina v. Woodlow* (2 New. Ses. Cas. 346); Pollock, O. B., held that personal knowledge is not necessary to constitute the offence. Rolfe, B., referred to the power given to the Commissioners of Excise to stay or forbear to prosecute, as showing the stringency of construction of the terms of these Acts. In the case of *Attorney-General v. Lockwood*, Baron Alderson observes that "very stringent provisions are sometimes enacted for purposes of general public good, involving great restrictions upon particular classes of men," and instances the provisions of the woollen Acts, whereby "persons are not allowed to be in the possession of wett of a particular description, without proving that they have come by it honestly, which is contrary to the general law." The conviction must be confirmed.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

RICE v. O'CONNOR—Nov. 26, Jan. 15, 20.

Specific performance—Statute of Frauds—Ratification—Pleading evidence—Contrivety—Words of qualification.

R. was put into possession of certain lands by H., the bailiff of F. B., the son and agent of R. B., the owner of the lands. H. made at the time an entry in his field book of the terms upon which he put R. into possession, and R. paid the fine and rent mentioned in the terms. Sometime afterwards H. copied the entry of the letting from his field book into the office book of the owner of the lands, and signed it. In a suit for the specific performance of the agreement disclosed by the above entries,

Held, that the entry in the office book was an agreement within the Statute of Frauds; that it was sufficiently put in issue by the petition, which alleged generally an agreement in the terms of the entry in the field book; that, under the circumstances, the adoption by F. B. of the letting made by H. was a ratification binding upon R. B.; that in suits for specific performance, this court will grant relief when satisfied of the terms of the contract, notwithstanding that the evidence for the petitioner may be conflicting in some details; that the words, "subject to the existing leases and lettings made to the undertenants of the said R. B.," are words of qualification only, and will preserve the rights of such undertenants against a purchaser claiming under a registered deed, although without notice.

THIS case came before the court upon an appeal from an order made by his Honor the Master of the Rolls. The following were the facts of the case:—Robert Bailey being the owner of the lands of Ballymacawhim, (amongst others) in County Kerry, under a lease made by the Provost, Fellows, and Scholars of Trinity College, Dublin, with a covenant for perpetual renewal, by a deed dated the 24th of March, 1858, assigned all his interest in the above lands to Thomas O'Connor (the respondent). The lands were conveyed, subject to the existing leases and lettings made to the undertenants of the said Robert Bailey, the above deed was duly registered. In the year 1860, the petitioner, Catherine Rice, entered into a negotiation with Francis Bailey, the son and agent of Robert Bailey, relative to the obtaining of a lease of the lands of Ballymacawhim, at the yearly rent of £100, and a fine of £100, as appeared by the following letter, written to George T. Rice, son of the petitioner, Francis Bailey, in the following terms:—"Cork, 22nd April, 1860,—I have only just returned from Dublin, and have learned from Mr. Holland (the under agent and bailiff of Francis Bailey), the result of his visit to Kerry. I have serious doubts about Duggan from the way he treated me on a former transaction. I have no great confidence in him as a tenant, and am therefore inclined, independent of other circumstances, to

let to your mother, although her offer with regard to rent and fine is considerably lower than his, and as I have not any reason to find fault with you as a tenant, I am induced to believe she may prove as satisfactory upon a nearer connection. Under the circumstances, I would accept of her offer of £100 per annum, commencing last March, with a fine of £100, payable now, and allowing her in the first half-year any arrears of rates she may have to pay, due upon the farm previous to her agreement. I suppose for the present an agreement upon a 2s. 6d. stamp will be sufficient for all purposes; the leases can be executed at leisure. Drop me a line by return of post as to whether I shall prepare the agreement upon a stamp."—FRANCIS R. BAILEY. Mrs. Rice returned no answer to that letter; but upon the 25th of April, Henry Holland gave possession to the petitioners of the lands of Ballymacawhim, and made an entry on the same day in his field book, in the following terms: "I gave possession this day (25th April, 1860) to Mrs. Catherine Rice and Henry her son, of Ballymacawhim, late in the possession of Mathias and John Bunyan (except the part in the possession of Daniel Glavin, which they are to get in September, 1850), for 31 years, from 25th of March last, at £100 per annum, they paying £100 fine; they are to get turf every year for their use on the farm of Ahamore, as soon as Mr. Bailey has possession of it. They have agreed to the above." Shortly after the petitioners agreed to pay the fine of £100. Catherine Rice communicated to Mr. Thomas O'Connor (the respondent), who was her nephew, and who had been the guardian of her children for many years after their father's death, the fact of such payment having to be made, and also told him that she was then unable to pay the amount of the fine. The respondent said that he would put his name on a bill of exchange for £50, upon which she could get cash; he did so, and she got the bill discounted. When signing the bill, the respondent added that "George" (another son of Mrs. Rice) "can get you the other £50 in the same way." George Rice joined his mother, the petitioner, in a bill for £56. After possession had been given by Holland, and after Francis Bailey had been informed of the fact, the latter wrote the following letter to Mrs. Rice:—"Cork, 26th April, 1860,—Mr. Holland has just returned from Ballymacawhim, and informs me of the terms you propose paying the fine of £100, offered for Ballymacawhim, namely, by bill at two months, renewed at the time of maturity. As the agreement was for cash, I cannot consent to accept a bill, and if you are not willing to pay the cash, you will consider the treaty at an end; you will, therefore, not commence operations on the ground until the matter is finally settled, and let me know immediately."—FRANCIS R. BAILEY. Notwithstanding, however, Francis Bailey took the joint bill of Mrs. Rice and George Rice as part payment of the fine, allowing for certain arrears of poor rates and county cess due on the lands, which were discharged by Mrs. Rice. The petitioners went into possession and paid regularly £100 per annum rent. On the 24th of June, 1867, Francis Bailey wrote a letter to George Rice, saying, that his father, Robert Bailey, was desirous of parting with his interest in the lands of Ahamore and Ballymacawhim, and that he would

give the preference to a tenant in possession. George Rice did not wish to purchase Mr. Bailey's interest, but he showed the above letter to Thomas O'Connor the respondent, who thereupon entered into treaty with Mr. Francis Bailey for the purchase, which was completed and carried out by the deed of the 24th of March, 1858. On the 24th of September, 1859, O'Connor served notice to quit upon the petitioners, for the 25th of March following. The petitioners on the 21st of November, 1859, filed a cause petition against the respondent, to enforce the execution by him of a lease, with a *toties quoties* clause of renewal, but when the answering affidavit of Henry Holland, stating the above agreement for a lease for 31 years, was filed, the petitioners consented to have the petition dismissed with costs. The petitioners applied in April, 1860, to O'Connor for a lease for 31 years, from the 25th of March, 1850, but O'Connor refused to execute any lease to them, and filed a summons and plaint in ejectment against the petitioners in June, 1860. On the 18th of the same month, the petitioners filed this cause petition for a specific performance of an agreement for a lease for 31 years. The respondent denied all notices of any tenancies existing in the lands when he purchased them, and stated that he had purchased them on the faith of the following letter:—"Cork, 24th October, 1857,—Dear Sir,—I am sorry I had not the pleasure of seeing you when last you were in Cork, as we might then have come to some final arrangement regarding the sale of my father's interest in the lands of Aghamore and Ballymacawhim, regarding your offer made, when then in town, of £1500. I beg to say, that as I wish to meet you in a fair, off-hand manner, and as I would prefer dealing with you as a tenant on the lands than with a stranger, I will let you have them for a sum of £1750, clearing up all rent and renewal fines to the previous gale day, I taking of course all renewal fines, &c., due of the tenants to the same period; or if you would prefer dealing with the tenants yourself, I'd let you have all due to me upon your paying me a sum of £2100; the sums due to me by Mr. Mason and Mr. Rice" (George Rice) "considerably exceed the increase, and you could deal with them immediately. Mr. Rice's lease expires in March, and Mr. Mason's the following September; neither of the other tenants have leases except Slievebeg, the particulars of which you are well acquainted with. May I request a line from you.—FRANCIS R. BAILEY." The case was heard before his Honor the Master of the Rolls on the 4th of December, 1860. Mr. Francis Bailey was examined *viva voce* as a witness for the petitioners, when it appeared that in addition to the entry which Holland made in his field book, which Francis Bailey did not see at all, he had copied the entry into the office-book of Robert Bailey, which entries relating to the management of Mr. Bailey's estates were made, and had signed it "H. H." F. Bailey did not see the latter entry until about six months before his examination. He also stated that when Holland told him of his having given possession to the petitioners upon the terms before stated, that he, as his father's agent, adopted the letting made by Holland. Holland's field book, when produce, contained the entry before mentioned. On the 18th of April, 1861, the Master of the Rolls

dismissed the petition, upon the grounds, that the entry in the office books, signed, H. H. was not put in issue, and that there was no contract between the parties within the provisions of the Statute of Frauds. This case was set down for hearing on the 4th of November, when it was ordered that it should stand over, to enable the petitioners to produce and stamp the entry in Mr. Bailey's office, which the Master of the Rolls had pronounced not to be in issue.

Jan. 15.—*Serjeant Sullivan* (with him *J. Leahy, Q.C.* and *Neligan*), for the petitioners and appellants.—The entry made by Holland in R. Bailey's office book, corresponds exactly with Holland's entry in his own field-book, and contains all the terms of the letting. There was a recognition here by R. Bailey of the letting made by Holland, which is equal to an original authority.—*Maclean v. Dunn*, (1 Moo. & P. 761); *Norris v. Cooke*, (7 Ir. Com. Law, 37); *Bradford v. Roulston*, (8 Ir. Com. Law, 468). The agreement of the agent need not be in writing; it is sufficient if the substance of the agreement be recognised and acted upon by the principal: per *Tindal, C.J.*—*Wilson v. Tummon*, (6 Scott. N. R., 904). The judge below was in error when he stated that the entry in Holland's field-book was not put in issue. "I am perfectly clear, according to the rule Lord Cottenham laid down, that whatever would be evidence of an agreement at law, is evidence in equity"—per *Shadwell, V.C.*—*Malcolm v. Scott*, (3 Hare, 63); *McMahon v. Burchell*, (2 Phil., 127); *Austin v. Chambers*, (6 Cl. & Fin. 1). "It is not the office of the Bill to do more than to state, with sufficient clearness and precision, the grounds upon which relief is sought in equity: it ought not to show by what evidence the case alleged is to be established"—per Lord Chelmsford—*Smith v. Kay*, (7 H. of Lds., 760); *Ridgway v. Wharton*, (3 De. G. McN. & G., 677). The judge below relied upon words of Lord St. Leonard's (*Vend. & P.* 126-9), that, "although an agreement be in part performed, yet, if the court is not able to ascertain the terms, the case will not be taken out of the statute." But the next sentence, which was not cited, provides for such cases as this. "If the terms be made out satisfactorily to the court, contrariety of evidence is not material." As to the liability of O'Connor, who it is said, is a purchaser for value without notice under a registered deed, it was proved that R. Bailey told him that there was no agreement between him and the Rices, but, O'Connor made no inquiries personally. O'Connor was affected with notice, having put his name on a bill for the Rices to make up the fine for Bailey. He also took his conveyance subject to all lettings and underleases, which would include this agreement.

The *Solicitor General*, (with him *A. Brewster, Q.C.* and *Jellet*), for the respondent.—The petitioners have alleged four different agreements at different times, and in the affidavits of different witnesses, therefore, the alleged contract cannot be enforced from uncertainty.—*Callaghan v. Callaghan*, (8 Cl. & F. 374). As Holland had no authority to sign, R. Bailey is not bound by the entry in the field-book—*Blore v. Sutton*, (3 Mer., 237); *Ridgway v. Wharton*, (6 Ho. of Lds., 238). Recognition implies knowledge of the act, which did not exist here.

Even if R. Bailey had told O'Connor of the existence of an agreement, the latter would not be bound. "Vague reports will not affect the purchaser's conscience—" Lord St. Leonard's, *Vend. & Pur.*, 621.—*Hamilton v. Royse*, (2 Sch. & Lef., 327). There is no evidence that Holland communicated the fact of his making the letting to R. Bailey, consequently, there was no ratification—*Fitzgerald v. Dressler*, (7 Scott, C. B. N. S., 374). To avoid the effect of registry, there must be such notice to the purchaser as amounts to fraud—*Popham v. Baldwin*, (2 Jones, 336); *Jolland v. Stainbridge*, (3 Ves., 478). The words "Subject to all underleases and lettings" in the conveyance are words of qualification only, and do not operate as an agreement—*Wolveridge v. Steward*, (1 Crompt. & Mea., 644). They are descriptive—*Serie v. St. Eloy*, (2 P. Wms., 385); *Goodwin v. Lee*, (1 K. & J., 377). In suits for specific performance the court is to judge whether the terms of the contract are certain; and notwithstanding that there may be a part performance by giving possession, this court will withhold its decree if there be any ambiguity in the contract—*Reynolds v. Waring*, (1 Younge, 346). It was to Mrs. Rice that R. Bailey offered to let the lands, not to the petitioner, but there is no proof of her acceptance of the offer. Holland had no authority to make any letting; he was only the bailiff of Francis Bailey, the authorised agent of Robert Bailey, therefore, no contract can be inferred from the letting. Had Robert Bailey been examined before the Master of the Rolls, he would have denied Holland's authority. The entry in the field-book might have been received in evidence if the petitioners had relied upon a parol agreement; if they relied upon a written agreement, they ought to have stated what the agreement was—(Lord St. Leon., *Vend. & P.*, 114). O'Connor could not have known of any agreement between Bailey and the petitioners, for the Powers, father and daughter, stated that when O'Connor was asked had Henry Rice a lease, he said, no. Power's evidence goes to prove a fifth contract. If R. Bailey had known of this alleged agreement of this lease at the time of the sale to O'Connor, the latter might have come here for relief.

Loahy in reply.—As to how far courts of equity will go to carry out the terms of an agreement, although there may be some uncertainty as to what they are, cited *Luther v. Foxcroft*, (1 Wh. & Ta. L. Cas. in Equity, 635); *Mundy v. Joliffe*, (5 Myl. & Cr., 177); *The East India Co. v. Nuthumbadoo, &c.*, (7 Moo. P. Cl. Cas., 497). "A general authority in an agent implies a right to do all subordinate acts incident to and necessary for the execution of that authority"—per Sir J. Romilly—*Collen v. Gardner*, (21 Beav., 542); the power of letting was incident to Holland's position as bailiff to F. Bailey.

January 20.—THE LORD CHANCELLOR.—This case comes before us, upon a cause petition, praying the specific performance of a lease, which, it is alleged, Mr. Robert Bailey had agreed to give the petitioners of certain lands situate in the County of Kerry. In the early stages of this case, both sides appear to have considered that only a parol contract existed between them. However, it turned out, that not only

a parol contract between the parties, but that there was in existence a written document, which, supposing it to be signed by Mr. Robert Bailey, or by a person duly authorised in his behalf, would constitute a written contract within the requirements of the Statute of Frauds. His Honor the Master of the Rolls, when the case was before him, came to the conclusion that in the form in which that written document was presented to him, it could not be treated as the contract; that it was not put in issue by the petition; that it was not evidence; and he dismissed the petition with costs. The first question then, which we have to consider is, can that document be looked at? Now it is plain, that it can be looked at, and the respondent's counsel have admitted so much; consequently it is clear, that the judgment of the Master of the Rolls cannot be sustained so far as it decided that this written document could not be looked at. I come then to the cause petition, and I find it containing an averment of an agreement in writing, and a written document put in issue, and an allegation that that document was written by the authority of Mr. Robert Bailey, and if there was nothing else in the case the matter would be plain. But we have then an averment that the respondents agreed to grant a lease to the petitioners in the terms stated in the petition, which are precise enough to let in evidence of the document upon the authority of the case of *Smith v. Kay*, (7 House of Lords, 760). That case shows that a written document not in issue, may be looked at under certain circumstances. At page 760, I find Lord Chelmsford saying, "I may, in passing, notice an objection which was made by him, that certain letters which have been used to implicate him in the transactions of Johnston and Adams with Kay, are not set out in the Bill, so as to give him notice of them. But it is not the office of the Bill to do more than to state with sufficient clearness and precision the grounds upon which relief is sought in equity: it ought not to show by what evidence the case alleged is to be established." I think, however, that in saying, the Bill ought only to show by what evidence the case is to be established, Lord Chelmsford was going too far; and I am sure his Lordship only intended to convey, that the petitioner was not bound to show all the evidence on the face of this petition; and in that I quite agree with him. Then, at page 766, Lord Cranworth, on this very point, says, "According to the old practice, if a defendant had, as in the present case, been called upon to answer to the Bill, and evidence had been gone into, and he could have shown at the hearing that he was quite taken by surprise, by the production of certain letters or alleged letters or drafts of letters and other facts being proved against him, of which he had no notice in the bill, the course would have been, which nobody would have controverted, that the court would have said: This defendant must have an opportunity of answering this; he has not had an opportunity hitherto, because you have chosen so to frame your pleadings, as not to let him know to what point it was that he was to direct his evidence: therefore, before any decree is made giving relief, an inquiry must be directed by a preliminary decree, giving him an opportunity to clear up all those matters which by

your bill, as originally framed, you did not give him an opportunity to clear up. That was the course under the old practice." There is no complaint here of surprise, for the document was produced, all the parties to it were in court, and no application was made to the court for an opportunity to answer that document. Taking that document as in issue, let us see what is its value. Is it a note or memorandum in writing, signed by an agent duly authorised by Mr. Robert Bailey? That depends upon the evidence. It is clear, it is not denied, that that document was written by a person in the employment of Mr. Francis Bailey the son and agent of Mr. Robert Bailey, the owner of the land; in fact, by Henry Holland, who was the under-agent and bailiff of Mr. Francis Bailey. Holland was sent down to confer with the petitioners upon the terms of the letting, and I cannot see any reason why the petitioners might not consider him a duly authorised agent of Mr. Robert Bailey. In the appendix I find Mr. Francis Bailey's evidence to be the following:—"Was H. Holland acting under your authority at that time as bailiff?—He was. Did you in April, 1850, give authority to Holland to let these lands of Ballymacawhim?—I did. For what purpose?—For the purpose of setting the farm. To whom?—To Mrs. Rice and her son—her son Henry. What did you authorise him to do?—I authorised him to set it to her at £100 a year, taking £100 fine, and I think I told him I promised her the term of thirty-one years. Did they get possession at that time under that agreement?—They did." Holland then settled the terms of the letting, and entered a memorandum of them in his field-book, and when he arrived at the office of Mr. Robert Bailey, the owner of the land, he entered in the office-book the full terms of the letting, and signed the entry. What does Mr. Francis Bailey swear?—That in 1850, he was managing the lands for his father; that he had absolute control over them; that while he had no legal authority from his father to make leases or lettings, his father would have sanctioned anything he did. And there is a letter in evidence, which shows that there was some demur about the completion of the contract by Francis Bailey, as he insisted upon getting a sum in cash. Mr. Francis Bailey says, "I think the arrangement was allowed to stand, and the sum of £57 was paid." Whose money was that?—It was a Bill of Exchange, the proceeds of which were received by Mr. Francis Bailey. One hundred pounds a-year was paid as rent, too, up to the day of the hearing of this petition. Robert Bailey, the father, was not examined; Francis Bailey, the son, was examined at length; Holland was not examined in this matter, but he had been a witness in the former suit, and his evidence on the former occasion was used again; in that suit the respondents put him forward to prove a different agreement was that then relied on. What is the effect, then, of Holland's memorandum? The Statute of Frauds points to no peculiar mode of authorisation; it enacts, "That no action shall be brought to charge any person upon any contract relating to any interest in lands, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith,

or some other person thereunto by him lawfully authorised." That Holland was an authorised agent is incontestable. Francis Bailey says that he adopted the letting made by Holland, when Holland told him of it: F. Bailey had previously stated that his father would adopt anything he adopted. It is then said, that Holland was not the agent of Robert Bailey, and that he was not empowered to sign for the principal; and the case of *Blore v. Sutton*, (3 Mer., 237) is relied on. It was held there that an entry of a memorandum containing the terms of a letting, not by Lady Bath's agent, but by his clerk and signed by the clerk, although made in the course of business, and approved of by the agent, was not a memorandum signed by an authorised agent, but there was no evidence that the fact of the letting was ever communicated to Lady Bath. But on the other side there is the case of *Giles v. Trecothick*, (9 Ves., 250). There an entry made, not by an auctioneer, but by his clerk was held binding on the purchaser, as the auctioneer had told the purchaser whose clerk he was: so that even if we had no evidence of the communication of authorisation from Robert Bailey to Holland, there is the fact of Robert Bailey, knowing that Holland acted as bailiff to Francis Bailey. But sitting in this court we occupy the position of a jury; and we must see if there is any evidence, and what, of ratification by Robert Bailey of Holland's act, to go before a jury. That a subsequent ratification is equivalent to an original authority is incontestable. What is the evidence then of a ratification of Holland's authority to sign for Robert Bailey? First, we have the entry in the field book by an under agent, who was employed in this very transaction; and then we have the entry afterwards made and signed in a book of the principal, in which were entered different matters of importance connected with the management of the principal's estates, and all parties resorting to the office in which that book was kept had notice of the entry. [*A. Brewster, Q.C.*—It was proved that Francis Bailey never saw the entry in the book until a few months ago.] Even so; it was an entry made in the usual course of business; some of the other entries in that book were made by Robert Bailey himself. Then we have as additional evidence, the payment of a fine; and not only the payment of a fine of £100, but the payment of rent to the amount mentioned in the entry to Robert Bailey himself. What is the effect of all this? Can it be contended that there was not ample ratification of this entry by Robert Bailey? The case of *Bigg v. Strong*, (3 Sm. & Giff., 692), which was not cited at the bar, is very clear upon this question of ratification; the marginal note is as follows:—"There being two proprietors of an estate, where one of them without any express authority from the other, agrees to sell the whole on behalf of both, (and without express authority) signs a contract for sale on behalf of both, and the other never expressly assents or signs the contract, but after knowledge of the contract does not within a reasonable time disavow it or express absolute dissent, a presumption of his assent arises, which is strengthened in proportion to the length of time during which he lies by: and, unless the presumption is rebutted by circumstances of evidence suffi-

ciently strong, he will be held bound. In such a case it is a conclusive circumstance (unless explained by evidence), that he, with knowledge of the contract, tacitly and knowingly enjoys a benefit from the contract to which, but for the contract he would not be entitled. At page 601, Vice-Chancellor Stuart, says, "The price paid by the plaintiff was the remission of the rent payable to him by the father and the son. The father, knowing that the son had entered into the agreement on behalf of both, knew that unless he adopted it, he was liable to pay the rent. If the truth was, that he refused to assent to the agreement, he derived a benefit to himself by concealing that truth from the plaintiff after the rent became due. His concealing the truth also deprived the plaintiff of the knowledge of his right to deal with the rent both before and after it became due. It is one of the plainest principles of equity that a man cannot be allowed to shelter himself by a defence founded on his own concealment of the truth, when a benefit accrues to himself, and an injury to the person with whom he was dealing from the concealment. Indeed, one of the strongest modes of recognising and adopting a contract made by an agent without previous authority, is to accept the benefit arising from the contract with a knowledge that the contract has been made." When we examine that case, it appears to be distinctly applicable to that before us. There is both knowledge and ratification of the contract here; that contract being the memorandum made and signed by Holland, and ratified and adopted by the Messrs. Bailey, father and son. I think that there is plenty of evidence to enable a jury to presume a ratification by Robert Bailey of the act of Holland. I come now to the point upon which the counsel for the respondent mainly rested their case, viz.: that the contract was so uncertain in consequence of the various terms in which it was put forward on different occasions, that this court would not enforce it. This is an elementary proposition, and if the fact be so, this contract cannot be sustained. Here is a contract in evidence, in writing, free from all ambiguity, and certain; we could not have a contract in terms more certain or better defined. It is said that there is another contract, one for a lease with a *toties quoties* covenant. It is clear that that would be a different contract; but what is the effect of a party on one occasion putting forward in his petition a contract different from that on which he relies on a subsequent occasion? The petitioners, on the first occasion, alleged what they believed to have been the contract, and a defence was put in, not denying that there was a contract between the parties, but denying that there was an agreement to grant a lease with a *toties quoties* covenant, and the petition was dismissed; but it is new to me to hear, that, when a party abandons a contract which is shewn not to be the actual contract between the parties, he cannot come forward again and allege another contract. That is the very case of *Lindsay v. Lynch* (2 Sch. & Lef., 1.) That was a petition for the specific performance of an agreement for a lease for three lives, at a certain rent. Some dispute having taken place, the plaintiff filed an amended petition. The answers, both to the original and the amended bill, denied that any agreement for a lease for three lives had ever been made, but they admitted a lease for the life of the

plaintiff, and that the defendants had refused to accept that lease. The Lord Chancellor dismissed the bill without prejudice to the plaintiff, relying upon the contract proved; and another similar case is mentioned in the note, when his Lordship said, "Where a party has mistaken his case, and brought the cause to hearing, under such mistake, the ordinary practice has been to dismiss this bill without prejudice to his bringing a new bill; but in this case perhaps it is better for the parties to let the cause stand for a few days, to give the parties an opportunity of coming to an agreement among themselves." I think that it would have been wise for the court to have thrown out some such suggestion as that below, and that course might have been followed without prejudice to either party filing a new cause petition. This is the principal ground on which the charge of irregularity is based, but other charges to the same effect were put forward, resting upon the contradictory evidence of persons who were present at the treaty between the petitioners and Holland; the variance in the duration of the lease, as stated by different persons—some saying that it was to be thirty-one years, others, for a lease with a *toties quoties* covenant; but what were the final terms agreed upon? They correspond with the entry in Holland's field book. That being so, the charge of irregularity cannot be sustained; there was a clear contract defined in the memorandum before us, which we have rightly received, in my opinion, there being sufficient evidence of ratification by Robert Bailey to make that memorandum binding upon him. Is Mr. O'Connor then protected by the fact that his conveyance from Bailey was registered? Registry of the conveyance, after notice of tenancy, would amount to fraud; but as to notice conveyed by conversations, I do not attach much importance to it; it may very easily have escaped from the recollection of the respondent, who may have a fallacious memory, like Mr. Francis Bailey, who must have seen the entry of the letting in the book in his father's office. Then as to the clause in Mr. O'Connor's purchase deed, by which the lands were conveyed, "*subject to the existing leases and lettings made to the undertenants of the said Robert Bailey*," it is contended, and rightly, I think, that we should not carry this case further than the case of *Serie v. St. Eloy* (2 P. Wms., 386), where it is laid down that that clause will not create any new contract, but passes only such contracts as may exist at the time of the execution of the deed, so that that clause makes no difference. It has been said, very properly, that that clause is merely a description of the condition of the property at the time of the purchase. I may say, I will sell you my estate, subject, however, to all the tenancies now existing upon it, and the rents reserved thereon, but I will not sell the interests of my undertenants. That being so, it appears to me that the registering of a deed cannot affect what that instrument does not purport to convey. There is here then such a contract as this court is enabled to enforce; but the petitioners have, in my opinion, acted in a manner calculated to mislead the respondent, and to give him grounds for supposing that they had no solid foundation for their claim; consequently, I will not give them any costs up to the establishment of that foundation.

THE LORD JUSTICE OF APPEAL.—I entirely concur

in all that has fallen from the Lord Chancellor. The following facts in this case are undisputed, viz., that the petitioner paid £100 as a fine, to purchase a lease for 31 years from Robert Bailey, from whom he received possession, and to whom he paid rent annually up to the year 1858. It is true that the terms of the contract, as stated by the petitioner, are not consistent with the statements of other persons, but the rights of the petitioners are not to be forfeited by reason of immaterial inconsistencies. The Master of the Rolls considered that the petition should be dismissed, as the petitioners had not put in issue a certain document which was signed H. H.; that document was the exact counterpart of the entry in the field book, the only difference being that the initials H. Holland were not affixed to the document, upon which the petitioners at first relied. Now, that book in which the initialled entry was contained, was in the possession of the respondents; they, too, were not aware of its existence: Francis Bailey totally forgot it. It was discovered after the hearing, and it was read without any objection being raised, except that it was not stamped, and its receipt in evidence was not relied upon by the respondent in his case; therefore, the entry in the office book was received as part of the evidence of the petitioners. It is too late for the respondent to object to that office book on this appeal. If an objection was made to the reception of that office book as evidence, it might have been brought forward by a supplemental petition in the nature of a bill of revivor. It is not necessary to refer to Mitford, to show that it would be a matter of course to allow newly discovered evidence to be introduced by a rehearing. As we have determined then to give the petitioners the benefit of the entry in the office book, to which the Master of the Rolls, without due reason, in our opinion, did not consider them entitled, can we oblige the respondent, a purchaser for value without notice under a registered conveyance, to execute a lease? It is plain that we can; for the respondent, when he took the conveyance from Robert Bailey, took it subject to all existing title leases and lettings, i.e., to the under-tenants of Robert Bailey. So far, then, the petitioners' claim is established. But it is contended that no valid title passed by that entry in the office book; that neither Robert Bailey nor his lawfully authorised agent signed that entry. Was Holland the agent of Robert Bailey? He was the bailiff and sub-agent of Francis Bailey. It is established by evidence that there was direct authority from Robert Bailey to Holland to let the lands; whether precedent or subsequent to the letting is immaterial. Holland's letting was adopted and sanctioned by Robert Bailey. There was a ratification equivalent to an original authority—that is clear from the case of *Maclean v. Dunn and Watkins* (1 Moo. & P., 761). There Dunn assented and approved of the entry of a sale of wool made by a broker's clerk, but not signed by the broker, and it was held that he was bound by his approval. We must look to the common law for the rule on this subject. In the last case Chief Justice Best says, "That as an authority may be presumed from previous employment in similar acts, so, the same presumption arises from subsequent acts of assent or acquiescence;

and this is most aptly expressed by the well-known maxim, that *omnis ratihabitio retro trahitur, et mandato æquiparatur*. I am clearly of opinion that the subsequent sanction or ratification of a contract signed by an agent, takes it out of the operation of the statute far more satisfactorily than an antecedent." Without, however, the aid of any authority, I should have entertained no doubts on this point, on the grounds that a subsequent recognition by a principal of the acts of his agent, is not only equivalent to, but more binding than, a previous authority existing only at the time of making the contract. When it is conceded that a subsequent ratification is equivalent to an original authority, I can hardly imagine a state of facts more satisfactorily establishing a subsequent ratification by a principal, than the case before us. We have the admission of the validity of the letting by Holland, and also the admission of his authority to make that letting. The terms of the agreement are contained in Robert Bailey's office book. He derives a material benefit from the agreement, for he receives one hundred pounds. He acquiesces in the agreement by receiving every six months the stipulated rent; and all the mutual rights of both parties are referable to the entry made by Henry Holland in his field book, and afterwards entered by him in Mr. Robert Bailey's office book. Such is my view of this case; I differ from his Honor the Master of the Rolls merely upon the effect to be given to the entry signed "H. H." I acquiesce in the remainder of his decision.

Reverse the order of the court below. Decree specific performance of a lease for 31 years, upon payment by the petitioners of the costs incurred up to the day on which Mr. Francis Bailey was examined.

Rolls Court.

[Reported by William Woodcock, Esq., Barrister-at-law.]

STACK v. ROYSE—Nov., 26, 1860; Dec., 10, 11; May, 31; Nov., 4, 1861.

Receiver—Judgment—Contract—After acquired property.

V. R., an idiot, was entitled absolutely to certain estates, held under leases for lives renewable. In 1794, R. R. his brother and heir presumptive married, and by the settlement executed previously to his marriage gave certain lands "together with all other the lands which he was then or should thereafter become entitled to to trustees upon trust, besides other trusts, for the issue male of the marriage, or one or more of them as he R. R. should appoint, and in default of appointment subject to a trust term of 500 years, to the use of the first son of the marriage. In Michaelmas Term, 1819, R. R. became indebted to S. by judgment. On the 18th of November, 1819, R. R. appointed the lands comprised in the settlement to his eldest son T. R. In 1839, V. R. the idiot died, and in 1842, the representative of the judgment creditor obtained a receiver over the lands upon a petition under the Sheriff's Act against R. R. R. R. died in 1859, and thereupon his eldest son T. R. went into receipt of the rents without having obtained the leave

of the court so to do. Upon an application to revive the receiver matter, Held, that T. R. was entitled to hold the lands discharged of the receiver, and the application was refused, but no costs were given, as the conduct of T. R. in entering into receipt of the rents without the leave of the court was not proper in the present case.

In 1768, Thomas Royse being seized of lands in fee-simple, and also of lands which he held under leases for lives renewable from the see of Limerick, executed certain ante-nuptial articles, which he afterwards, in the year 1770, subsequently to his marriage, carried into execution by a settlement. By that settlement both the fee-simple and freehold lands were expressed to be limited to the use of Thomas Royse for life, and then subject to a jointure for his wife and to portions for his children, to the use as to the fee-simple lands of the first and other sons of the marriage in tail male, and then the settlor covenanted to assign the freehold lands to the first son of the marriage, to vest in him on his attaining twenty-one. There were two sons of this marriage, the eldest, Vere Royse, who was an idiot from his birth; the younger, Robert Royse. On the 3rd May, 1792, Thomas Royse the settlor died, leaving these two sons him surviving. Vere was found an idiot by inquisition, and in 1794, letters patent were granted by the Crown to his brother Robert, granting the estates of the idiot to him for life, he paying out of them £300 a-year for the maintenance of the idiot, and keeping down the interest on the charges upon the estates. In the same year, Robert Royse intermarried with Elizabeth Stack, and previously to that marriage a settlement was executed, bearing date May 17, 1794. By that settlement Robt. Royse in consideration of the intended marriage, and of £1,000, the lady's fortune, and for making a provision for her, and for settling and assuring the towns and lands after-mentioned granted to certain trustees their heirs and assigns all that and those the towns, lands, tenements, and hereditaments of Ballinverick and Larraga, the town and village of Loughill, together with the several and respective lands, tenements, hereditaments, and premises next, and immediately adjoining the said lands of Loughill by whatever names or descriptions they were then respectively called or known, situate in the County of Limerick, together with all other the lands, tenements, hereditaments, and premises which the said Robert Royse was then or thereafter should be possessed of or entitled unto in reversion, remainder, or otherwise, howsoever, together with the rights, members, and appurtenances, and the reversions and remainders thereof and therein, and all the estate of him the said Robert Royse, of, in, to or out of the said lands, tenements, and hereditaments, and all other lands he should thereafter be possessed of or entitled to, and every part and parcel thereof to hold upon trust from and after the solemnisation of the said marriage, to the use of the said Robert Royse for life, and after his decease to secure a jointure for his wife, with power to the said Robert Royse by deed or will to give, grant, or devise to or in trust for the issue male of the said marriage, or to one or more of them in such shares, manner, and proportions as he should think proper to direct, limit, or appoint all and every

the said towns, lands, and premises, and any other lands he should be thereafter possessing, and in default of such appointment, subject to a trust term of 500 years, vested in the trustees, to the use of the first son of the marriage and his heirs male, and in default of such issue then to the use of the second, third and every other son of the said marriage in the usual course of family settlements. The trusts of the term of 500 years were declared to be by demise, sale, or mortgage of the said towns, lands, tenements, hereditaments, and premises, and all other lands and premises which he might hereafter have or be entitled to comprised in the said term of 500 years, to raise portions for younger children. The deed was further expressed to be upon the further trust that in case the said Elizabeth Stack should happen to die in the lifetime of the said Robert Royse, and that the said Robert Royse should happen to have no issue male by the said Elizabeth, and should happen to marry any other woman or women after the decease of the said Elizabeth Stack, and should happen to have issue male by such after taken woman or women, that it should be in the power of the said Robert Royse by deed in his lifetime, or by his last will and testament by him duly executed and attested by two or more credible witnesses to leave, give, grant, or devise to the issue male of such aftertaken woman or women lawfully to be begotten all and every the said real and freehold estate or estates which he should die seized, or possessed of or entitled unto, in such shares, manner, and proportion as the said Robert Royse should think fit, but subject to the jointure of the said Elizabeth Stack, and to a sum theretofore provided of £8,000 for the issue female of said Elizabeth Stack, in case there should be such female issue and no male issue by her living at the time of Robert Royse's death, which said sum of £3,000 upon the last-mentioned contingency was by the said indenture made an express charge on the aforesaid lands, tenements, hereditaments, and premises, and on all and every other lands and tenements he should thereafter be possessed of or entitled to. The deed contained a covenant by the said Robert Royse for himself, his executors, administrators, and assigns, with the trustees, their heirs, executors, and administrators, that for and notwithstanding any act, matter, or thing whatsoever at any time, theretofore, had made, done, committed, or wittingly or willingly suffered to the contrary by him the said Robert Royse or any of his ancestors, all and every the said towns, lands, tenements, hereditaments, and premises thereby granted, or released, or mentioned, or intended so to be, should, from time to time, and at all times, for ever thereafter remain, continue, and be to and for the several uses, intents, and purposes upon the trusts and subject to the provisos and agreements by the deed expressed and declared of and concerning the same. It also contained another covenant by the said Robert Royse for himself, his executors and administrators, with the trustees, their heirs, executors, and administrators, that he the said Robert Royse should and would at the request of the trustees or the survivor of them his executors and administrators, but at the proper costs and charges of the said Robert Royse, make, do, levy, suffer, and execute, or imme-

diately, and when required, cause or procure to be done, levied, suffered, and executed all and every such further and other act and acts, thing and things, deed and deeds, conveyances and assurances in the law, whatsoever of and concerning the aforesaid lands and premises, or any other lands and premises which the said Robert Royse should at any time thereafter be possessed of or entitled unto, as by the trustees or their counsel, should be reasonably advised, devised, or required for the further better and more perfect and absolute carrying the deed and the true intent and meaning of the parties thereunto into due, full, legal, and perfect execution.

On the 18th November, 1819, Robert Royse, pursuant to the power contained in this deed, appointed all the lands comprised in it, and which remained unsold to his eldest son, Thomas Royse, absolutely. In or as of Michaelmas Term, 1819, John Stack recovered against Robert Royse a judgment for £3000. In 1837, John Stack died, having first made his will, of which he appointed his wife, Jane Stack, executrix. She proved the will, and subsequently filed a petition under the Sheriff's Act against Robert Royse. On this petition, an order was made extending the receiver, who had been appointed in a cause of *Fitzgerald v. Roger*, to the matter of her judgment. Vere Royse, the idiot, died in September, 1839. Jane Stack died in 1843, but no order was then obtained to revive the proceedings in her matter. On the 18th April, 1859, Robert Royse, the consor of the judgment of 1819, died, and thereupon his son Thomas, the appointee under the deed of May, 1819, without applying to the court, entered into the receipt of the rents of the entire of the lands. Fourteen months afterwards, General Stack, the administrator of Jane Stack, obtained a conditional order for liberty to revive the receiver matter, and have the receiver continued over the lands. Against this order cause was now shewn by Thomas Royse, who claimed to hold the lands discharged of the receiver. The case came on before the court upon several days, and stood over from time to time, partly in order that a cause petition should be filed to ascertain the rights of the contending parties. Ultimately, however, it was arranged that the whole case should be decided by the Master of the Rolls upon the motion. The argument was entirely confined to the effect of the settlement of 1794 upon the lands held for lives, it being admitted upon both sides that there was no question as to the lands held in fee simple.

Brewster, Q.C., (with him *R. R. Warren, Q.C.*) for Thomas Royse.—Thomas Royse is a purchaser for valuable consideration of his rights under the settlement of 1794. He possesses everything which entitles him to the favour of the court, except the legal estate. His rights are equitable. He is engaged in a conflict with Mr. Stack, who is not a purchaser, but only a judgment creditor claiming under a judgment which was entered before the passing of the stat. 3 & 4 Vict., c. 105, by which additional rights were conferred upon creditors. The first question here is as to the meaning of the deed of 1794. Upon that there can be no doubt. It is that all lands or real estate to which Robert Royse should become entitled, or was entitled at the date of the deed should be subject to

that settlement. One of the earliest authorities on contracts of this nature is *Lewis v. Madocks* (8 Ves., 149). Another strong case is *Harley v. Green* (12 Beav., 182). It is clear on these cases that a contract which is clear in its construction is valid in law. The only question is as to what is the effect of the contract, which is one for value. When a man contracts for value with reference to specific property, the contract attaches on the property, and it is not a mere personal equity against the contractor. Lord St. Leonards, in *Jones v. Kearney* (1 Dr. & War., p. 159), says that he cannot see why such a contract should be binding upon the ancestor, and not on the heir. So, too, the observations of the same judge in *Averall v. Wade* (L.L. & G., temp. Sugd., p. 261). There is no doubt that, in order to create a lien, the property must be specific; but the terms of the deed are as specific as if the lands were named.—*Mornington v. Keane* (2 De G. & J., at p. 312); *Wilkinson v. Wilkinson* (4 Jur., N.S., 47); *McClurkin v. Lane* (5 Ir. Jur., N.S., 26); *Prebble v. Boghurst* (1 Sw., 309). The word "all" is used here, and that defines the property as much as any other description.—*Metcalf v. The Archbishop of York* (6 Sim., 224; a.c., on appeal, 1 M. & Cr., 547). The word "any" used in that case is not more specific than the word "all."—*Lyster v. Burroughs* (1 Dr. & War., 149); *White v. Anderson* (1 Ir. Ch. Rep., 419); *Gubbins v. Gubbins* (cited in the note to *Lyster v. Burroughs*); *Fletcher v. Steele* (6 Ir. Eq., 382).

Serjeant Sullivan, and Burroughs, Q.C., for General Stack.—Thomas Royse ought not, in this case, to be allowed to oust the judgment creditor. There is no specific lien attaching upon the freehold lands, and the terms of the deed of 1794 are not sufficient to create such a lien as to give Thomas Royse priority over the judgment creditor. *Ennis v. Smith* (Jo. & Car., 400), applies here rather than the cases cited on the other side. All that Robert Royse had in these lands at the date of the settlement of 1794, was an expectancy which cannot be made the subject of a contract.—*Carleton v. Leighton* (3 Mer., 667). *Mornington v. Keane* (2 De G. & J., 312), is in our favour. They also cited *Lloyd v. Lloyd* (4 Dr. & War., 354); *Lyde v. Mynn* (1 Myl. & Keen, 683); *Wright v. Butler* (2 B. & Ad., 278); *Jones v. Roe* (3 T. R., 93) 1st Fonbl. Eq. Jur., Book 4, c. 1, s. 2; *Wilkinson v. Wilkinson* (4 Jur., N.S., 47), in opposition to *Creed v. Carey*. Upon the point of Thomas Royse having gone into possession without the leave of the court, *Britton v. McDonnell* (5 Ir. Eq., 275), and *Kenny v. Clarke* (5 Ir. Eq., 280), were referred to.

Nov. 4.—THE MASTER OF THE ROLLS delivered a written judgment, in which, having stated the judgment and the order extending the receiver, he proceeded to say that Robert Royse died in 1859, and that thereupon his eldest son had entered into possession without the leave of the court. That course was adopted on the authority of *Britton v. McDonnell* (5 Ir. Eq., 275), and *Kenny v. Clarke* (5 Ir. Eq., 280). Previously to these cases, it had been the practice to require the leave of the court before such a step was taken, and such was now the practice of the Court of Chancery in England, and so it was stated in *Smith's*,

Chancery Practice and in Daniell's Chancery Practice. In a simple case there could be no difficulty in this course; but in a case of difficulty like the present, it was very inconvenient. A conditional order had been obtained by General Stack to revive the proceedings, and the question having arisen whether he was entitled to revive as to the freehold lands, the case had come on for argument. His Honor then stated the settlement of 1794. Vere Royse died in 1839, and the respondent in the judgment matter had then become entitled to his lands as his heir-at-law. If the present Mr. Royse had applied to the court to discharge the receiver, he would have been put to file a cause petition to decide his right, which his Honor was now called upon to decide on motion. As to the first question, whether the deed of 1794 created a lien in equity on the freehold lands, we should bear in mind the position of Robert Royse as to the lands. Vere Royse, the idiot, could not bar the estate tail; no question had been raised as to that. As to the lands of inheritance, his Honor was not called on to give any opinion, as counsel for General Stack admitted that the judgment did not affect those lands. As to them, Robert Royse was seised of an estate tail in remainder, which Vere Royse could not bar except by suffering a recovery in person. As to the freehold lands, the deed was in the form of a present grant. His Honor then said that there was a doctrine that an estoppel might operate as a contract in equity, and adverted to *Mornington v. Keane* (2 De G. & Jo., 570), and to stat. 4 Wm. 4, c. 92, s. 22, which excluded the case of an expectant heir. It was stated in Story's Equity Jurisprudence, that even a naked possession might become the subject of settlement, and that the contract would be enforced after the death of the ancestor. The cases cited there did not apply, as the freehold lands were not named in the deed of 1794, and that being so, the question was whether the trust attached upon them. There could be no difference as to the effect of the deed by of the lands having afterwards come by descent from Vere Royse. There was no doubt, on the construction of the deed of 1794, that any property acquired should be subject to the trusts of that deed. His Honor then referred to *Mornington v. Keane* (2 De G. & Jo., 312); *White v. Anderson* (1 Ir. Ch., 419); *Lyde v. Mynn* (1 M. & Keen., 688); *Jones v. Kearney* (1 Dr. & War., 159). *Creed v. Carey* (7 Ir. Ch., 295), was also an authority on this subject. There was a distinction between cases where a time was fixed for performance, and those where the contract was general. He then again referred to *Mornington v. Keane*, *Lyster v. Burroughs*, *Metcalf v. The Archbishop of York* (6 Sim., 224—s.c., on appeal, 1 M. & Cr., 547), and *Falkner v. O'Brien* (2 Ball & B., 214). He was of opinion that, having regard to the provisions of the deed of 1794, it was the intention of the parties to it, that on the acquisition of future property by Robert Royse, the trusts of the deed of 1794 should at once attach on that property, and the cases to which he referred shewed that the language of the deed was sufficient to effectuate that intention. It was clear that the judgment of 1839 could not affect the freehold lands till after the death of Vere Royse. By the law as it then stood, a judgment was not a charge or

actual incumbrance on land.—*Neate v. The Duke of Marlborough* (3 M. & Cr., 407). He should, therefore, allow the cause shewn, but without costs; first, because the question was not a simple one; and, secondly, because the course which had been adopted, of taking possession of the estates without the leave of the court, was not a proper one.

Court of Exchequer.

[Reported by I. S. Heale, Esq., Barrister-at-Law.]

R. CORNWALL AND ELIZABETH CORNWALL v. CHARLES HUDSON.

Practice—Damages for breach of covenant—Particulars—46th section, Common Law Procedure Act, 1853.

In an action to recover damages for breach of covenant by defendant in not completing his title to a house purchased from him by the plaintiff, the court refused to grant particulars of the costs of a Chancery suit, incurred by plaintiff, or of monies expended on the house by him, or the times of the expenditure.

THIS was an action to recover damages for breach of contract in not making out a good title to a house and premises purchased by plaintiff. An agreement had been entered into on the 15th December, 1853, whereby defendant agreed to sell his interest in the house, No. 39 Upper Fitzwilliam-street for a sum of £225, subject to certain covenants contained in the lease. An abstract of title was prepared. The purchase money was lodged in the Royal Bank, and defendant gave plaintiff the possession; not, however, being able to complete the title plaintiff brought an action, and the present application was made by defendant to the court for an order to get the particulars of the costs of a Chancery suit in this cause incurred by plaintiff, the particulars of the money expended on the house, the times of the expenditure, and also to stay the present proceedings till such particulars be given.

Byrne, for plaintiff, resisted the application on the grounds that, plaintiff after having got possession, and being obliged to file a bill in Chancery to compel performance, was content to take the title defendant could make, when an ejectment was brought and plaintiff put out of possession. The action is in the nature of an action of tort, and not one where the demand is liquidated, therefore the 46th section of the Common Law Procedure Act, of 1853, is not applicable. In *Retallick v. Hawkes* (1 M. & W. 573) an application similar to the present was refused. *Wicks v. Macnamara* (3 Hurl. & N. 568) was an action in tort, particulars were refused in that case also, and the distinction between actions being done away with is a case in point. Referred also to the 194th section of the Common Law Procedure Act, of 1853.

Exham, contra.—Though damages are to be estimated by the jury the plaint contains some items, as, the expenditure and attorney's bill, which are fixed, it is therefore in the nature of a liquidated demand. The plaint gives the sum total in one amount, viz., £500 for damages, the 46th section therefore applies. Defendant is further entitled to the particulars because he

would get them by a bill of discovery. In the case in 1 M. & W. there was only one claim, whilst here there are different items, so that, defendant cannot say to which of the items the amount applies. Referred to Lush's Pr. 298; *Stannard v. Ullithorne* (3 B. N. C. 326); and *Penprase v. Crease* (1 M. & W. 36).

FITZGERALD, B.—We think that this motion must be refused, as there is express authority against it, although the application seems reasonable, that a party getting such particulars under the 46th section, might be able to pay money into court to meet the plaintiff's demand. But we cannot alter the authorities, and they are express that a party has no right to get a discovery of the evidence of his adversary.

PIGOT, C. B.—I concur with my learned brother. We cannot change the practice of the court, although, it has always appeared unreasonable that the court should, in the exercise of its discretion, enforce particulars of breaches in cases of ejectment, in actions on covenant to repair, nay more, in criminal trials, such as conspiracy, whilst in cases of special damage it should not do so.

Motion refused.

POWELL v. ATLANTIC STEAM PACKET COMPANY.

*Second trial—Taxation of costs—
Conditional order silent as to—Misdirection.*

Where there has been misdirection at the first trial, and the conditional order is silent as to costs, the successful party in the second trial is entitled to the costs of both.

THIS was an action to recover damages for the loss of a trunk, the property of the plaintiff, by the defendants on the voyage from New York to Galway, and the present application to the court was for an order to Master Collis to review the taxation of the first trial had in this cause, and on which occasion a verdict was returned substantially for the defendants. The summons and plaint contained five counts: the first was against defendants as contractors, the second was similar, only varying the terms of the contract: the third averred that defendants were to carry plaintiff from New York to Galway, and the remaining counts were for the conversion, &c. Defences, a traverse of the contract, and a special defence that, unless plaintiff signed a special contract, defendants were not to be liable, and that plaintiff did not sign same. On the trover counts, the defence was a denial of the conversion, and an allegation of the special contract. Upon these pleadings the issues submitted to the jury were in substance, "did the defendants contract as in the first, second and third counts alleged, and did they accept the bailment as alleged." In the findings of the jury on some of the issues, it appeared that the word "not" was erroneously omitted, and that in the amended issue paper the defendants got a verdict on each of the traverses. The case was tried first at the Summer Assizes held at Sligo, 1860, and a conditional order was obtained for a new trial on the 26th November following, on the ground of misdirection. The second trial took place in 1861 when plaintiff obtained a verdict. Judgment was entered on the postea on the 2nd September, 1861, and a summons to tax costs

was served on defendant's attorney. The costs were taxed at £109 2s. 5d., allowing plaintiff the costs of the first trial and of the conditional and absolute orders. As the record and postea stood there was a verdict on five of the defences for defendants, these five defences covered the entire cause of action. The jury assessed the full value of the plaintiff's claim at £62 12s. Plaintiff refused to pay the special jury, and defendants did so. The judge took the verdict and left the parties to their remedy. The conditional order was silent as to costs, and the question now was whether the plaintiff having succeeded in the second trial, the costs of the first trial are to be taxed for him, whilst the verdict on that trial was substantially for the defendants.

Sydney, for the defendants. — Where there is misdirection of the judge and a finding generally for defendant and damages for the plaintiff, the rule is that no costs are given at either side. *Thompson v. Kennedy*, (Ir. Term Rep. 253); *Ferguson's Prac.* vol. 2, p. 999. *Goodtill v. Walter*, (4 Taunt. 670). Even an undertaking by the party who gained the first trial, generally to pay the other his costs, only includes the costs of the second trial. *Rouse v. Bardin*, (1 H. Blackstone, 639). A party who fails in the first trial though he afterwards succeed in the second, therefore is not entitled to the costs of the first trial. The present is such a case, as the verdict on the first occasion was for the defendant generally. Farther where the first trial is set aside for misdirection, and the absolute order for a new trial is silent as to costs, the party succeeding in the second trial does not get the costs, no matter what the result of the second trial. *Austen v. Gibbs* (8 T. R. 619). *Yeo and Billings*, Pr. 300, and 50th section, Common Law Procedure Act, 1856; *Byrne v. Elliott* (2 Ir. Jur. N. S. 99); *Fitzpatrick v. Robinson* (3 Law Recorder, 281).

Morris, contra. — There was a finding of gross negligence on the part of the company, the amount of the verdict was £62 12s., the plaintiff has, as the record showed, obtained the verdict. The allegation of the Taxing Master is that when the order is silent as to costs; the officer allows the costs of the first trial. The case in Blackstone was decided on the terms of the written undertaking and, therefore, is an authority for the plaintiff.

PER CURIAM. — My brothers think that there was misdirection at the first trial, and that from thence arose the motion for the second trial; the proceedings, therefore, were similar to what would have occurred if the first trial had been abortive. According to the present practice, in that case the costs would be taxed for the successful party. If it was necessary to decide this case, we would have to consider whether this was a verdict for defendant or plaintiff; but if we are to go upon the postea, the proper document for the taxing master, we must regard it as a verdict for the plaintiff, and where the conditional order is silent, the party who obtained a verdict on the second trial is entitled to the costs of both.

Motion refused with costs.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., Barrister-at-Law, and H. Fawcett, Esq.]

[BEFORE JUDGE LONGFIELD.]

IN THE ESTATE OF FRANCIS GRISPI, OWNER; JOHN CAREY, PETITIONER.

Judgment mortgage—Affidavit of registration.

In an affidavit to register a judgment as a mortgage, sixpence, appearing by the record of the judgment to have been awarded by the jury for costs, was omitted—Held, that the registration is void.

An affidavit to register a judgment as a mortgage against premises in the parish of St. Michan's, and city of Dublin, stated the premises to be situate in the parish of St. Michael's—Held, that the registration is void.

THE petition in this matter was filed for the sale of premises in Pill-lane, in the parish of St. Michan's, and city of Dublin. The petitioner's demand was a judgment obtained in the Court of Common Pleas. This judgment, as appears by the record, was obtained for £27 1s. 2d. debt, with 6d. for expenses and costs awarded by the jury, together with the sum of £48 4s. for costs, making together the sum of £75 5s. 8d. This judgment was registered as a mortgage against the premises sold in this matter on the 21st of June, 1859, and by supplemental affidavit on the 1st of July, 1859. Both these affidavits stated that judgment was recovered for £27 1s. 2d. debt, and £48 4s. costs, omitting the sixpence awarded by the jury. The judgment was set out on the schedule of incumbrances, No. 7. Upon the hearing of the schedule, the owner objected to this judgment on the ground that the affidavit of registration did not properly state the sum recovered, but the court, following the decision in *Re Fergus Farrell* (not reported), refused to permit the owner to set aside the judgment on a mere point of form, and disallowed his objection, reserving liberty to any party interested in the fund to file an objection, if so advised. The only person who availed himself of this permission was Felix Schurr, a judgment creditor, No. 10 on the schedule. Schurr's judgment was obtained in the Court of Queen's Bench for £295 penalty, and £31 1s. 1d. costs, and had been registered as a mortgage on the 5th of November, 1858. The affidavit of registration stated the premises sought to be charged thereby, were situate in the parish of St. Michael's, they being actually in the parish of St. Michan's. The petitioner, on receiving notice of Schurr's objection, obtained leave to object to his judgment, and the objection and cross objection came before the court at the same time.

O'Shaughnessy, for Schurr, briefly stated the requirements of the statute 13 & 14 Vict., c. 29, with regard to affidavits to register judgments, and relied on *McDowell v. Wheatley* (3 Ir. Jur., N.S., 322; 5 Ir. Ch., 502). In *Crosbie v. Murphy* (3 Ir. Jur., N.S., 364; 5 Ir. C. L., 301), it was laid down that everything on the face of the judgment must be carefully set out in the affidavit. In the present case the petitioner has omitted sixpence. *Francis Fitzgerald's Case* (5 Ir. Jur., N.S., 204—11 Ir. Ch., 278), is

precisely in point here. In that case it was held that a variance of £1 between the record and the affidavit of registration was sufficient to make the registration void. The amount of the variance is immaterial, and the remarks of the court in that case are applicable to this. The petitioner's judgment, therefore, must be disallowed.

McMahon for the petitioner.—To hold Schurr's judgment to be well registered, would be to repeal the statute. His affidavit states the premises to be in the parish of St. Michael's, and they are not in that parish, but in St. Michan's. There are two distinct parishes bearing these names in Dublin. The Act is very particular on this point, and requires the parish to be specifically stated. This is an objection going to the root of the registration. If a party is allowed to state the parish incorrectly, why may he not state the wrong county? This point was decided in *Lord Limerick's Estate* (7 Ir. Jur., N.S., 65), where the barony was wrongly stated, and the registration was held to be bad. It is of importance for the purpose of the registry that the parish should be correctly stated; if not, in making searches, the whole city should be searched against, and small properties would be unsaleable from the expense of making title. In *Jennings's Case* (8 Ir. Ch., 421), followed by *Harding v. Carry* (10 Ir. C. L., 140), it was held that a memorial not containing the names and additions of the witnesses to the deed, was not sufficiently registered, within the meaning of 6 Anne, c. 7, s. 2. The misstatement of the place is of far more importance than the omission in these cases. As to Schurr's objection, if the court is not absolutely bound by the Act, it should be disallowed. The words "making together £75 5s. 8d.," form no portion of the curial part of the judgment; they are words added by the officer in making up the judgment. The jury has no power to give costs, and we must, therefore, assume that the 6d. is included in the £48 4s., though it is added in, in the tot. Execution would not issue for this sixpence. Suppose the officer, in making up the judgment, had said, "making together £1,000," would execution issue for it? Certainly not. *Fitzgerald's Case* has no bearing on this. There, the judgment awarded £3 2s. 8d. for costs, and the affidavit stated the costs to be £2 2s. 8d. Here the affidavit and judgment agree as to the costs, and execution could not issue for more. In *Edgeworth's Estate* (11 Ir. Ch., 293), an objection was raised that by the record it appeared £3 2s. 8d. had been recovered for costs, and the affidavit was silent as to costs, but stated £2 2s. 8d. had been recovered for damages, and £1 for registration, and the court held that as the amount agreed, the registration was good.

O'Hagan (with *McMahon*).—The words of the statute are not cumulative, but in the alternative. The deponent is to state the debt, &c., or sum recovered, under which he might go for the debt alone, and if he chooses to give up 6d., that ought not to make the registration void; £1 is a substantial sum, but 6d. is merely nominal. Would the omission of a farthing vitiate the registration?

O'Shaughnessy in reply.—The court is not to consider the difference between £1 and 6d., but whether the terms of the Act have been complied with. Ex-

execution would issue for the whole amount recovered by the judgment. Such is the invariable practice of the courts. The registration of Schurr's judgment was not such as was calculated to mislead. In *Heaver v. Cox* (6 Eng. Jur., N.S., 1339,) in a bill of sale and affidavit filed under the statute 17 & 18 Vict., c. 36, the residence of the grantors was misdescribed, but it was held that the description was sufficient, as a creditor could not be misled by it. In *The Queen v. Naghten* (9 Ir. Eq., 593), a recognizance had been entered into by A.B., of Mallard Lodge, and to a writ of *sci. fa.*, describing him as of Mallow Lodge, he pleaded *nul tiel record*, which was overruled, Mallard and Mallow being *idem sonans*—*Gordon v. Hassard* (9 Ir. C. L., app. xxi.)

LONGFIELD J.—All arguments on the construction of this Act of Parliament founded on common sense or justice might be spared, for they can have no influence on the court, as it is bound by the rigid terms of the statute. I should be inclined to give the Act as wide a construction possible, and not to allow trivial objections to succeed. When the Legislature speaks in general terms, I think anything in common sense coming within the words of the statute sufficient, but when an Act requires the parish to be named, it must be done whether the court may think it necessary or not. If the Legislature requires anything, however immaterial, to be done, I must see its directions complied with. The objections in this case are very trivial; one party objects because a 6d. is omitted, and the other because 1 is put for n. In *Fitzgerald's Case*, the omission of the £1 was held to be fatal, not because the sum omitted was £1, but because the statute was not complied with. I am of opinion that the sum recovered by the petitioner was 6d. more than that stated in his affidavit; all of the judgment is, in the fiction of law, the act of the judges, although made up by the officer of the court; and I must, therefore, hold that the 6d. formed part of the sum recovered by the judgment, and that this case is governed by *Fitzgerald's*. *Edgworth's Case* does not govern it, for there the special terms of the Act were complied with. As to Schurr's judgment, the Act requires the parish to be stated, and it appears there are two parishes in the city with names nearly alike. If the Act required the street to be named, I would hold "Obeapside" a sufficient description, although the word street was not added; but where there are two parishes with similar names, and the wrong one is put into the affidavit, I must hold the registration void. The case of *The Queen v. Naghten* is a very strong one, but I am inclined to think that decision would have been different if there had been two places with similar names in the vicinity. The misfortune here is that there are two distinct parishes, and the wrong one is stated, and I am coerced by the Act of Parliament.

Declare that Schurr's judgment is not registered according to the statute, and consequently he has no *locus standi* to object to the petitioner's demand, and therefore disallow his objection with costs. Declare that the petitioner's judgment is not registered according to the statute, but as there is no person before the court entitled to take advantage of this defect in the registration, allow his demand,

but in case the Court of Appeal shall decide that Schurr's judgment is well registered, allow it in priority to the petitioner's, as Schurr will then be in a position to sustain his objection.

Court of Bankruptcy & Insolvency.

(Reported by John Levey, Esq., Barrister-at-law.)

Insolvency.

[BEFORE LYNCH, J.]

RE SMITH.—Jan. 1862.

Making away with property—Failing to account—Improbability of insolvent's statement.

Where an insolvent attempts to account for property disposed of immediately before his insolvency, by saying he paid a debt he owed to a person, who he alleged had left the country, and swears positively he can give no other account, he will be remanded the fullest period the law will permit, instead of dismissing his petition.

THE insolvent was a provision dealer in Francis-street, Dublin, where he carried on business, and sustained his credit remarkably well, until within a few weeks of his insolvency, when he stopped payment, called his creditors together, and was unable to account for a deficiency of £300 for goods that came into his hands within the previous month. He stated that he kept no books, and could submit no general statement of his dealings. He was then arrested and opposed by all his creditors.

Purcell was for them, and examined the insolvent with regard to the deficiency, which he attempted to account for, by saying that, when going into business, he borrowed a sum of £250 from a Miss Brodins, that she got married to a foreigner in Liverpool, who was an interpreter, and that, being obliged to go abroad with her husband, he sold his goods to raise money to pay her. On his examination with regard to this transaction, his account was most contradictory. He admitted that, in the statement laid before his creditors, he stated nothing of the alleged loan or the payment of it, and his answers on the whole were most unsatisfactory.

Sydney for him, admitted that his statement was, to say the least, improbable, and great suspicion was attached to the case; but, after all, it was no more than suspicion, and in dealing with the penal sections of the Act, which awarded a very severe punishment, the court would not condemn him on mere suspicion.

LYNCH, J., said he could not accede to the view put forward by the counsel for the insolvent, who came into that court as an accounting party, bound to satisfy his creditors, at least to a reasonable extent, as to how he had disposed of the proceeds of goods sold to him on credit, and if he failed to do that, he came clearly under the operation of the penal sections of the Act for making away with property, with intent to defraud his creditors. The case, although not founded upon extensive mercantile operations, was a very important one, both as regarded the class of traders to which he belonged, and the merchants who gave

them credit, and for the protection of honest traders, it was necessary that an example should be made. But whether he should dismiss the petition, or remand him for the longest period the law would warrant, was the only question he had to consider. If the petition were dismissed, the insolvent would, of course, come up to be heard again, and thus the creditors would be put to fresh expense in coming to oppose him, and as it was sworn by the insolvent that he could give no better account than the very improbable one he had already given, he would sentence him to two years' imprisonment, at the suit of the creditors who opposed, that being the longest period the law warranted in remanding an insolvent, no matter how fraudulent his conduct might be.

MONAGHAN SESSIONS.

BEFORE JAMES MAJOR, Q.C., CHAIRMAN CO. MONAGHAN.

RE PATRICK MAGLONE—Jan. 1862.

Making away with property on anticipation of insolvency—Fraudulent preference.

Where an insolvent is sued in an action for damages, for not fulfilling his contract by delivering a horse purchased from him, and after two trials, the plaintiff gets a verdict for one farthing damages, but whilst the litigation is pending, the insolvent sells and assigns his property, and pays his brother and his landlord, and when arrested for the costs he has no property, he will, notwithstanding, be entitled to his discharge.

THE insolvent was opposed by *Levy* on the part of the detaining creditor. *Faulkner* was for the insolvent. The detaining creditor's debt, which might be said was the only one on the schedule, was contracted in the following manner. The opposing creditor resided in Glasgow, and he bought a horse from the insolvent for £40, which was to have been delivered the following week, but when sent for by the purchaser, the insolvent said he could not give him, but that he would return the money; this was refused, and an action was brought to recover damages for the non-delivery of the horse, which was tried at the Monaghan Spring Assizes, 1861, when the jury disagreed. Early in July notice of a second trial was served, and within a few days afterwards the insolvent, who had a valuable farm, assigned it to his brother for a sum of £150, and in payment of an alleged debt; he also sold his chattel property, paid his landlord all rent due, and also paid another creditor, and thus denuded himself of every particle of property he had. The second trial went on, when the jury found for the plaintiff one farthing damages, in addition to the 40^l, the price of the horse, which the insolvent lodged in court. The costs were taxed, and on account of the two trials, they amounted to nearly 120^l, for which the insolvent was arrested, and having filed his petition and schedule, he sought to take the benefit of the Act.

Levy contended that two grounds of remand appeared on the face of the schedule, namely, a making away with property in anticipation of insolvency, and

a fraudulent preference to his brother, supposing that a debt were due to him at all. But there was another mode of dealing with the case that would answer the ends of justice much better—that was, either to dismiss the petition or discharge the order for hearing, and not allow him to come up again until the brother recovered the farm, and have it returned on the schedule. He designated the case as a gross fraud and a violation of the principles of law that always governed insolvent cases. He cited *Re Price* (15 L. T., 188); *Re Murrell* (16 L. T., 275); *Re Pratt* (Thompson Cooke, 191); *Re Margaret Duffy* (30 L. T., 75). He thought it was a case that ought to be severely dealt with by the court.

Faulkner contended that it was a case where all the merits were on the part of the insolvent. He at once offered to return to the creditor the price of his horse, and give him no trouble, but the creditor should proceed with his action, which resulted in a farthing damages, and the court was asked to remand him for the costs of an action where the damages amounted to one farthing.

THE CHAIRMAN said the opposing counsel had urged the grounds of opposition to the fullest extent in his power, but he totally differed from him in his view of the law. He thought that where a man owed no debt, but was sued merely in the hope of recovering damages, which resulted in the jury giving one farthing, he had a perfect right to dispose of his property as he thought proper. He was always ready to return to the opposing creditor his 40^l, and he was very wrong not to have taken it, instead of proceeding with his actions, and accumulating costs to such an enormous amount. These costs constituted the principal, he might say the only debt which he owed, and because he preferred his brother who made him advances, and was a creditor at the time he assigned his farm to him, a man who was not a creditor at all at that time now sought to have him remanded. He thought the man entitled to his discharge, and would discharge him accordingly.

Bankruptcy.

[BEFORE LYNCH, J.]

RE THOMAS GILBERT.—Jan.

Right of lien on goods in possession of vendor, for which the vendee passed his bill.

Where goods were sold for which a bill was passed, and a memorandum given to the purchaser that they were to be kept to his order subject to the amount of the bill, and they are in possession of the vendor at the time of the bankruptcy of the vendee, he has a right to retain them, and, on application by the assignees, to get them for the general creditors, leaving the vendor to prove for his debt, will be refused with costs.

THE bankrupt was a trader in Lurgan, and dealt with the Messrs. Lindsay, of Belfast, for corn and flour. Some weeks before his bankruptcy, he purchased from Lindsay flour, amounting to £360, for which he passed his bill at three months. On the occasion of the purchase, the following invoice or memorandum was given by Lindsay to Gilbert:—"£360." "Thomas

Gilbert bought of Lindsay & Co. flour, amounting to three hundred and sixty pounds, to be kept to the order of Thomas Gilbert, subject to the amount of bill, and the costs incurred to be paid in full." Shortly after this transaction, and before Gilbert took away any of the flour, he petitioned under the arrangement clauses, with a view to carry out a composition with his creditors, but having failed to get three-fifths in number and value to vote for him, the case was turned into bankruptcy. In the arrangement schedule he did not return Lindsay as a creditor for the £360, in fact made no allusion whatever to the purchase of the flour, or the circumstances connected with it; but in his bankruptcy schedule he stated the facts as they were, and his assignee filed a charge claiming the flour in question, and seeking to make Lindsay come in and prove as a creditor for the amount. The bankrupt swore that he purchased the flour absolutely, and could have taken it away at the time of purchase, and that it was not until an hour after the purchase was made that Lindsay gave him the document in question, and that it never was his intention to have left the flour as security for the payment of the bill. Lindsay swore that the bill was to have been paid before the flour was removed.

Musgrave for the assignee.—The story of Lindsay was absurd, and contradicted itself. If the flour was to be left there until paid for, there was no necessity to pass a bill. A creditor could not take a different security, and still retain his lien on the property sold. *Bonny v. Poyntz* (1 Nev. & Man., 229); *Cowd v. Simpson* (16 Ves., 293); *Harrison and another, assignees of George Mickle, a bankrupt, and John Mickle v. Guthrie* (2 Scott, 398).

Kernan, Q.C. for Lindsay.—The cases cited did not apply at all, for there was no law better established than the right of a vendor to stop in transitu upon the insolvency or bankruptcy of the vendee, even though bills were out for the purchase money of the goods, and those bills endorsed over to third parties—*Feise v. Wray* (3 East., 93); *Patten v. Thompson* (5 M. & Sel. 350); *Edwards v. Brewer* (2 Mason & Welsby, 375); *Dixon v. Yeates* (5 B. & Ad., 343). But independently of the law, there was an express contract that he was to hold the flour until the bill was paid.

F. Smith for the bankrupt said it was not his business to interfere between the assignees and the creditors, but he thought it his duty to have the attention of the assignee called to the facts.

LYNCH, J. said there was no difficulty in the case either upon the law or the facts. The document in writing was evidence of the fact that the flour was to be held as security until the bill was paid, and upon that agreement between the parties he could at once decide. It was a strange thing that the assignee of the bankrupt should seek to take out of the hands of a merchant goods he sold for which he was never paid, and upon which he had a clear lien in point of law for the price. It was admitted that the goods never reached the possession of the bankrupt, and never left the possession of Lindsay, but even if they did, he would have a perfect right to stop them *in transitu* upon hearing of the bankruptcy of the vendee, and being in possession of the vendor he had as good

a right to retain the possession as he had to stop *in transitu*. The charge of the assignee should be disallowed, and Lindsay should get his costs.

RE PATRICK KELLY.

Arrangement turned into bankruptcy—Obtaining protection by misrepresentation—Want of books.

Where a trader petitions under the arrangement clauses, and obtains protection for person and property upon untrue statements, and whilst the arrangement is pending disposes of his property, and keeps no books. Upon the case being adjourned into Bankruptcy, the examination will be adjourned sine die and protection refused.

THE bankrupt came up to pass his final examination; he had no books, and failed to vouch his schedule. It appeared that he had petitioned under the arrangement clauses, and offered a composition of five shillings in the pound, which was to be secured by the manager in a bank in Monaghan; he subsequently modified his proposal, and offered the composition in cash, which the creditors refused to take, and the case was adjourned into bankruptcy. Whilst the arrangement proceeding was pending, he sold nearly all his chattels for the purpose as he stated of lodging money in court to meet the official assignee's expenses, and paying his attorney the costs of the arrangement, and there scarcely appeared to be anything left for creditors. He admitted that the manager of the bank had never promised to guarantee the payment of the composition; he merely thought he would, and the offer of the five shillings in cash depended on a schoolmistress, a friend of his, whom he knew had money.

Kernan, Q.C. for the creditors, called upon the court to adjourn the examination *sine die* as a mark of its censure for the fraud that had been committed. Whatever chattels he had were sold to a man named Swanzy, who had been in the bankrupt's employment, and no doubt would be all returned to him if he could pass through that court and get into business again.

Levy for the bankrupt admitted that for the present the examination should be adjourned *sine die*, until he was in a position to make a better case than he could make at present. The sales of his chattels were really made for the purpose of paying the great expenses incident on the arrangement. If he had taken his advice he would in the first instance have become bankrupt.

LYNCH, J. said the case was an exemplification of the fraudulent purposes to which the arrangement clauses were turned. He considered that a gross deception had been committed on the court. In the affidavit to support his petition for arrangement, the bankrupt swore that Mr. Millner Gibson, the manager of a bank in Monaghan, would guarantee the composition. If that were true, it was evidence that he was a man of character and worthy of being trusted, and under these circumstances the court gave him protection for person and property, and the use he made of it was to dispose of whatever property he had, and for which he was at present unable to satisfactorily account. It appeared that he never asked the

manager of the bank to be security for him at all, so that the whole story was a fabrication. The case was not one of much magnitude as regarded the amount of debts, or the mercantile transactions, but in a small way it was a very bad one, and it would be a warning to the court to investigate with rigour the truth of statements put forward by parties seeking protection under the arrangement clauses. He would adjourn the examination *sine die*, and refuse the bankrupt protection.

RE ROBERT AND THOMAS DILL.—February, 1862.

Mortgagee, fixtures attached to the freehold—Goods and chattels—Order and disposition.

Although a water-wheel can be removed by taking off the caps, and removing the boxes, and that this may be done without injury to the freehold, still it is a fixture not coming under the order and disposition clause; and although the shafting and gearing put in motion by, and in connexion with it, may be also removed without injury to the freehold, they are also fixtures. Beetling engines standing upon stones raised above the floor, attached to one another, made steady by their own weight, and attached to the joists above by stays, and, when at work, put in motion by the driving shaft of the outside wheel, are also fixtures, and, in case of a mortgage by the bankrupt, they go to the mortgagee.

THE question in this case was, whether certain machinery in a flax mill were fixtures attached to the freehold and, consequently, belonging to the mortgagee, or moveable chattels to which the assignees in bankruptcy of the mortgagor would be entitled. The facts appear in the judgment.

Doctor Seeds, for the assignees, cited *Broom's Legal Maxims* (3 Evn. 372); *Lawless v. Lawless* (3 Atk. 13); *Dudley v. Ward* (Ambler, 113); *Hern v. Baker* (9 East. 215); *Eliver v. Marr* (3 East. 38.)

Kernan, Q. C., for the mortgagee, cited *M'Kibbon's case*, which he said was decisive upon the point at issue.

LYSON, J., said.—In this case there remains only one point to be decided—namely, whether the beetling engines were fixtures or goods and chattels at the time of the bankruptcy. I have already decided as to the other articles, and I cannot now reconsider my judgment, unless the matter is formally and regularly brought forward for review. I can now only consider the question in reference to the particular articles—the beetling engines—and decide whether they are fixtures or mere chattels which never became fixtures. The description of the machines in question is detailed in the evidence. Mr. Gray describes them, after describing the water wheel itself, as removable, by taking off the caps on the pedestals and removing the boxes, &c., and the shafting and gearing as removable by removal of screws, bolts, &c., he deposed that all these things could be removed without injury to the freehold. He describes very clearly the beetling engines. They are six in number, each attached to the other, so that the whole becomes steady by its weight, and rests on

stones laid above the floor, but not screwed or fastened in any way to the stones or to the floor—so standing undetached and separate. “Little bits of stays” (to use the words of the witness) go from each machine to the joists above, and he says this is done merely to steady the framing when the engines are at work, and serves no purpose of propping the upper floor, but, being only to prevent vibration in the machines themselves, would have rather the opposite effect, as regards the upper loft; they are worked then by a shaft which is attached to the shaft of the wheel by a coupling box, made fast by screws—in the words of the witness, “the shaft of the wheel is connected by a coupling box to the beetling engine, as if it was all a solid thing.” Mr. Beale's evidence does not materially vary from Mr. Gray's, except that he makes “the little bits of stays,” as described by Mr. Gray, to serve the purpose of props for the upper loft, which, by reason of its breadth, he considers, would require props to be placed in the centre, if these stays were removed. Now, on this evidence I have to decide whether these machines are goods and chattels, to be removed and sold by the assignees, or are fixtures belonging to the mortgagee as contained in the deed of mortgage. I have already ruled the water-wheel to be a fixture, and the gearing also—this is *res adjudicata* here; and I have, therefore, solely to regard the question as applied to the beetling engines. Unfortunately, the cases on this point are numerous and conflicting, and, what is much worse, it is impossible to deduce any fixed and certain propositions to announce as determining principles that ought to be unalterable. The very definition of the term fixtures is itself uncertain. Fixtures most often mean things fixed to the freehold, but by reason of usage not finally and permanently attached thereto, but capable of removal for the benefit of trade, and upon other grounds of exception. This definition treats all fixtures as annexed actually themselves to the freehold; but fully to comprehend the subject another class of chattels must be regarded—namely, such as become annexed by relationship, that is, as necessarily belonging as parts of a whole thing to that which has actual annexation to the freehold. Now, it is clear that this leads to a very wide and somewhat lax principle, introducing the purpose and object of machinery, and the use intended in particular cases, and renders all the cases on this matter complex, uncertain, and unsatisfactory, and I refer to *M'Kibbon's case* (4 Ir. Chan. Rep. 520,) as showing the great latitude of construction capable of being applied to the mere question—what is a fixture?—independent of the other intricate inquiry as to its removeability in various relationships of property. Of course it would be out of place for me to consider this subject in any more extended view than as respects the single machine in question, but I should be glad to have further opportunity of endeavouring to classify and to bring to order and system the too numerous decisions and dicta on this most important subject, and, saying so, I now proceed to consider the case of these machines, the beetling engines. If *M'Kibbon's case* be rightly decided, these engines directly are within the rule applied to the steam engine by the Chancellor. If this be so, it almost necessarily follows that when I have ruled the water-wheel and gearing to be fixtures, that the

beetling engine, for which they exist, must have also the same character. Two very recent cases which I have found go a good way to confirm this part of the judgment in *M'Kibbon's case*, *Mather v. Fraser* and *Walmsley v. Milne*. These cases seem to me to go to a considerable extent to confirm that part of the judgment in *M'Kibbon's case* which is applicable to the point before me. In this case there is actual annexation of the engines—therefore, it is stronger than many of the cases. Of course the point may be raised as to the “stays,” that it is annexation merely for the use and working of the chattel, but that must be subject to the further consideration, that it is the very purpose of the whole building and water power to work such engines, and they require for the due working annexation to the freehold, and to employ the water power they require, again, annexation to the shafting, and all the later cases go to show that it is not a necessary test that such annexation is effected by screws and bolts easily removable, if the purpose of annexation be of a permanent nature. In this case, further, the thing mortgaged was a beetling mill, and were I obliged to rule the case proved by the assignees, I should give to the mortgagees the bare walls of what once was a beetling mill, having taken away the water wheel, the gearing, and every matter therein, which made it at all what was given as a security. I, therefore, rule this question also in favour of the mortgagees.

RE THOMAS JOHNSON.

Transfer of goods in payment of a debt—Fraudulent preference—Goods removed by night, and given to bankrupt's own immediate connections.

Although a debtor may legally prefer one creditor to another, under certain circumstances, and pay him by a transfer or handing over of goods to him, yet if that transfer takes place by night, and in a surreptitious manner, it is, at least, prima facie evidence that the trader contemplated bankruptcy, and where bankruptcy immediately followed, and it appeared that the trader was then in insolvent circumstances, the creditor will be compelled to pay the assignees the value of the goods so obtained, with costs.

THIS case came before the court upon charge and discharge, and the question to be decided was, whether the bankrupt had made a fraudulent preference to two of his creditors named Wilson, which was overreached by the bankruptcy.

Kernan, Q. C., for the assignees, claimed the amount of the goods thus given by way of preference. He said that in the month of May, 1861, the bankrupt transferred to his brother-in-law, Robert Wilson, and to his mother-in-law, Elizabeth Wilson, and allowed them to take away from his premises, a large quantity of shop goods. They alleged that the value of the goods was only £40 3s. 1d., but the assignees state that the value was much greater. The act of bankruptcy was a declaration of insolvency filed on the 22nd of May. The charge further stated that in the same month Robert Wilson removed from the bankrupt's place various articles of furniture which the Wilsons

valued at \$10; that the bankrupt also gave them a sum of about £27 in cash, and that the removal of the goods and the giving of the money were acts of bankruptcy and a fraudulent preference; the bankrupt being in insolvent circumstances, and not able to pay his creditors in full; that Robert Wilson was aware of the fact, and that the transfer of the goods and the giving of the money were the result of an arrangement between the parties, made without consideration having been given for them, or, if given, for any debt that was due antecedent to the transfer; that the property was obtained by Robert and Elizabeth Wilson, for their own use, and that the assignees were entitled to the goods for the benefit of the general body of the creditors.

Dowse, for Robert and Elizabeth Wilson, contended that they were fully entitled to retain possession of the goods and the money which had been given to them by the bankrupt, who owed them £100. The goods and money were given in part payment of the debt, and it was not because the goods were removed at night that the transaction was not fair and equitable. If the goods had been removed in the day time it would only lead to exposure and precipitate the bankruptcy. He submitted that there was nothing in the evidence to show that there was a fraudulent preference of the Wilsons, or that they were not *bona fide* holders of the property for valuable consideration, and in respect of a debt due to them by the bankrupt. He cited *Johnston v. Fessenden*, (3 De Gex. & Jon. 13); *Wood v. Dazie*, (7 Q. B. 892), *Mogg v. Baker*, (3 Mea. & W. 195).

LYNCH, J., said he was of opinion that it was the strongest case of fraudulent preference that ever came before him. It was manifestly a fraudulent preference of the Wilsons by Johnston, who was in insolvent circumstances at the time. With respect to the existence of the debt to the Wilsons, the entries in the books were very contradictory. He took it, however, that the debt did exist, but were the parties pressing for payment? He did not find, except in one passage in the discharge, that they came to ask for payment. Then the evidence showed that the goods were removed from the bankrupt's premises by night, and not on a single occasion, but that on several occasions during the week they were removed at the dead of night, or at an early hour in the morning, presenting the appearance of a surreptitious transaction, the object being to conceal the proceeding from the eyes of the world, and although a trader might legally prefer one creditor to another, under certain circumstances, yet where a preference was given by the removal of goods at night it was at least *prima facie* evidence that the trader contemplated bankruptcy. The very servants in the house were sent to bed, and the only stranger to the family was also sent out of the way, after the shop was shut, the Johnston's remaining up while the goods were being removed. This was inconsistent with a sale of the goods to Wilson. The goods were packed up after the hour of business had passed, and the shop was closed—surreptitiously packed up, and sent off at night in the absence of all the persons in the house who could give any information on the subject. It appeared to him to be agreed upon between Johnston and Wilson to remove the goods out of the power of

Mr. Galt and the other creditors, and with the fraudulent intent to pay in full what was alleged to be a debt due to Wilson, leaving very little for the other creditors. Under such circumstances, he had no hesitation in deciding that the property that had been given to Wilson belonged to the assignees. His lordship ruled that the assignees should get the costs of the motion from Wilson.

Attorney for the assignees, Mr. Larkin.
Attorney for Wilson, Mr. Wilson.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

KELLY v. KELLY—Nov. 30.

Short-hand writer's fees.

Where by a final decree each party was ordered to bear their own costs of the cause, the shorthand writer, who by the direction of the judge had taken notes of the evidence, is entitled to an order for payment of one moiety of his fees by the plaintiff on his default to pay them.

In this case there had been a verdict for the plaintiff, establishing the will, save as to the residuary clause, which was struck out. The court, by a final decree, directed that each party should abide their own costs. As in other cases, a short-hand writer by the direction of the court, had in this case taken notes of the evidence, and the defendant had paid him one moiety of his fees, but the plaintiff objected to pay the other, amounting to £17 5s. 4d.

Doctor Walsh, Q.C., now moved on behalf of the short-hand writer, that the plaintiff or his solicitor be ordered to pay to the applicant the said sum of £17 5s. 4d. The trial, it appeared, had lasted six days, and the affidavit stated a demand of the amount on the plaintiff's solicitor. Under the 84th General Order, the court had full power to make the order, and in similar cases the Court of Chancery would not hesitate to grant an attachment.

M. Morris for the plaintiff and his solicitor resisted the motion.—As to the solicitor, the court has no jurisdiction to make the order; but as to the plaintiff, the application should have been made before the case was finally disposed of. The proper course now would be to proceed at law for recovery of his demand.

KEATINGE, J.—That would be a disagreeable alternative, as the action, if brought against any one, should be against the judge, who had directed the short-hand writer to act in the case; but in fact he was in the position of an officer of the court, and the only question was, whether the order should go against the plaintiff or his solicitor.

Doctor Walsh having consented to waive the application as to the solicitor, the court made the order for payment of the sum asked by the plaintiff within ten days, and £6 for the costs of the motion, and that service on the solicitor of this order be deemed good service.

O'CONNOR v. HENKERT—Jan. 30.

Practice as to sending cases to the Assizes—Influence of parties really interested—Issue where a will and codicil are propounded by different parties.

Where it appears that persons really interested in the litigation are likely from their position and influence to occasion a disagreement in the jury at the Assizes, and have put forward a person without any interest to litigate as a defendant in the case, the court will not send the case for trial to the Assizes, though all the witnesses reside in the county, but will fix a day specially for the trial.

Where a will and codicil are propounded by different parties, and respectively impeached in the pleadings, it is not necessary to have separate issues as to the validity of each. The proper issue is, whether the will and codicil together are, or either and which is the last will, &c.

THIS was a motion on behalf of the plaintiff to fix the mode of trial. A cross notice of motion was also served on behalf of the defendant, to send the case for trial to the next assizes for the county of Kerry, on the ground that all the witnesses resided there, and of the humble circumstances of the defendant. The deceased, Timothy Connor had made a will, dated 1st May, 1842, the validity of which was not contested; he also made a second, dated 1st May, 1857, and a codicil, dated 19th December, 1859. Under the will of 1857, the plaintiff would be entitled to all his property, subject to the widow's interest, for her life. The codicil was much more favourable to the widow, who was also executrix; she survived her husband six weeks, and took possession of everything, except a sum of £3000 in the Bank, but she never proved any of the documents, and, therefore, could not get that sum. She, it was alleged in the plaintiff's affidavit, had given away all the property she so got hold of, and especially large sums to two Roman Catholic clergymen, Mr. Maw and Mr. M'Entyre. The plaintiff was the sole next of kin of the deceased, and he cited all the next of kin, who were numerous, of the widow, of whom Mr. Maw was one, and propounded the will of 1857. The only person who appeared was the defendant, who was stated to be a poor carpenter, and only put forward by Mr. Maw and Mr. M'Entyre on their behalf. The defendant relied on the codicil of 1859, and impeached the will of 1857.

Dr. Ball, Q.C. for the plaintiff, submitted that this case was not like motions at law to change the venue, and besides it was a case peculiarly unfit for the assizes, as it appeared that the Messrs. Maw and M'Entyre had so much interest at stake, and there would probably be a disagreement in the jury. Mr. Maw was the parish priest of Tralee. The court will not, unless in an extreme case, send a case out of its own court—*Cooper v. Moss* (Sw. & Tr., 143); besides we must bring up three of the witnesses referred to, and there is a railway from Tralee to Dublin.

Heron, Q.C. for the defendant, relied on the convenience to the witnesses to send the case to Tralee, where all of them resided. It was very nearly the same as a motion to change the venue; and as to the alleged influence of the Rev. Mr. Maw, it was absurd

to suppose it could have any weight on the special panel; besides he offered to have a jury selected under the old system—*M'Lester v. Fegan* (9 Ir. C. L. R., 45, app); *Smily v. Hughes* (7 Ir. Jur., 139). If the case should be retained in Dublin, he submitted that the plaintiff should pay the expenses of the witnesses of the defendant.

KEATINGE, J.—In this case I consider that the two clergymen are mainly interested, and that they have received about £3000 out of the assets; that is sworn to, and no affidavit has been made in reply to it. I do not cast any imputation whatever on the jury panel of Kerry, but I am apprehensive that the respectability of the gentlemen who are really interested in the case might cause a disagreement amongst the jury, and the plaintiff must himself examine three of the persons named by the defendant, and as the railway runs from Tralee to Dublin, I consider it much more convenient for the witnesses to have the case tried here on a day which I shall specially fix, than to have to wait at Tralee perhaps during the whole assizes.

Dr. Ball then asked to have separate issues, as to the validity of the will of 1857 and the codicil of 1859, as they were not propounded by the same party, and there might be some confusion with the jury respecting them if comprised in the same issue.

KEATINGE, J.—No; the questions are always in the same issue, viz:—whether the will of 1857 in the declaration mentioned, and the codicil of 1859 in the plea mentioned, together are, or either and which of them is, the last will and testament of the deceased.

HOEY v. REDMOND—Jan. 30.

Practice—Setting aside rule that non-appearance be deemed a renunciation.

Where a citation has been served by a next of kin on an executor to accept or refuse probate, and no appearance has been entered within the time specified, but the solicitor for the plaintiff was aware from communications which the executors' solicitor had with him, that the papers were being prepared for the purposes of probate by the executor, a rule entered by the plaintiff that the non-appearance of the defendant be taken as a renunciation was set aside.

THE testator, Richard Hudson Hoey, made his will, dated the 3rd of April, 1860, in which he appointed two gentlemen named Moore and Redmond his executors, and several bequests were given to Redmond's wife and children, and also to the plaintiff who was one of the next of kin. The testator died on the 8th August, 1861, and no steps were taken to lodge or prove the will until a citation was issued by the plaintiff, which was served on the defendant Moore on the 30th November, and on Redmond on the 20th December last. Moore declined himself to act, but as solicitor for Redmond he proceeded to prepare the papers for probate, and for that purpose had several communications on the subject with the plaintiff's solicitor, who on the expiration of the time limited for appearance, and none being entered, immediately en-

tered the side-bar rule that the non-appearance of the defendants be taken as and for a renunciation. The defendant's solicitor then offered by notice to pay the costs of that rule if it was set aside on consent, but the plaintiff's solicitor would not consent, and filed an affidavit relying on the delay, and on the fact that Redmond resided in Liverpool, and was not in very solvent circumstances, and had misled the plaintiff.

Dr. Townsend for the defendant now moved to set aside the rule so entered, as entered by surprise and contrary to good faith, the solicitor being quite aware that Mr. Moore was in earnest in preparing to take out probate for Redmond, and the notice served offered all that they were entitled to.

Beytagh for the plaintiff, insisted that the rule should stand, and he relied on the 84th section of the Probate Act, 1857, which prevents an executor who has once renounced having a right to retract it, and submitted that the rule entered should be construed in the same way.

KEATINGE, J.—I am now dealing with an appointment of an executor made by the testator himself, and whatever be the circumstances of Mr. Redmond, his right to take probate is clear. Then while his solicitor is preparing the schedule, and pending communications between him and the plaintiff's solicitor respecting it, this rule is entered immediately on the expiration of the time allowed to appear. Then Mr. Moore for Redmond offered to pay the plaintiff the costs of entering that rule. I must set it aside, but as the fact of Redmond residing out of the jurisdiction may have misled the plaintiff, I will excuse the plaintiff from paying costs, and will hold Redmond to his offer. I, therefore, set aside the rule with £1 for the costs of entering same, and let each party abide their own costs of the cause. Defendant to extract within 14 days, and in default liberty to plaintiff to apply for administration with will annexed.

PHILLIPS v. HASSARD—Jan. 31.

Practice—Limiting the time to extract administration to less than 14 days.

Where a case is made out shewing a pressing necessity for a personal representative to be forthwith raised, as to revive an abated suit in Chancery, which was pending for hearing on the Chancellor's list, the court will limit the time accordingly.

Frazer for the plaintiff, moved that the time provided (14 days) by the rules, for the defendant to extract administration with the will annexed, be limited to 3 days. The testatrix, Margaret Wilkinson, had been a party respondent in a petition matter in Chancery, in which the plaintiff was the petitioner, and a person named Mills, and several others, including Margaret Wilkinson, were respondents. She died pending the matter, and left a will, in which Mills was named executor, and the defendant in this cause, residuary legatee. Mills lodged the will upon a subpoena, and a citation was, on the 11th January, 1861, served on Mills and the defendant to accept or refuse. The defendant alone appeared and consented to take out administration with the will annexed, and on the

25th January, the side-bar rule to extract within 14 days was entered. The affidavit of the plaintiff referred to considerable delays in the litigation in Chancery, having been occasioned by Mills, who merely put forward Miss Hasard here as his nominee. The case was entered in the list for hearing during the present sittings before the Lord Chancellor, and the object was to have the case heard before he rose. It appeared that the duty payable on the letters of administration would not be more than £8.

Coates for the defendant, objected to the plaintiff limiting the time specified in his own rule, and the defendant would not be prepared to pay the duty before the lapse of 14 days.

KEATINGE, J.—Under the 100th General Order, I have full power to limit the time fixed in any of the rules, and this is a case in which, I think, I ought to do so, as the defendant is plainly only acting for Mills, and as the duty is so small and the will very short, I, therefore, say, let the defendant extract on or before Monday next.

THOMAS BELL, PLAINTIFF; THE ATTORNEY-GENERAL AND OTHERS, DEFENDANTS.—Feb. 3.

Pleading—Incorporation—Reference to documents lodged in the registry.

In a plea which alleges that by a certain testamentary instrument, a former testamentary instrument was incorporated in it, it is not necessary, if the instruments are lodged in the registry, to set out in the plea the passage of the will or codicil relied on, which constitutes the incorporation, but the several instruments must be specially referred to in the plea, as then lodged in the registry, and thereby their contents will be considered as if fully set forth in the pleadings.

THE plaintiff, in his declaration, had propounded a will of the deceased David Lyons, dated the 5th November, 1819, (which revoked all former wills) with two codicils bearing date respectively the said 5th November, 1819, and 12th November, 1819. The plaintiff was named an executor in said will. The Attorney-General, by his plea, alleged that the will and two codicils alleged in the declaration together to be the last will of the deceased, did not alone form such last will; because the testator had made another will, dated the 10th September, 1819, which contained a bequest for charitable purposes, and that although the will of the 5th November, 1819, did contain a clause of revocation as alleged, yet that the testator, by his said codicil of the 5th November, 1819, incorporated the said will of the 10th September, 1819, with said codicil, and that thereby such will became, and now is, a part of the last will of the said deceased, and so entitled to probate, together with the other testamentary dispositions in the said declaration propounded, and that by reason of such charitable bequests contained in the said will of the 10th September, 1819. The Attorney-General was interested for and on behalf of her Majesty, &c.

Dr. Townsend moved to fix the mode of trial.

Dr. Lloyd, Q.C., (Dr. Ball, Q.C., with him) submitted, that the plea, as it stood, was embarrassing to the plaintiff, who wished to raise and argue the

question of incorporation either on a demurrer or a traverse; but as the passage relied on as making the incorporation was not set out in the plea, nor was it averred that the papers referred to were in the registry, neither course could be adopted.

Dr. Townsend for the Attorney-General.—We have no objection to amend our plea, if the court considers it necessary. The documents, in fact, are all lodged in the registry.

KEATINGE, J.—The plea must be amended by averring that the several papers referred to are lodged in the registry. That will enable the court to read them as if set out fully on the record, and the plaintiff must have liberty to reply or demur.

Court of Quarter Sessions.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

APPEAL FROM MAGISTRATES TO QUARTER SESSIONS.*

MATTHEWS, APPELLANT, STRONG, RESPONDENT.

A conviction under the 3 & 4 Vic., c. 91 (an Act for the more effectual prevention of frauds and abuses committed by weavers, sewers, and other persons employed in the linen and woollen manufactories of Ireland) s. 6, should set out that the yarn suspected of being embezzled was found in the dwelling house of the prisoner.

THIS was an appeal from a conviction by the Justices at Petty Sessions, at Lurgan, on the 16th of July, 1861, that upon the hearing of a complaint that the defendant, George Mathews, had on the 29th of June, 1861, at Lurgan, in his possession, a quantity of linen yarn suspected to have been purloined or embezzled, and the defendant with the said yarn having been duly brought before the Court of Petty Sessions, on the 16th of July, 1861, before the four Justices then presiding, and having been called upon by them to give an account how he came by the same, did not give an account to the satisfaction of the said Court how he came by the same, an order was then made by the Justices that the defendant was adjudged guilty of a misdemeanour and that he be deprived without compensation of the said yarns, and fined £10 and 8s. for costs to be paid forthwith, and in default of immediate payment that he be imprisoned for two months with hard labour, unless said sums shall be sooner paid, one-third to be allocated to complainant, and two-thirds to the Crown, &c. It appeared on the hearing of this appeal that the complainant being on duty as a constable, on the night of the 29th of June, 1861, in Lurgan, found a boy at half-past eleven o'clock carrying a bag, which on examination he found to contain linen-yarn, which he (having been a weaver) suspected to be embezzled yarn. He proceeded with the boy and the yarn to the house of defendant and his father and demanded admission, but the door was not opened to them. By the evidence of this boy and of Francis Weir, it was satisfactorily proved that the defendant had, about nine o'clock on that evening, sold the yarn in his dwelling-house to Francis Weir, who then paid for it, and that defendant

* The above important decision was made by the Chairman of the County of Armagh, at the Lurgan Sessions, upon the 6th of January, 1862, upon appeal heard on the 14th of October, 1861.

gave it to the boy in the bag to be carried by him to a cart, which was then on the road at Lurgan, with cabbages in it, to be carried in the cart for Francis Weir who had bought it. The yarn was proved as to the greater part to have been of that description which is reasonably suspected to have been embezzled, and persons in the trade were examined who established it to be such to the satisfaction of the court. The defendant on the hearing of the summons and also of the appeal produced evidence to show that the yarn was not in his dwelling-house or possession but in his father's, but he failed to establish it, the court being of opinion that he had the yarn in his own possession in the house in which he dwelt and which was therefore his dwelling-house, and that he did not satisfactorily account for having it in his possession.

It was objected on his behalf that the facts proved did not establish the offence created by the statute 3 & 4 Vic., s. 91, ss. 6, 7, & 8. There were other statutes referred to, 5 & 6 Vic., c. 68, continues s. c. 71, but s. 4 modifies the power of constables under s. 7 of the former Act, 17 & 18 Vic., c. 46, and 22 & 23, Vic., c. 25 continues it to the present time. It was also objected that there was no information or search warrant granted thereon and that the conviction did not show any offence under the statute. The Act 3 & 4 Vic., s. 91, made for the benefit and encouragement of trade and manufacture, and especially of the linen manufacture in Ireland, and for the security of the property of manufacturers and employers, recites that former provisions were ineffectual to prevent or even materially to check the theft and embezzlement of linen and other yarns, and proceeds to make further provisions to carry out this object, which seem to be borrowed from the English Acts for preventing frauds by persons employed in the woollen trade, 17 Geo. 3, c. 56, s. 10. The decisions, therefore, upon that statute have an important bearing upon the statute made for Ireland; s. 10 is similar to 3 & 4 Vic., c. 91, s. 6, both of which provide that on information on oath, Justices of the Peace may grant a search warrant to search the dwelling-house where yarns or other materials suspected to be purloined or embezzled are concealed, and the latter Act allows it where there is reason to suspect that any person has such in his possession or on his premises; s. 7 as modified by 5 & 6 Vic., c. 68, s. 4, allows a constable to place a guard on premises so suspected of his own authority till he can obtain a warrant; s. 8 enables a constable to arrest persons carrying such suspected property, and to lodge them and the property in a police office, &c., and such person is bound to account satisfactorily for such possession or is liable to be convicted of a misdemeanour. The construction of the English Act was the subject of decision in the *Reg. v. Wilcock*, (1 N. Sess. Cas., 651, & 7 Ad. & Ellis, 317, 355); also in *Ex. In re Boothroyd*, (2 N. Sess. N. S. Cas., 350 & 16 M. & W. 1). Previous to these decisions, the validity of a conviction under this statute had been considered by Tindal, C.J., before whom it was allowed to be given in evidence on a trial in *Davis v. Nest*, (6 Car. & P. at page 167). In trespass for taking yarn and entering plaintiff's house. It appeared that defendant in search of robbers entered plaintiff's house and

found the yarn, who summoned, convicted, and fined for having the yarn in his possession, and it was condemned. It was objected that the conviction was bad, as there was no search warrant, nor information to ground it; but Tindal, C.J., observed, the entry of the house cannot be justified for want of a search warrant. I see no objection to the validity of the conviction, a search warrant was not necessary to give the magistrates jurisdiction. The conviction was received. In this and the other cases, the conviction stated the yarn to have been found in the dwelling-house and in the possession of the defendant. In *Reg. v. Wilcock*, (Denman, C.J., page 336), in pronouncing the judgment of the court says, "An argument is founded on the words of sec. 10, that the introduction of the word 'such' applied to the materials found, refers to materials circumstanced in the manner described in the preamble, in the earlier part of that section. The misdemeanour is created, 'if any such materials suspected to be purloined or embezzled shall be found therein, &c.' The word *such* is supposed to incorporate all the preceding particulars, or at least the fact of their being found concealed in the dwelling-house. But we think that is not the true construction." The offence aimed at is "the possession of goods suspected to be purloined, without being able to give a satisfactory account of them." Considering this case to settle the law as to cases similarly circumstanced, I am required on its authority to hold the conviction in this case valid; in doing so, I should certainly be going beyond what has been decided, this conviction does not state, as all former reported convictions have done, that the goods were found in defendant's dwelling-house, although, if it had done so, probably the evidence would have supported that alteration. The words of 3 & 4 Vic., c. 91, sec. 6, in creating the offence says, "If any such property shall be found therein," i. e. in the dwelling-house or premises. The conviction does not therefore accurately follow the words of that section. It may be answered, the offence is the possession by defendant of such property unaccounted for, and by sec. 8 an offence is created irrespective of finding such in a dwelling-house. It is also observable that Lord Denman in describing the offence aimed at by the statute does not include as an element the finding such in the dwelling-house. Still, I do not feel justified without distinct authority in carrying the construction of this statute (which creates a new offence contrary to the principles of the general law) to the extent contended for. It has not been contended that the conviction could be maintained under sec. 8, and there are difficulties in holding that it could. It is also worthy of being observed that the finding of the property in the possession of the party charged was not by the constable, but the fact of his possession is made out by the evidence of the person with whom it was found. I confine myself to holding that this is not a good conviction under section 6, by reason of its not stating that the goods were found in appellant's dwelling-house. See for *certiorari*, *McMaster v. Banbridge Union*, (4 L. R. 394). Should the respondent desire it, I am willing to state a case, as was done in the above case, for the consideration of the Queen's Bench.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister at Law.]

NEWTON v. NEWTON.—June 20 30; Feb. 12.

Will—Conditional revocation—Revival of a non-existing will by a codicil—Parol evidence.

A testator duly made a will, dated the 4th of Feb., 1858, containing a clause of revocation, and destroyed it. On the 11th of January, 1859, he made a second will, and added a codicil to it on the 7th of February, 1859. On the 16th of February, 1859, he made a codicil to his will of 1858, and confirmed all the provisions of that will, adding, however, that in case the devisee therein married a certain person, the estates devised to him were to go to another. Both the will of 1858 and the codicil of the 16th of February, 1859, were destroyed by the testator before his death. Held, that a non-existing will cannot be revived by a codicil, by reference.

That parol evidence is not admissible to explain a testator's intention, which must be collected from the instruments themselves.

Held—that as the codicil referred to the original will of 1858, the draft of the will could not be incorporated, by reference.

That (reversing the decision below) as the codicil of the 16th of February, 1859, referred to the will of 1858 alone, there was no evidence of an intention not to revoke the will of 1859 in case the testator failed to revive that of 1858.

The Probate Act has not introduced any change in the old practice as to the costs of the heir at law; therefore, where there is both real and personal estate, and the heir-at-law having been cited, intestacy is pronounced, the costs are to be borne by the personal estate alone.

Rogers v. Goodenough, before Sir C. Cresswell.

THIS was an appeal from a decision of the judge of the Court of Probate, under the following circumstances:—John Newton died in the month of October, 1859. On the 4th of February, 1858, he made a will, drawn by G. F. Johnson. On the 11th of January, 1859, he made a second will, drawn by Thomas Jamieson. On the 7th of February he made a codicil drawn by G. J. Litton. On the 16th of February, 1859, he made a codicil, drawn by C. F. Johnson, which he declared to be a codicil to his last will and testament, dated the 4th of February, 1858, wherein he declared, that as he was dissatisfied with his nephew Philip Charles Newton, he did not absolutely revoke the bequest given to the latter by the will of 1858; but in case the nephew should contract a marriage without the testator's approbation, he then gave the real and personal bequests before given to Philip Charles Newton to another nephew, Philip Jocelyn Newton, subject to the limitations before declared thereof. By both wills a legacy was given to Miss Roberts, an intervenient. At the time of the testator's death, neither the original will of 1858 nor the original codicil of the 16th of February could be found, and Philip Jocelyn Newton, the heir-at-law of the testator, contended that an intestacy resulted therefrom. The

judge of the Court of Probate ordered certain issues to be tried by a special jury before himself. From that order Philip Jocelyn Newton appealed; and on the 9th of November, 1860, the Court of Appeal in Chancery* affirmed that order. Pending the trial, the following issue was settled by consent: "Whether the codicil in the plaintiff's declaration, alleged to bear date on the 16th of February, 1859, and to have been made by John Newton, deceased; the deceased in this case, and not now forthcoming, and to be a codicil to a certain will, in said declaration also alleged to have been made by said John Newton, deceased, and not now forthcoming, and bearing date the 4th of February, 1858, is a true transcript of the paper writing marked 'A' in the plaintiff's declaration mentioned, or of any and what part or parts thereof; and if so, whether said alleged codicil, bearing date the 16th of February, 1859, and the said alleged will, bearing date the 4th of February, 1858, were together at any time the last-mentioned will and testament of said John Newton, deceased." No evidence was given of the mode or time of the destruction of the will of 4th February, 1858. At the trial the judge of the Court of Probate left the following collateral issues to the jury:—"First, Were the will of the 4th of February, 1858, and the codicil of the 16th of February, 1859, destroyed by deceased for the purpose of revoking the same, or for the purpose of giving effect to and establishing the will of the 11th of January, 1859, and the codicil of the 7th February, 1859, or of either and which of them;" and the jury found "That the will of the 4th of February was destroyed by the deceased for the purpose of revoking the same, and that the codicil of the 16th of February, 1859, was destroyed for the purpose of giving effect to the will of the 11th of January, 1859, and the codicil of the 7th of February, 1859." Secondly, Did the deceased destroy the will bearing date the 4th of February, 1858, and if so, did he destroy same before or after the making of the codicil bearing date the 16th of February, 1859?" And the jury said, "We are decidedly of opinion that the will of the 4th of February, 1858, was destroyed before the 16th of February, 1859." The jury having returned those findings on the collateral issues, the judge directed them to find upon the issue settled by consent, that the paper writing marked 'A' was a true transcript of the codicil of the 16th of February, 1859, and that both it and the will of the 4th of February, 1858, were duly made and executed by the deceased John Newton; that said will of the 4th of February, 1858, and codicil of the 16th of February, 1859, were never together at any time the last will and testament of the deceased." Philip Jocelyn Newton, the heir-at-law of the testator, applied to set aside the findings on the collateral issues, on the grounds of the admission of illegal evidence, and of misdirection; and also to set aside the verdict so far as it found that the will of the 4th of February, 1858, and the codicil of the 16th of February, 1859, were never together at any time the last will of the deceased, on

Vide Newton v. Newton (11 Ir. Chan., R., 239; 6 Ir. Jur., N.S., 1); the contents of the various wills and codicils are there given.

the grounds of misdirection; and, if necessary, for a new trial, or that it might be declared that on the facts found the said will and codicil did form together the last will of the deceased; or if not, yet that the said codicil operated to revoke the will of the 11th of January, 1859, and that the deceased died intestate. On the 6th of May, 1861, the judge of the Probate Court delivered an elaborate judgment,* refusing the above motion, and upholding the finding of the jury, that the will of the 11th of January, 1859, and the codicil of the 7th of February, 1859, were together the last will of the deceased. From this decision Philip Jocelyn Newton, the heir-at-law of the testator now appealed.

The *Solicitor-General* (with him *A. Brewster, Q. C.*, and *C. Shaw*) for the appellant, Philip Jocelyn Newton. — Assuming that the testator could not by the codicil of the 16th of February revive the will of 1858, (which had been previously destroyed), as he intended, we contend, that although inoperative to revive the will of 1858, yet it was operative to revoke the intermediate will and codicil of 1859. To arrive at the conclusion which he has laid down, the Judge of the Probate Court attributes to the testator, in addition to the intention to revive the will of 1858, another intention, viz., that if that will should not be revived, the will of 1859 should stand. There is not a particle of evidence of any such intention. In *Doe d. Evans v. Evans* (10 Ad. & El. 228); *the Attorney-General v. Lloyd* (3 Atk. 55); *Onions v. Tyrer*, (1 P. Wms. 345); *Burtenshaw v. Gilbert* (Cowp. 52), there was evidence of such an intention; the testator's intention here was to make the will 1858 his last will, irrespective of the will of 1859. The codicil of the 16th of February by confirming the will of 1858 revokes the will of 1859, *Hale v. Tokelove* (2 Robert. 318). Even if the testator did destroy the codicil of the 16th of February, with an intention to revive and set up the will of 1859 in case he failed to set up the will of 1858, intestacy is the result; "for the doctrine of dependent relative revocation applies only where a will is destroyed, on the supposition that a subsequently executed will is valid." — *Dickenson v. Swatman* (6 Jur., N. S., 831). Any act done by a testator, showing an intention that his property should go in a different direction from that which he had directed in his last will, is sufficient to revoke that will, although the property cannot by law pass as he wishes — *Fitzgerald v. Sterling* (6 Ir. Chan., 198). By the 22nd sec. of the Wills Act, — "No will or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Destruction is one of the modes whereby a will can be revoked, (sec. 20). A will is but the expression of the testator's wishes; if a will be lost, its contents may be proved by parol evidence; here the draft of the will of the will of the 16th of February, 1858, exists, yet the judge below held that it could not be revived by incorporation. Where a will was executed in duplicate, and the testator by a subsequent will revoked that part in his own possession, it was held, that the original will

was not revoked, as its contents could be proved, *Limberry v. Mason* (Comyn, 463); *Payne v. Meredith* (1 Robert, 583); also reported in 5 Notes of Cas. 152. If a will be lost without the privy of a testator, its contents may be established upon proof of its destruction and of its contents, *Trevelyan v. Trevelyan* (1 Phil. 149); *Martin v. Laking* (1 Hagg. 244); *Scruby v. Fordham* (1 Adams 74); *Davis v. Davis* (2 Adams 223); *the goods of Gardner* (1 Trist & Swa. 108): the destruction of a second will revoking a former one does not set up the former, *the goods of Brown* (ib. 32). As to how far the court will go in admitting parol evidence in such cases, — *Brown v. Brown* (8 Ad. & El. 876). As the draft of the will of 1858 was in existence at the time of the making of the codicil of the 16th of February, 1859, the reference in the latter to the will of 1858, is sufficient to incorporate the draft will, *Allen v. Maddock* (11 Moore, P. C., Cas.). The will of 1858 contained a revoking clause, consequently by its incorporation with the codicil of the 16th of February, 1859, the will of January 1859 and its codicil are revoked; but the testator destroyed the will of 1858 and the codicil of 1858, therefore he died intestate.

Battersby, Q. C. (with him *J. Walsh, Q. C.* and *E. Johnstone*) in support of the will of the 11th of January and the codicil of the 7th Feb., 1859, and for Beauchamp Bagenal, a devisee thereunder. Unless the will of the 4th of January, 1858 be incorporated with the codicil of the 16th of February, 1859, there is nothing in the latter to revoke the will of January, 1859 and its codicil, for it is not the act of revival which revokes the last will, but the first will when revived, *Serocold v. Hunter* (2 Cas. temp. Lee. 490). As to the doctrine of incorporation relied on by the appellants, *Allen v. Maddock*, (sup.) goes no further than that an existing instrument will be incorporated by reference with a subsequent one. [*The Lord Justice of Appeal*. — Do you maintain that a draft of the original instrument cannot be incorporated?] Yes, *Hale v. Tokelove* (sup.) supports this assertion. The court must look at all the circumstances of the case; when the testator has referred to a former will in an instrument executed long subsequently, they will decide as to what will be intended to refer to, *Thomson v. Hempenstal* (1 Robert 783). The words of Dr. Lushington, in *Sheldon v. Sheldon* (1 Robert 88), show that a non-existing instrument cannot be incorporated by reference. The same appears from the *goods of the Countess of Durham* (3 Curteis, 57), and *the goods of Dickens* (ib. 60). The doctrine laid down in *Allen v. Maddock* (sup.) will not be extended; *the goods of Greves* (Swa. & Trist. 250). This court will effectuate the intention of the testator, although he may have partly failed in carrying out his intention. Mr. Newton's intention was to revoke the will of 1858, therefore the will of the 11th of January, 1859 and its codicil must stand, *Winsor v. Pratt* (2 Brod. & B. 650); *Lord St. Helens v. the Marchioness of Exeter* (3 Phil. 461, note); *Coward v. Marshal* (Cro. Eliz. 721); *Doe dem. Hearle v. Hicks*, 1 Cl. & F. 20).

J. T. Ball, Q. C. (with him *J. A. Byrne*) for Philip Charles Newton, the plaintiff below, and in support of the finding of the jury. — The will of 1858 was re-

* 6 Ir. Jur., N.S., 261.

vived by the reference to it in the codicil of the 16th of February, 1859, and it was destroyed with the intention of setting up the will of 1859, which intention failed through the testator's mistake; this court will rectify this mistake, and carry out his intention. The doctrine of dependent revocation is well established, *Onions v. Tyrer* (1 P. Wms. 342); also reported in Chan. Rec. 459; *Perrott v. Perrott* (14 East 423); *Scot v. Scot* (1 Swa. & Trist. 258).

B. Lloyd, Q.C. (with him *E. F. Litton*) appeared for Miss Roberts, an intervenient, and in support of the finding of the jury or of probate of the codicil of the 7th of February, 1859, cited 1 Jar. on Will 128; *Thomas v. Evans* (2 East 488); *Freeman v. Freeman* (5 De G. M. & G. 704).

A. Brauster, Q.C. in reply.—The codicil of the 16th of February either revived the will of 1858 or revoked the will of January, 1859; it referred to the will of 1858, and evidence of mistake is not admissible. *Lord Walpole v. the Earl of Cholmondeley* (7 T. Rep. 138); affirmed by *Crosbie v. Mac Douel* (4 Ves. 616); *the goods of Chapman* (1 Robert 1); and, since the passing of the Wills Act, *The goods of Davy*, (1 Swa. & Trist. 262). As to the doctrine of incorporation, the draft of the will of 1858 can be incorporated by reference with the codicil of the 16th of Feb. 1859; *the goods of Almosino* (1 Swa. & Trist. 508); *Acherley v. Vernon* (3 Bro. Parl. Cas. 91); *Winter v. Winter* (5 Hare. 306); *the goods of Dadds* (1 Swa. & Trist. 290). Declarations of the testator made after the execution of the codicil of the 16th of February, were inadmissible to show its object, *Doe dem. Shallcross v. Palmer* (16 Ad. & El. 747). The will of 1858 and the codicil of the 16th of February having been destroyed to effectuate a purpose, which has failed, the testator must be held to have died intestate if the 22nd sec. of the Wills Act be law.

THE LORD CHANCELLOR—This case comes before the court by way of an appeal from the decision of the Judge of the Court of Probate, whereby he held that the will of the 11th of January, 1859, and the codicil of the 7th of February, in the same year, were together the last will and testament of the testator, John Newton. The appeal has been brought by Philip Jocelyn Newton, the heir at law of the testator, who contends that the decision of the court below was erroneous, and that the testator died intestate. The solution of these questions depends upon the legal construction of four wills, and two codicils, viz., a will of the 4th of Feb. 1858; one of the 11th of January, 1859; a codicil of the 7th of February, 1859, and a codicil of the 16th of February, 1859—these are the four instruments with which we have to deal; and the question simply comes to this, whether the will of the 4th of February 1858, not being forthcoming, was destroyed by the testator (as the jury found it was) before the 16th of February, 1859; in other words, before the making of the codicil of that date. The will of Feb., 1858, having been revoked absolutely by an intermediate will of the 24th of April, 1858, it is not necessary for me to go any farther into that part of the case, and had nothing else occurred, I would feel no difficulty in pronouncing the decision below to be right, in affirming the will of January, 1859, and the codicil of the 7th of Febru-

ary, 1859, to be the last will of the testator. But we must consider the codicil of the 16th of February, 1859, and we must attend carefully to its language. It runs thus—"This is a codicil to the last will and testament of me, John Newton, of Bagenalstown House, in the county of Carlow, Esquire, bearing date on or about the 4th day of February, 1858, and which I desire may be considered as annexed to and be taken as part thereof;" the testator then recites that his nephew Philip Charles Newton would be entitled to his estates, and to the residue of his personal property, but says, that being dissatisfied with his nephew, does not absolutely revoke the bequest to him; but in case his nephew marry imprudently, or without his consent, he then revokes all the above bequests, and substitutes an annuity of 20*l.* for him, giving to Philip Jocelyn Newton the estates previously given to Philip Charles Newton, and then continues "In all other respects I confirm my said will and codicil." That codicil is not forthcoming, it was destroyed by the testator; but there is no question as to the validity of its execution; it was prepared by Mr. Johnson, the depository of the will of 1858; that gentleman retained a copy of the codicil, which is in proof, having given the original to the testator. The first legal position contended for by the appellant is, that by no possible means can the reference made by that codicil of the 16th of February, 1859, to the will of Feb. 1858, be applied to the will of January, 1859; on this subject the authorities are clear. Great mistakes seem to have taken place all through these transactions, the testator thought he was doing what was right, but I must hold with the judge below, that the codicil of the 16th of February, 1859 is applicable to the will of 1858 alone. What was the effect of that codicil of the will of 1858? The Judge of the Probate Court held rightly, that its effect could not be to set up a document governing the distribution of property, in other words, it could not revive the will of February, 1858, and that on the plainest ground, for the will of February, 1858, had been destroyed, and there could not be a will composed of a non-existing will and a codicil, as it would contravene the enactments of the Wills Act. But the question is not so much would the Statute of Wills be complied with in such incorporation, as what was the effect of the codicil of the 16th of February, 1859, upon the will of January, 1859? Here, also, I agree with the judge below, that the simple effect of that codicil was to revoke the will of January of 1859, together with its codicil of the 7th of February. The codicil of the 16th of February, 1859, refers to the will of 1858, and professes to affirm it with some alterations, and it declares the intention of the testator to be, that the will and codicil of January, 1859, shall not be taken as his last will and testament; for, as the Lord Justice of Appeal observed in *Fitzgerald v. Sterling*, (6 Ir. Chan. 210), "A deed may be completely inoperative to transfer the property bequeathed, and yet be effectual as a revocation, for it is at least an irrevocable declaration of an intention that the legatee shall not take, though it fails from any cause to transfer the subject matter to another." Then, it is said, that there are circumstances which may qualify a revoking codicil, like that of the 16th

of February, 1859; and that though the intention of that codicil was to set up the will of 1858, there was a condition annexed to that intention; in other words, that if the will of 1858 was not set up, and if the condition failed, the will of January, 1859, and its codicil was to be set up. Now, no doubt, certain acts done by a testator will admit of qualification; acts of cancellation, such as burning, depend on the intention with which they are done, by the testator, and, if done under a mistake of facts—as where they are done, under an impression that thereby he is setting up some other instrument, if his intention fail—the court will overlook the act of cancellation. There are many cases affirming that proposition. But the question here is not how far the act of cancellation will be controlled, but how far a written instrument can be controlled by parol evidence, i.e. can you by parol evidence ingraft a condition on a written instrument? That is a proposition for which I have heard no authority. If a testator, by mistake, thinks that a person is dead, and under such mistake he makes a will, leaving that person out, that is a perfectly good will. I find cases showing that when there is a misrecital in a written instrument the courts have held that the instrument must be taken as it stands, as in the *Attorney General v. Lloyd*, (3 Atk. 557.) In that case a testator made his will before the Statute of Mortmain, which was not retrospective, and gave his real and personal property to charitable uses, by a codicil made after the Mortmain Act had come into force, he regretted that having been advised the devise of his lands would be void, he thereby made a new disposition of his real estate, and the devise by the codicil was held good. Now, suppose Mr. Newton made this codicil of the 16th of Feb., under a mistaken impression, that it would revive the will of 1858, would its provisions be altered if he failed in his object? Would they be altered by showing that he was wrongly advised? There is a plain distinction between a misrecital of facts, and evidence of advice erroneously given; but here there was no evidence of advice erroneously given, and we are now asked to engraft a condition; upon a presumption, that the last codicil was made under erroneous advice or opinion as to its effect, and that is an error in fact, which we cannot interfere with. Well, then, we have here a codicil revoking all former instruments, as it purports to confirm an instrument which had that effect, as the judge below held; there is no evidence that the testator intended the codicil of the 16th of February, 1859, to affect both the will of 1858, and that of 1859, in the manner contended for here. If the codicil of the 16th of February, 1859, must stand, we have a written instrument revoking the will of 1859, and its codicil. The codicil, if existing by itself, would have no effect; as the occurrence did not take place on which the testator made the revocation depend. But the testator destroyed that codicil of the 16th of February, so that I am of opinion that he died intestate.

THE LORD JUSTICE OF APPEAL.—This case comes before us on appeal from the decision of the Judge of the Court of Probate, that the will of 1858, and the codicil of the 16th of February, 1859, were not together, nor were either of them, the last will and testament of Mr. John Newton; but that the will of Janu-

ary, 1859, and the codicil of the 7th of February, in the same year, were his last will, in conformity with the finding of the jury. The heir-at-law, in his reasons for appeal, contends that the testator died intestate, inasmuch as the codicil of the 16th of February, 1859, had the effect of revoking both the will of January, 1859, and the codicil of the 7th of February, 1859. That view raises two questions—first, did the codicil of the 16th of February, 1859, revive the will of 1858?—if it did, an intestacy is the result; if it did not, it at least had the effect of proving that the will of January, 1859, and the codicil of the 7th of February, 1859, is not the last will of the testator. The judge below held that the codicil of the 16th of February, 1859, did not revive the will of 1858, and that it did not revoke the will of January, 1859. I think that the Judge of the Probate Court was right in holding that the will of 1858 was not revived by, or incorporated with the codicil of the 16th of February, 1859; that codicil contains a clear expression of an intention to set up the will of February, 1858, but that will had been destroyed and revoked in the month of December, of that year, therefore, it was a mistake on the part of the testator to try and set up that will. This court, however, cannot correct mistakes of that nature, as has been decided in *The Goods of Chapman*, (1 Robert 1); *Walpole v. Cholmondeley*, (6 T. Rep. 138); *the goods of Brown*, (1 Swa. & Trist, 32); and *Hale v. Tokelove*, (2 Robert, 318). This mistake was never made known to the testator, nor was it discovered until his death; it showed, however, what he intended to do, for he describes his anxiety that the will of 1859 should not be his last will, and secondary evidence cannot be given to shew his meaning upon the authority of many cases. The testator meant to set up the actual will of 1858, but the fact was that that will was not then in existence, and the copy of it must undoubtedly be presumed as only to represent what the contents of that will had been, but not what they might have been when the will was destroyed. Dr. Lushington has referred to this principle, and Judge Keating has acted on it; and the thirteenth rule of the Probate Court, in respect of non-contentious business, declares that “no deed, paper, or memorandum, or other document, can form part of a will or codicil, unless it were in existence at the time when the will or codicil was executed.” Therefore, in my opinion, we are bound to have the will of 1858 produced, and a copy of it is not sufficient. Two cases were cited at the bar as opposed to this doctrine, first, *Thomson v. Hempenstall* (1 Robert, 783); but that will be found to have been a case of latent doubt as to which of several existing instruments the testator intended to refer to. The second case cited was that of *Scott v. Scott* (Swa. & Trist., 258). In that case a testator destroyed a will and codicil under the belief that he had substituted another will for them, which proved to be improperly executed. Copies of the first will and codicil were forthcoming, and Sir C. Cresswell says, “I must take the fact to be that the deceased having, as he supposed, duly executed a second will, said, ‘Now I have executed this will, the former will and codicil are of no use,’ and destroyed them. He intended only to destroy the first will in

substituting another for it. The first will and codicil, therefore, are entitled to probate." The reason for the destruction failed in that case, and it is to be classed with *Onions v. Tyrer*. The second question raised by the decision of the judge of the Probate Court turns upon the principle of dependant revocation. In other words, as the codicil of the 16th of February, 1859, failed to validate the will of 1858, it did not revoke the will of 1859 and its codicil. Now, *Dickenson v. Swatman* (6 Jur. N.S., 831), is a direct decision upon this point. Sir C. Cresswell there says, "There is no case in which it has been applied to past transactions; so that a will which has been cancelled on the supposition that an earlier is thereby revived, shall, on the failure of that condition, be re-established." But I do not decide this question merely upon that authority. It is well established that if evidence of the intention of the testator be required, the only admissible evidence is the document itself. When it is said that the doctrine of conditional dependent revocation applies here, what is contended for? First, that the will of 1858 and the codicil of the 16th of February, 1859, are to be taken as incorporated together. Secondly, that as the codicil of the 16th of February, 1859, recites the provisions of the will of 1858, annexes conditions thereto, and substitutes other devisees, but in all other respects confirms the will of 1858, the will of 1859 was revoked only contingently on a certain event taking place. Now, to impute to the testator such a mental reservation, as that contended for, is quite arbitrary. He could not possibly foresee the failure of his desires. The language of the codicil excludes all supposition that the testator had any other instrument in contemplation save the will of 1858. He excludes all presumption that there was any other will by which he intended his property to be governed. The intention of the testator must be governed by what he has said himself; and he alluded to no other will save that of 1858. Suppose that the will of 1858 had not been destroyed, it cannot be doubted that it would have been revived and incorporated by the codicil of the 16th of February, 1859, and that is what the testator intended to do. It is improper to expound the codicil of the 16th of February, 1859, by any other means than by the words of the testator. That codicil must be construed without any qualification. The will of 1859 cannot be supposed to have been contemplated by the testator. I have carefully perused, with great attention, the judgment of the judge below, and with great deference to his authority, and with great distrust of my own judgment, I must concur with the Lord Chancellor in holding that Mr. John Newton died intestate.

February, 3-4, 1862.—The order made in this case by the judge of the Probate Court, declared "that the costs of all parties were to be paid out of the estate." The order made by the Court of Appeal in Chancery, directed that the costs of all parties to the appeal should be paid as provided by the order of the Probate Court. Philip Jocelyn Newton, the heir at law of the testator, who had been declared as above mentioned, entitled to the real estate, now objected

to the form of the order of the Court of Appeal, upon the ground, that the word "estate" was ambiguous, and might be construed to include real estate as well as personal estate.

Battersby, Q.C., (with him, *J. E. Walsh, Q.C.* and *E. Johnstone*), for B. Bagenal, in support of the order.—The Probate Court can by its order make costs payable out of the real estate. The 30th section of the Probate Act, 20 & 21 Vic., cap. 79, invests the Probate Court with the same powers as the Court of Chancery in the enforcement of its decrees and orders; the 34th section provides that the Probate Court shall follow the practice of the Prerogative Court, save where it is otherwise ordained by the Probate Act. The 65th section declares that when a will affecting real estate is proved in solemn form, the heir at law shall be cited to see proceedings or otherwise summoned in like manner as the next of kin or others having interest in the personal estate. By the 66th section the decrees of the Probate Court are made binding on the heir at law when cited: and by the 76th section the court can appoint a receiver over real estates. These sections show that the Legislature contemplated that the real estate was to be dealt with by the court in the same manner as personal estate as regards costs and other liabilities. Costs are given out of the testator's estate, in consequence of the testator having left his papers in such confusion that parties are put to expense in seeking to determine what were his intentions.—*Hillam v. Walker*, (1 Hagg., 74).—That decision was followed in *Robins v. Paxton*, (1 Swa & T., 518), where the costs of a defendant, although unsuccessful were given out of the testator's estate, because the points of law which he had relied upon were difficult and important. In *Fyson v. Westroppe*, (1 Swa. & T., 279); Sir C. Cresswell lays it down distinctly, that an heir at law, cited under the 61st section of the Probate Act in England, which corresponds with the 65th section of the Irish Act, is to be treated as one of the next of kin in the old Prerogative Court; the next of kin and not the heir at law are the favourites of the Court of Probate.—*Urchhart v. Fricker*, (3 Adams, 56).—The intention of the Legislature was that the Court of Probate should have full power to deal with both the real and personal estate as it thought fit when all the parties were brought before it. This question as to costs came before the Court of Probate in England within the last few weeks in the case of *Rogers v. Goodenough*. We have obtained a shorthand note of Sir Cresswell Cresswell's judgment, and he would seem to be in favour of our view.* [The Lord Chancellor.—It does not appear that Sir C. Cresswell was informed, or was aware, that this court had overruled the decision of the judge below in this case.] No. [The Lord Chancellor.—If we make the costs payable out of the real as well as personal estate, how will you levy them?] If this court puts the interpretation upon the order below, which we contend for, we will get the costs; by a cause petition we will come in upon the real estate. The Court of Probate does not now admin-

* Vide *Rogers v. Goodenough*, *infra*. Through the kindness of the counsel for the intervenients I have been enabled to append hereto this case, and shorthand note of the judgment.

ister the fund.—In *Christian v. Foster*, (2 Phil. C. C. 165)—Lord Cottenham directed the costs of a suit as to the construction of a will to be paid rateably out of the realty and personally according to their value. *Prinsep v. Dyce Sombre*, (10 Moo., P. C., 305). The Court of Probate has full jurisdiction over the real estate, and when the heir at law receives, as he does, a parliamentary title from that court, surely it must have been the intention of the Legislature to impose costs upon the real estate. [The Lord Chancellor.—There can be no worse principle than that which has crept into the practice of the courts of this country, of giving all parties their costs out of the fund: it encourages reckless litigation.]

The Solicitor-General, (with him, *A. Brewster* and *Shaw*), for Philip Jocelyn Newton, the heir at law.—The heir at law was cited here and brought before the court, and should not have costs imposed upon the estate which he has been declared entitled to. The Court of Probate may make an order upon the heir at law, personally to pay costs, but cannot make an order against his estate. The Probate Court properly deals, *in rem*, with the personal estate. In *Fyson v. Westroppe*, (*supra*), there were just and reasonable grounds for directing the costs to be taxed against the heiress at law. This court always gives the heir at law (who is its favourite) his costs, although unsuccessful, upon an ejectment to try a will. There is no clause in the Probate Act giving the Court of Probate power over the real estate, so as to make an order, *in rem*. [The Lord Chancellor.—The 69th section refers to the 68th section only.] Under the old practice, *Ripley v. Moysely*, (1 Keen., 578), is decisive upon this question. There it was laid down, that the general personal estate of a testator is liable to all costs occasioned by his mistake, though some of the costs may have been incurred in proceedings affecting the real estate, the result of which was to benefit a devisee of real estate. Where two suits were instituted, one relative to a testator's real estate, the other to his personal estate, it was declared that the costs of both suits must be borne by the personal estate.—*Pickford v. Browne*, (2 K & J., 426); *Stringer v. Harper*, (26 Beav., 585).

B. C. Lloyd, Q.C. (with him *E. F. Lutton*) appeared for the intervenients.

THE LORD CHANCELLOR.—This question does not appear to have been yet raised in England, consequently we cannot dispose of the case as there does not appear to be any new declaration introduced into the Probate Act, charging the heir at law with costs, he would not be subject to under the old practice; and I would be very slow to make any change unless there were clear and distinct words in the Probate Act, expressly giving the power contended for to the Probate Court. That court has power to administer personal estate, and has power to appoint a receiver over the former, *pendente lite*. But the Legislature seems to have been very chary in introducing any change in the law, when they gave that the latter power expressly. The word "practice" does not imply "jurisdiction," but only mode and form. It is contrary to all the settled course of practice, both in courts of law and equity, to visit with costs out of his estate, a successful heir at law.

This is my present opinion. The legatees here chose to call on the heir at law to intervene. A will may be propounded in common form, but it is only where a will is proved in solemn form and the heir at law is cited, that the real estate is bound. It seems a very strong proposition that legatees and devisees should pay the costs of a person who disputed the possession of the real estate and recovered it from them. I will write to Sir Cresswell Cresswell, to inquire if this case has ever come before him.

THE LORD JUSTICE OF APPEAL, concurred.

February 12.—THE LORD CHANCELLOR.—By our former order in this case, we decided that all the parties to this suit should have their costs in the manner provided by the order of the Probate Court, viz.: out of the testator's estate. The difficulty which there arose was, whether that order could charge the real estate of the testator, as well as his personal estate. It was insisted, that the effect of that order would be to charge the real estate with the costs, and the jurisdiction of this court to do so was questioned. There is no clause in the Probate Act giving that court power to create any charge upon real estate, except in the case of the appointment of a receiver under the 76th section. And the fact that the Legislature, by a subsequent section enables the Probate Court to provide remuneration for the receiver, (if appointed) shows that the Legislature considered, without this express power, the courts could not have made such remuneration, a charge upon the real estate, and that it was necessary to confer it expressly. Evidently great care had been taken in framing the Probate Act to avoid imposing any charge upon the real estate, and this court must be equally cautious before doing so. What is contended for here, is certainly a novel proposition, viz., to give against an heir at law, the costs of his successful opposition in a suit to establish a will. Such has never been the practice of this court; on the contrary, so far from such being the case, where an heir at law, in a non-vexatious manner, opposes a will, this court has frequently given him his costs, although he may have been unsuccessful in his opposition. The Court of Probate is a court substantially for the administration of personal estate; its proceedings end with the grant of Probate or Administration. The 34th section of the Probate Act, which was relied on as confirming a jurisdiction over real estate, merely provides that the practice is to be the same as in the old Prerogative Court, but does not create any new jurisdiction as to real estates. This was the opinion which we formed at the hearing of the argument, but we deferred giving judgment until we had conferred with Sir Cresswell Cresswell on the subject. In answer to my inquiry, he stated that he had never yet been asked to give costs out of real estate; consequently, he has not decided the question, but, in his opinion, he has no power to charge real estate with costs. We will, therefore, make the order in the usual form, giving all parties their costs out of the estate, as was given below, this being the usual form of order made in the Court of Probate, intimating at the same time, that, in our opinion, those words gave the costs out of the personal estate only. We will not add any declaration

that the estate was not a charge on the real estate, lest the order might be cited as a precedent, that were it not for our declaration, we were of opinion that the words "estate" included real estate.

THE LORD JUSTICE OF APPEAL concurred.

ROGERS v. ANDREWS.

BEFORE MR. CRESSWELL CRESSWELL.—Jan. 17.

Effect of reference to a destroyed will in a codicil upon an existing will, made after the destroyed will and before the codicil—Costs.

This is a question arising on demurrer to the declaration of the plaintiffs, wherein they propounded certain testamentary papers as containing the last will and testament, and a codicil thereto, of Joseph Goodenough, late of Godmanstone, in the County of Dorset, Esq., deceased. On the 7th of July, 1857, Mr. Goodenough executed a will (see script, marked B); and in the year 1858, he gave instructions to his friend and solicitor, Mr. George James Andrews, of Dorchester, Dorset, to alter the will of 1857; and as the alterations were not extensive, the original will of 1857 was altered in pencil, and with script marked A, made to form the rough draft of the intended new will, which was copied and signed by Mr. Goodenough according to the provisions of 1st Vic. cap. 26; the plaintiffs alleging that it was so executed on the 30th of June, 1858, the signatures of Mr. Goodenough to the will of 1857 were then out out. By the will of 1858, Mr. Goodenough's dwelling-house, all his effects therein, and his cottages and gardens, held with the house, were given to John Rogers, of Bishop Hall, in the County of Somerset, Esq., one of the plaintiffs in this suit, and described in his will as the father of his godson, Herbert Goodenough Rogers (and in fact the husband of a niece). The residue of the personal estate was given to his son and only surviving child; the defendant, Stephen Goodenough, the plaintiff, George Rogers, and the plaintiff, the said George James Andrews, as trustees of his will. The interest on the sum of £10,000, part of the residue, was to be paid to his said son, the defendant, Stephen Goodenough, for his life; and after the death of his said son, the trust fund was to fall into the other part of the residue. Several small annuities were directed to be paid out of the income of the other part of the residue to old servants and others, and subject to such payments, one-third part of the income of the residue was given to his godson, Herbert Goodenough Rogers, one of the sons of the plaintiff Rogers, for life, and after his decease the capital was to go to his children, if any. Another third part of the income of the residue was given to George Henry Rogers, the other son of the plaintiff Rogers, and his child or children, as should correspond with the trusts in favour of the said Herbert Goodenough Rogers, and his child or children, and the income of the remaining one-third was given to Mary Goodenough Rogers, the daughter of the said plaintiff Rogers; and after her death, the capital was to go to her children, if any, upon such trusts in favor of her children as corresponded with those in favor of the children of Herbert Goodenough Rogers. The appointment of executors would have to be explained, as the rough draft was never completed; but the script says,

"I appoint my daughter, S. G. G. R., and my said friend, George James Andrews, to be trustees and executors of this my will." In 1859 Mr. Goodenough gave Mr. Andrews instructions for his will to be altered, and on the 15th of April, 1859, executed a fresh will, a copy of which is herewith. But why a fresh will was necessary instead of a codicil is not apparent, as the testator appears only to have altered his will by giving to the plaintiff Rogers a life estate in his dwelling-house, cottages, and household effects at Godmanstone, with remainder to his son the said Herbert Goodenough Rogers, instead of absolutely as he did by will of 1858. By this will he appointed the defendant, Goodenough, and the plaintiffs, Andrews and Rogers, his trustees and executors. The will of 1859 having been duly executed and attested, Mr. Goodenough gave his will of 1858 to Mr. Andrews, and requested him to destroy it by tearing it up and then burning the pieces. This Mr. Andrews immediately did in his presence. Towards the end of 1859, the testator told Mr. Andrews that he was going himself to make a codicil to his will, and requested to be informed how and in whose presence the codicil should be signed. Mr. Andrews told him, but suggested that he should prepare it for him; but the testator would not allow it. He died at Godmanstone, on the 13th November, 1860, and the executors to his will of 1859 found amongst his papers the said will of 1859, and a codicil dated the 2nd February, 1860. The codicil, a copy of which is herewith, begins as follows:—"It is my wish that this should be added as a codicil to my last will, made the 13th June, 1858. First, I give," &c., &c., naming the will of 1858, which he had caused to be destroyed, instead of his will of the 15th April, 1859. By this codicil the testator gives to each of the sons of Mr. George James Andrews a sum of £50, and a few legacies, and a cottage then occupied by James Davis, to his servant, Mary Anne Stermy, for her life; and at her death to his nephew and godson, the said Herbert Goodenough Rogers. Mr. Andrews, on behalf of himself and co-executors of the will of 1859, applied to the Court of Probate, on common motion, to grant probate of that will and the codicil of 1860, but the Court refused the application. See Probate Court, May 1st, 1861, in *the goods of Joseph Goodenough*, (L. J. Rep. vol. 30, p. 166,) and 2 Swa. & Trist. 141. The children of Rogers applied to the Court on the 6th November, 1861, for leave to intervene and plead, on the ground that the plaintiffs by their pleadings had admitted that the codicil of 1860 had revoked the will of 1859, and they were desirous of liberty to set up that will and codicil; and the Court accordingly allowed them to plead and amend the record. The plaintiffs, Rogers and Andrews, sought to prove the cancelled will of 1857, as partially altered in pencil, together with script marked A, to form the destroyed will of 1859, with certain additions, which Mr. Andrews' clerk states he made when he engrossed the will, and to which he was prepared to swear he recollects, they assuming that the codicil of 1860 revived the will of 1858, as shown by the draft and Mr. Andrews' clerk, as before mentioned.

Mr. G. S. Andrews, the solicitor for the testator, was examined, and deposed that he had the custody

of all the testamentary wills mentioned in the case; that upon the execution of the will of 1859, he burned the will of 1858, by the testator's direction and in his presence; that the testator afterwards told witness that he wished to make a codicil to his will, but would not allow witness to prepare it.

Jan. 17.—SIR CRESSWELL CRESSWELL.—Although some parts of the case presented a great deal of difficulty, and had I to deal with them I should require a great deal of time to examine the authorities, yet I think that the very full and satisfactory argument I have heard in this case enables me to dispose of it certainly without any doubt in my own mind as to what the correct decision of the case should be. It appears the first will was made in 1858, and the second in 1859, and that the will of 1858 was actually destroyed, the will of 1859 having previously revoked it. A codicil was made afterwards in terms intended to be a codicil to the will of 1858; and the first question is, whether the codicil can revive that will, assuming it to have been referred to by that document, and that it was the intention of the testator that it should be so revived. I think that is determined by the 1st of Victoria, chap. 26. Where the instrument had been burned and no longer existed, either in law or in fact, as a will, and could not exist from the time the second was executed, it existed no longer as a written instrument or a written paper from the time when it was burnt. Well, it was not then a will, no doubt about that, and it was not a writing; how could it again become a will? For that you must look, as it seems to me, to the statute. Now, this statute, in the 9th section, says that no will shall be valid unless it shall be in writing, executed in the manner hereinafter mentioned; therefore, the very first step of the statute is not satisfied. It is supposed by the codicil that the will of 1858 could again become a will because it is said to be revived. It could not be revived in its original condition as a written instrument, because it did not exist; then it cannot satisfy the very first thing that is required by the statute in order to make a valid will. It appears to me that the expression, "no will shall be valid unless," and so forth, must apply equally to the original, or to the revived will. Now, the two cases of *Hall v. Tokelove* and *Newton v. Newton*, undoubtedly, both proceeded on the assumption that a document that had once existed as a will, and had afterwards been destroyed, could not be revived by any intention of the testator manifested by a subsequent codicil, assuming, as it was said, that *Hall v. Tokelove* was a case *primæ impressionis*. The decision of the very learned person who pronounced that judgment was reconsidered by the judge of the Court of Probate in Ireland, and by him confirmed and established, so far as that part of the case went, without the least hesitation; and I, sitting in a court of co-ordinate jurisdiction, should hesitate for a long time before I should venture to depart from the precedent which they established, even if my own judgment had not gone along with it. But, for the reasons which I have stated, I think it is perfectly plain, according to this statute, that the will could not be revived. Mr. Montagu Smith, in his very ingenious argument, has contended that the 22nd section is an answer to this view of the case, for it says,

"That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re execution thereof, or by a codicil executed in like manner as hereinbefore required, and showing an intention to revive the same." He adds to that, "but that any will, however revoked, may be so revived." I cannot go along with him in that construction of the statute, because it would be to violate that which the Legislature appears most cautiously to have provided for in the 9th section. I limit this in my judgment to cases where the will was destroyed by the testator, and in his presence, or where it was destroyed by his authority, and he knew it. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge; that question may arise another day, whether a person could revive an instrument or the contents of an instrument which no longer exists, and whether he could, in that case, satisfy the terms of the 9th section of the Act. That may come hereafter, but my judgment is limited to that which is before the court in the present case. Then, supposing that is the case, the next question which has been so much argued by the Solicitor-general is in favor of the 2nd will of 1859. Now, what is there to revoke that second will? Certainly, nothing but the codicil. It may be revoked by another will; and, again the statute, I think, disposes of this question, because the clause as to the revocation of wills says, "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, which is by marriage or by another will or codicil executed in manner hereinbefore required, or by some writing, declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, or by his direction, with the intention of revoking the same." Now, this codicil, certainly, did not in terms revoke the will; it did not in terms declare any intention, or show any intention, to revoke the will of 1859. There might have been an implied declaration of such intention if the codicil had contained the disposition of the property so at variance with it, that no will, or any part of it, could take effect, but it has no such operation. It does not dispose of the property inconsistently, it only shows an unexecuted intention to revive the former will. I am not aware that any such unexecuted intention could by possibility have the effect of revoking that second will. For these reasons it renders it necessary for me to deal with the two more difficult points, namely—the admissibility of evidence to explain the mistake, or supposed mistake, that the testator made in reference to the will of 1858. It is also unnecessary to deal with the very difficult, and I may call it, very interesting subject connected with these matters; but, upon the ground I have stated, I agree entirely with the judgment of Dr. Lushington and Mr. Justice Keatinge, in the Court of Probate in Ireland, that the codicil could not have the effect of making that again a will which no longer had any existence in fact or in law; and that the codicil, for the reasons I have stated, had no operation in cancelling or revoking the second will, and therefore I pronounce for that will of 1859 and the codicil of 1860.

The Solicitor-General—Your lordship will give us our costs, having succeeded in the argument.

THE JUDGE ORDINARY—Are you an executor.

The Solicitor-General—No my lord. We are beneficially interested, and we have intervened and succeeded.

THE JUDGE ORDINARY—You may have your costs out of the estate.

Dr. Phillimore—I would submit it is a proper case for the costs to come out of the estate.

THE JUDGE ORDINARY—I think it is.

Mr. Smith—Of course the executors are to have their costs.

THE JUDGE ORDINARY—Yes.

Mr. Smith—They are executors under the will of 1859.

THE JUDGE ORDINARY—They will take care of themselves. If there is any doubt about the result, I shall be very glad to have the point discussed and decided, so that it may be a binding authority on the point.

[WESTMINSTER.]

[Reported by C. H. Keene and Thomas Brooksbank, Esqrs., Barristers at law.]

[BEFORE THE LORDS JUSTICES.]

SALTMARSH v. BARRETT.—June 26, and July 13.

Will—Absolute gift to executors—Charge of legacies
Executors trustees for next of kin—11 Geo. 4, &
1 Will. 4, c. 40.

The testator by his will, after certain legacies to charities, gave to three persons, whom he appointed his executors, nineteen guineas each, and then "gave and bequeathed the whole of his estate and effects whatsoever absolutely" to them, their executors and administrators, charging so much thereof as should consist of Long Annuities with the gifts therein mentioned, and his other stocks and funds in Three per Cent. Reduced Annuities with certain other payments, with directions for accumulations in certain cases, with power to the executors to select and vary the investments. And his will contained a clause indemnifying the executors against any loss to be sustained by his estate otherwise than from their own wilful default; and lastly, that they should be at liberty to reimburse themselves all costs and charges out of the estate or any part of it. The M. R. held that the executors did not take the residuum beneficially, but only as trustees for the next of kin—and on appeal,

Their Lordships affirmed his Honor's decision:

Lord Justice Turner, without reference to the statute above mentioned, but on the ground of the previous gifts to the charities and to the executors, on the ground of the gift to the executors being in joint tenancy, and of the indemnity clause to the trustees themselves, thought that the executors were merely trustees for the next of kin, and that the gift in the will was not to them beneficially.

Lord Justice Knight Bruce, however, thinking that

the executors were residuary legatees for their own benefit absolutely.

Love v. Gaze, 8 Beav. 472, commented on.

THIS was an appeal from a decision of the Master of the Rolls on the 27th April last, which turned upon the construction to be put upon the will of Mr. William Saltmarsh, dated the 11th Oct., 1830. The testator thereby directed payment of his debts, legacies, and funeral and testamentary expenses, and gave certain legacies to charitable institutions mentioned, and proceeded thus:—"And I give to my good friends Richard Barrett and Jonathan Barrett, and Robert Williams, a legacy of nineteen pounds and nineteen shillings each, and appoint them executors of this my will. I also give and bequeath the whole of my estate and effects whatsoever and wheresoever absolutely unto the said Richard Barrett, Jonathan Barrett, and Robert Williams, to hold the same unto them, their executors and administrators, according to the several natures and tenures thereof, charged nevertheless, and I do hereby subject and charge so much of my estate as shall at the time of my decease consist of long annuities, to and with the payments to the several persons hereafter mentioned." Then there followed a series of payments to be made out of the long annuities to the several parties whom he named, so long as they should live, and if the long annuities should so long continue. And, then, among other provisions, there was a provision, with respect to these several persons, for those parties who might not at that time be entitled, and in that case the testator directed: "In the case of personal incapacity my said executors, or the survivors or survivor of them, shall apply the proportion of such of them so incapacitated for her or their benefit as they may think fit." Then after a series of charges upon some new three per cent. reduced annuities which the testator had, the will proceeded thus:—"I also charge the stocks and funds which may be standing in my name in the books of the Governor and Company of the Bank of England at the time of my decease in the three per cent. reduced bank annuities, to and with the several payments hereinafter mentioned." Then followed a variety of charges upon these reduced annuities. After which the testator proceeded: "My will is, and I do hereby direct, that if either of the parties to whom, or for whose benefit, I have hereinbefore made any gift, or directed any payment to be made, either with or without being accumulated, shall die before the period mentioned for payment, then I declare that such legacies and accumulations shall not be paid, it being my express desire that no person shall take any vested interest in any gift or direction, either of the principal monies or accumulations, until the period of payment to each respectively shall actually have arrived; and I further declare that in all cases where I have directed any gift or payment to be accumulated, that my executors shall be at liberty to invest such respective sums so to be accumulated in the public stocks or funds, or on mortgage, either separately or together, or in the savings banks, or such other place of investment or accumulation as they, or either of them, may think fit or most expedient; and shall not be responsible for any loss whatever in consequence of the exercise of

such discretion, unless the loss shall be wilful. And I further direct that my said executors shall be at liberty, when they or either of them may think fit, to alter, vary, and transpose any of the stocks, funds, or securities on which any such parts of the several gifts, bequests, and legacies may be invested; and that they shall not be answerable for any loss happening therein by failure of the stocks, funds, or securities in which the original or any renewed investment shall be made, or for any legislative or other alteration therein, notwithstanding they shall not acquiesce, or shall refuse to acquiesce, in any conditional or other arrangement which the then existing Legislature may enact, order, or direct; nor for any other deprivation, alteration, or loss whatever, unless the same shall be wilful, and then only the person who occasioned such wilful loss shall be alone responsible. And I also direct that all costs, charges, and expenses which my said executors, or any of them, may incur or become liable to, shall be borne and sustained by any moneys which may come to their hands from any part of my estate. And out of such moneys, from whatever source derived, I direct all of them to deduct, retain, and apply such sums as will fully reimburse themselves respectively." The testator afterwards made two codicils to his will, which are not material to be stated. He died on the 30th May, 1837; and the will and codicils were on the 21st June, 1837, proved by Jonathan Barrett alone. He applied to his own use certain portions of the residuary estate, and he died on the 3rd July, 1860, having by his will appointed the defendants to be his executors. The testator was a bachelor, and left no parent, brother, or sister surviving him, his next of kin at the time of his death being seven nephews and nieces, the administrator of one of whom is the plaintiff in the present suit. He prayed by that bill that it might be declared that he, as personal representative of Richard Saltmarsh, one of the next of kin, was entitled to a distributive share of the residuary personal estate of the testator, and that all proper accounts might be taken of that personal estate. The Master of the Rolls was of opinion that the executors of the testator did not take beneficially; and after payments of the legacies, and deducting all their expenses, he declared that they were trustees of what would be left for the next of kin, and he directed the usual accounts, &c. The defendants now appealed.

Roundell Palmer, Q.C., and *Ellis*, for the plaintiff, supported his Honour's decree, and referred to 2 Wms. on Exors. 1267; *Dean v. Dalton*, 2 Bro. Ch. Cas. 634; *The Attorney General v. Malkin*, 2 Phil. 64; *Hames v. Hames*, 2 Keen, 646; *Meryon v. Collett*, 8 Beav. 386; 6 Moo. Md. App. 1.

Selwyn, Q.C., and *Hardy*, for the representatives of the testator's executor, Jonathan Barrett, supported the appeal, referring to *Dawson v. Clarke*, 18 Ves. 247; *Ellicock v. Mapp*, 3 H. L. cas. 492; *Williams v. Roberts*, 4 Jur. N. S. 18; S. O. 27 L. J. 177, Ch. The Act 11 Geo. 4, & 1 Wm. 4, c. 40, was also referred to.

Roundell Palmer, Q.C., having been heard in reply, their lordships reserved their judgment until the 13th July, when

LORD JUSTICE KNIGHT BRUCE said:—The question of partial intestacy raised by this suit may fairly, I

think, be considered one of difficulty. But after attending carefully to the contents of the testator's will and the judgment of the Master of the Rolls, and the authorities cited before us, and the arguments of the learned counsel, I remain not convinced that William Saltmarsh, the testator, died partially intestate; or that the plaintiff has any title; and, with deference to the Master of the Rolls, my impression is that the bill ought to be dismissed. The provisions which the will makes for indemnifying the executors, including their costs, charges, and expenses, are all, I think, consistent with that view. They were unquestionably to be made from some portion or portions of the testator's personal estate. The executors and representatives seem to me to be made residuary legatees for their own benefit absolutely. But I am far from being confident as to the accuracy of this conclusion, which, indeed, as it differs from the united opinion of the Master of the Rolls and my learned brother, is probably erroneous, and will certainly not cause any alteration in the decree.

LORD JUSTICE TURNER said:—William Saltmarsh, the testator in this cause, by his will directs the payment of his debts, legacies, funeral, and testamentary expenses. He then gives several legacies to charities, and then he gives in these terms [his lordship then proceeded to read passages of the will to the effect already stated, and continued thus]: The Master of the Rolls has by his decree declared that the residuary estate of the testator by his will bequeathed to Robert Williams, Richard Barrett, and Jonathan Barrett, his executors, was bequeathed to them as trustees for the persons properly entitled thereto, and then he has directed the usual accounts to be taken of the testator's estate, and inquiries as to the testator's next of kin, and as to any of the legatees to whom payments were to be made during the continuance of the long annuities before those annuities expired. The defendants, the representatives of the deceased executor, have appealed from this decree; and it has been contended before us, in support of this appeal, that the whole estate of the testator, all of which consisted of personality alone, was by the will given absolutely and beneficially to Richard Barrett, Jonathan Barrett, and Robert Williams, who, by the will, were appointed his (the testator's) executors, and that the testator's next of kin, therefore, have no interest in the estate, and that the bill ought to have been dismissed. The Master of the Rolls considered this question to be one of considerable difficulty, and certainly I have not felt it to be otherwise, for it has very much perplexed me; but, upon the whole, I agree with the conclusion to which his Honour has arrived. William Saltmarsh died in May, 1837, long after the statute of 1 Will. 4, c. 40, came into operation; and, looking at the decision of *Love v. Gase*, 8 Beav. 472 (I don't think the case was referred to at the bar), I am not satisfied that the statute alone does not furnish a sufficient foundation for the decree. His Honour, however, appears to have thought otherwise, and my learned brother being, as I collect from him, of the same opinion, I cannot venture to dispose of the case upon that point simply; and I desire to be understood as giving no opinion upon it. That was a case in which there was a gift of the entire fund to the executors, and there the will

had not disposed of the whole of the fund. Lord Langdale considered that case to fall within the provision of the Act of the 1 Will. 4, c. 40, and that there was an intestacy by virtue of the statute. I am not aware whether that case has been followed. It is a very important construction on the statute, holding that the statute does not apply merely to cases of intestacy by executorship, but applies to intestacy by gift. I shall consider the present case, therefore, as his Honour appears to have done, wholly without reference to the statute. And, looking at the case in this point of view, there can, I think, be no doubt that the defendants, in order to maintain the claim insisted upon by them, are bound to show that the residue of this estate was, by will, given absolutely and beneficially to the three persons named as executors. Upon any other footing, these three persons must have been trustees for the next of kin, by reason, among other things, of the equal legacies they take under the will. The question, therefore, is whether, upon the true construction of this will, the testator intended to give the residue to these three persons, not only absolutely, but beneficially also. That the words of gift which the testator has used would be sufficient to pass the residue to these three persons both absolutely, as the testator has expressed it, and beneficially also, cannot be doubted. No doubt, we are bound to collect the testator's intention from the words he has used; but then it is from the words of the whole will, and not from a particular clause only, that the intention must be collected; and this is the view taken in all the cases. Now, it is to be observed that the gift to these three persons is of the whole of the testator's estate and effects, but that the testator had before directed his debts, legacies, and funeral expenses to be paid, and had before given several legacies to charities and equal legacies to the executors. He must have intended, therefore, that these payments should be made out of what was given to these three persons. To this extent, it is clear they can take as executors or trustees; and if it be clear that they were, as to part of the gift, to take in either of their characters, I cannot see my way to holding that, as to the residue of the gift only, they could be intended to take beneficially. The gift to these persons is in joint tenancy, which is indicative of a trust; and the long annuities, so far as they are charged, are treated as remaining vested in these three persons as executors. It may be observed that the power to vary the securities is not in terms expressed to be a duty which was meant to be confined to the period of the subsistence of the charge. Again, there are here equal legacies to these three persons appointed to be executors, and these legacies must be payable out of the estate which is said to be given to these three persons beneficially, so that the testator, according to his intention, was at the same time giving to these three persons part and the whole of the same estate. It may be said that these legacies might be given for the purpose of putting the executors to that extent upon the same footing as the other legatees; but that argument has been urged in many cases in which the question has been, whether the executors, to whom there was an express gift, were trustees of the residue for the next of kin, and it has not succeeded. I do not see my way to holding

that much, if any great weight is due to the argument in which there is a gift to the persons who are the executors, when the question is, what is the character of that gift? There is, besides all this, the indemnity which extends to the whole estate. It is surely difficult to suppose that the testator intended to provide for the indemnity of the executors out of a fund which he intended them to take beneficially. Looking at all these circumstances, I have come to the same conclusion, although certainly not without doubt, as the Master of the Rolls has done, that the testator did not intend that these executors should take the residue beneficially, and the appeal must therefore be dismissed, but as my learned brother has come to a different conclusion, there will be no costs of the appeal.

Appeal dismissed, but no costs of the appeal given.

Solicitor for the plaintiff, Mr. Henry Sibley.

Solicitors for the defendants, Messrs. Stevens and Sachell.

Rolls Court.

[Reported by William Woodcock, Esq., Barrister-at-law.]

IN THE MATTER OF THE TRUSTS OF THE WILL OF MARTHA TISDALL, DECEASED, AND OF THE TRUSTEE ACTS, 1850, 1852, AND 1859; *Ex parte*, HESTER TISDALL—January 29, 1862.

Trustee Relief Acts—Appointing persons to execute assignment in place of party out of jurisdiction.

Right of husband out of jurisdiction of executrix to execute an assignment, vested in another person, under s. 22 of the Trustee Relief Act, 1850.

THIS was a petition by a married woman, praying that in conformity with the 22nd section of the Trustee Act, 1850, the court should make an order vesting the right of William Henry Tisdall, in the petition mentioned, the husband of the petitioner, to execute the assignment or release and satisfaction of the mortgage of the 27th Jan. 1847, in the petition mentioned, in John Davis White, in substitution for and to the exclusion of the said W. H. Tisdall, and so that the execution of the said assignment or release and satisfaction by the said John Davis White in conjunction with the petitioner, might be a good and valid assignment, both at law and in equity, to the full extent, as if the same had been executed by the said William Henry Tisdall; and that the costs and expenses of the petitioner in making the present application, and consequent thereon; might be paid out of the consideration money of £200 for the assignment. The petition stated that Martha Tisdall, spinster, deceased, made her will on the 20th March, 1860, and thereby, besides other legacies, bequeathed to the Rev. Henry Monsarratt, in trust for the petitioner, the sum of £100, for her own use, free from the control or debts of her husband, and to be paid in such sums and at such times as the said Rev. Henry Monsarratt should think advisable; and the testatrix further declared that the receipts of the petitioner, Hester Tisdall, should be sufficient discharges respectively for the sums thereby declared to have been received; and the testatrix further left her personal chattels to the petitioner for her separate use, and left and devised the residue and remainder of her property,

real and personal, to the said Rev. Henry Monsarratt, his heirs, &c., in trust, for the sole and separate use of the petitioner, free from the control of her then present, or any future husband. And the said testatrix appointed her cousin, Charles Tisdall, executor of her will. That Martha Tisdall died without having revoked or altered her said will; that the Rev. Henry Monsarratt and Charles Tisdall, respectively, refused and declined to act as trustee and as executor under the said will; that letters of administration, with the will annexed, were on the 8th June, 1861, granted to the petitioner, the beneficial residuary legatee; and in the letters of administration the petitioner was rightly described as the wife of William Henry Tisdall; that the said William Henry Tisdall had long since left this country, and was a resident beyond the seas out of the jurisdiction; and that the petitioner, believing him to be in Texas, had, within the last twelve months, addressed divers letters to him, but that owing to the civil war at present existing between the Federal and Confederate States of America, the petitioner's letters had been returned to her from New York; that by an indenture of mortgage of the 27th of January, 1847, one Packenham Beatty, in consideration of £200 mortgaged to the said Martha Tisdall certain lands in the County of Louth; that the £200 had hitherto remained out on the said security, but that the petitioner being now desirous to call in the sum in her capacity of administratrix, and for the purpose of satisfying and discharging the several legacies given by the will, and of realising the residuary real and personal estate; that in order to carry out that object, there was an arrangement for assigning the mortgage to one Sarah Brunner, who had agreed to pay the £200 to the petitioner; or that upon payment of the £200, the mortgage should be released and satisfied upon record, so as to enable Packenham Beatty to execute a new mortgage to Sarah Brunner; that the petitioner was advised that such assignment by her would not be a good and valid assignment at law or in equity, inasmuch as such assignment should also be executed by the said William Henry Tisdall, the petitioner's husband. The petitioners then named John Davis White as a fit and proper person to act in the matter, and concluded with the prayer above given.

W. Trench Johnson, for the petitioner, before opening the petition, applied to have it amended by adding the name of a next friend of the petitioner. On the question raised by the petition he cited *in re Dennison's Trusts* (2 De G. M. & G., 900).

The court made the order as sought.

Court of Queen's Bench.

Reported by Walter M. Bourke, Esq., Barrister-at-Law.

O'ROURKE v. M'DONNELL.—January 13.

Action for work and labour—Tender—Costs—Directions to taxing officer.—C. L. P. Act, 1853, section 77. 49th Gen. Order. Hil. Term, 1862.

Action for work and labour. Pleas; first, a set-off of £10, and secondly, never indebted except as to a balance of £45 tendered. This sum had been tendered before action brought. Issues on the fact

of tender, and as to whether the defendant was indebted to the plaintiff over and above the sum lodged in court, and if so, to what amount. The jury found for the defendant on the first issue, and on the second, a verdict was had for the plaintiff for £8 over and above the £45 lodged in court. The plaintiff did not obtain a certificate that the cause was proper to be tried in a superior court. The taxing-master refused to certify for full costs. Held: (Fitzgerald, J., dissentiente), that the plaintiff was entitled to full costs.

Harris, Q. C., moved that the ruling of the taxing-master be rescinded, and that he be directed either to certify the costs already taxed, or to proceed to tax and certify same, upon the ground that the sum recovered by the verdict, including the sum lodged in court in discharge of the action, amounted to more than £20, thereby entitling the plaintiff to her costs of suit. There had been no issue, and therefore, no finding on the tender, and consequently the plaintiff recovered £53. *Evans v. The Great Southern and Western Railway Company*, (5 Ir. Jurist, 329), was overruled by *Hughes v. Guinness*, (7 Ir. Jurist, 290), s. c. (4 Ir. C. L. R., 314), where it was held that "when a defendant lodges money in court, it is to be considered as money recovered in the action, and the plaintiff will get his full costs if the money so lodged and the verdict together make up £20." This decision was strengthened by *Crosse v. Seaman*, (10 C. B., 884 & 11 C. B. 524); *Cooch v. Malby*, (2 L. J., N. S., Q. B., 305). If it be held that less than £20 was recovered in this action, a man who buys a horse for £20, and tenders one penny in payment may compel the vendor to go into the inferior court, and there would be a similar hardship imposed on the holder of a bill of exchange for £20 if sixpence were tendered. *James v. Vane* may be relied on by the other side, but that was a case of a divisible demand.

R. Ferguson, contra.—Three things are to be considered: The object of the Legislature—the nature of the plea of tender—the decisions on the point. In *Evans v. The Great Southern and Western Railway Company*, Barons Greene and Pennefather held that upon the section 97 of the C. L. P. Act, 1856, the plaintiff should have drawn the money and sued elsewhere for the balance. The plaintiff should have done so here. *Dixon v. Walker*, (7 Mees. & W. 214)—A tender before action brought estops the plaintiff of so much of his demand, (49 Gen. Order, C. L. P. Act, 1853, section 77). The sum recovered in an action is not the sum lodged in court, but the amount of the verdict. *Lafone v. Smith*, (5 Jur. N. S., 127).—The intention of the C. L. P. Act was to have issues on the controverted points, and if a substantial statement be uncontroverted, it must be admitted. Here therefore the plaintiff admitted the tender, but alleged a sum due *ultra*, and even if the plaintiff were non-suited after the tender, he should have gotten the sum tendered, and consequently it could not have been recovered in the action. The effect of tender and of lodgment after action brought are essentially different. 1 Arch. Practice, 424; 2 Ferguson's Practice, 921–28; and this was an action for less than £20, C. L. P. Act, 1856, sec. 97.

Cur. adv. vult.

Feb. 17.—FITZGERALD, J.—This was an action for £110. The defences pleaded were that the work and labour done as stated in the plaint was of the value of £55 and no more, it therefore amounted to a non-assumpsit to all but the £55; £10, a portion of the £55, was pleaded as set-off, and the balance £45 was tendered before action brought. This money was lodged in court and the action proceeded, there being three defences.—Not indebted, but to amount of £55, set-off of £10, and tender of £45, which was brought into court. To one of these defences the plaintiff pleads a replication, denying the set-off, and having filed it the plaintiff tenders two issues which were accepted:—1, Whether the plaintiff's replication was true in substance and in fact; 2, Whether the defendant was indebted in a greater sum than the £45 lodged, and if so to what amount. If the defendant controverted the tender he might have replied traversing the tender, but she gives the go-bye to the tender, and in her replication traverses the set-off only. The £45 was lodged on the 12th, and was drawn by the plaintiff on the 26th of July, and on doing so he gave the ordinary receipt. The case was tried before me at the last assises, but my attention was not called to the fact of there having been no issue on the tender, or I should not have permitted evidence that the money was twice tendered before action brought, on the second occasion, the defendant's attorney having brought the money in notes to the exact amount, to have been given. The plaintiff established her claim for £63; the tender of £45; set-off £10, and £8 in addition, but beyond the sum tendered and the set-off she recovered by the verdict, not the balance of the £110, but £8 only. The *postea* records that judgment was given for the plaintiff, and damages assessed to 8*l.* over the 45*l.* brought into court, with sixpence for costs. It therefore appears to me that the plaintiff recovered but 8*l.*, and that the judgment was for 8*l.* only. It may be said that this is too technical, and that as the action was for 110*l.*, though the plaintiff failed as to 63*l.*, yet, having recovered 45*l.* and 8*l.*, she is entitled to her full costs, the trial having resulted in establishing her claim to 63*l.*; that the tender was only of a portion of the demand, and that it was negatived since the plaintiff was entitled to a larger sum, 53*l.* having been due when the action was brought, and tender of part of the demand was no bar to the action. The judgment of Wightman, J., was cited by Mr. Harris in support of this argument. But tender is, either *pro tanto*, or to the whole extent a defence to the action, though no bar to the demand. The plaintiff, at the time of the tender, had made a demand for a certain sum, and the defendant must go to show that he was at that time ready to pay. The essence of the plea of tender is that it contains this unqualified admission of the demand. In the plea of tender, in addition to its defensive character, the defendant is bound to bring the money into court, because the plea of tender is an admission of the demand, and the fact of the tender shows his readiness to pay; such was the character of this plea before the C. L. P. Act, and such also it has been since. The C. L. P. Act provides for tender in two cases; where it is pleaded in part satisfaction, and where it is in full of

the whole demand. The plaintiff may draw the amount tendered in full satisfaction of his demand, and he will be entitled to all his costs, or he may draw it in part payment and go on for the balance. The plaintiff, if he wish, may take issue on the fact of tender. He may plead that previous to the tender he had made a demand for the amount due to him, and that the defendant had refused to pay him. For, if the plaintiff makes a demand which the defendant refuses, the defendant cannot afterwards plead a tender, though he may plead a subsequent demand. Another mode of avoiding the tender is furnished by the case of *Dixon v. Clarke*, (5 C. B., 365), where it was held that a tender of part of an entire demand is inoperative, and on special demurrer to a plea of tender of 5*l.*, to which the plaintiff had replied that 13*l.* 15*s.*, part of the sum in the declaration mentioned, was due *on one entire sum and on one entire contract and liability*, the replication was held a good answer to the plea. In *Nesteth v. Fawcett*, (11 Mess. & Wels. 356), it was held on special demurrer that the replication to a plea of tender was insufficient, as it did not show that the amount demanded, though larger than the sum tendered, was not due *on one entire contract*, and leave to amend was given on payment of costs. This principle arises from the fact that several separate sums may constitute one cause of action. There was a tender of part of the sum due to the plaintiff, and a set-off of 10*l.* The plaintiff did not negative the tender either by replication of subsequent demand and refusal, or that the demand was indivisible and larger than the amount tendered. There is no issue on the tender, but there is issue on the non-assumpsit. The plaintiff's right to 45*l.* was never contested, but the 45*l.* was brought into court as a defence which entitled the plaintiff to her costs, and even if there were no authority upon the point I should on reason and principle hold that the plaintiff has not recovered more than 8*l.* If the defendant had pleaded tender of the whole demand before action brought, issue thereon, that the plaintiff had gone to trial, and that a verdict was had for the defendant that the whole amount due had been tendered, the defendant would have been entitled to judgment and all her costs. This is a question of great general importance, and there is a conflict of authority upon it. The plaintiff relies on the doctrine in *Crosse v. Seaman*, (2 Lowndes Practice Reports, 273), in which case the unanimous decision was that "where the sum sued for exceeding 20*l.* is reduced below that amount by a plea of tender of part, (which is confessed) and a verdict is found for the plaintiff for the residue, the plaintiff is not deprived of his costs by the County Courts Acts." In this case the point suggested by the court was not what the plaintiff recovered, but whether he was entitled to 20*l.* at the time the action was brought. In *Woodham's v. Newman*, (7 C. B., 654)—where the demand originally exceeding 20*l.* was reduced below that sum by a claim of set-off, the plaintiff was not deprived of his full costs; and in *Cooch v. Malby*, (23 L. J., N. S., Q. B., 305)—where the sum of 3*l.* was recovered over the amount tendered, it was held that the plaintiff was entitled to have his costs taxed on the higher scale, as the amount of the tender was part of the

sum recovered in the action, which, consequently exceeded 20*l*. The arbitrator to whom this case had been referred, certified that the cause was proper to be tried before a judge of one of the superior courts. Wigham, J., in his judgment gave no opinion respecting a plea of set-off, and treated the case as if there had been no certificate of the arbitrator with respect to costs. He cited the case of *Giles v. Harris*, (1 *L. Raym.* 254)—where it was said, "Though a tender is made and the plaintiff refuses the money, yet, the tender cannot be pleaded in bar of the action, neither in debt nor assumpsit, but in bar of the damages only." The tender, therefore, is no bar but a defence to the action, and when the defendant succeeds he succeeds entirely and recovers all the costs. *Hughes v. Guineas*, (4 *I. C. L.*, 314)—is not in point. The decision in that case did not arise upon a plea of tender. The plaintiff did not accept the sum lodged in court, and the jury found for the plaintiff. In this case the demand was for more than 20*l*, the action proceeds to a certain point; the defendant confesses the action to that point, and brings a sum of money into court on a plea of tender, which is a defence to the action, either *pro tanto* or to the whole amount, and entitles the plaintiff to her costs. But if the money tendered is not recovered by force of the action, what is recovered is the amount in controversy, *i. e.*, the sum recovered over and above the amount tendered. *Dixon v. Walker*, is decidedly in point, though overruled by *Crosse v. Seaman* and *Cooch v. Malby*. In *Dixon v. Walker*, (7 *Mees. & Wels.*, 214). Alderson, B., in his judgment, says, "In the cases cited in argument it was taken for granted that the plaintiff's right of action is defeated to the extent of the set off, and that the sum recovered in the action is only the balance." *A multo fortiori*, the plaintiff here is defeated to the extent of the money tendered, and the sum recovered is only the surplus. In *James v. Vane*, (29 *L. J.*, N. S., Q. B., 169)—the question was fully discussed, and it was unanimously decided by the court that the sum tendered was not part of the amount recovered. Cockburn, C. J., in giving judgment, said, "Where a plaintiff claims an amount which is the result of one demand, and which cannot be separated, he may say to the defendant when the smaller sum is tendered to him, 'I will not take less than the whole sum which I claim;' but where the whole demand is made up of an aggregate of items, and the defendant comes and says, 'I acknowledge that I owe you so much, and there is your money for you,' the plaintiff is wrong if he refuse to take it; and *quoad* that amount, he ought not to be allowed to keep the claim alive in its entirety for the purpose of suing the defendant upon it in the superior court, so as to get costs upon the higher scale." If the plaintiff wishes to avoid the plea of tender as being less than the amount demanded, which is indivisible, he must plead this by way of replication. *James v Vane* is exactly in point, and cannot be distinguished from the present case. In that case it was said, per Crompton, J., that "the effect of a plea of tender and of its being proved is that the plaintiff is deprived of his costs upon the higher scale, for he has made a claim for something that he does not recover. In

early times when pleading was *ore tenus*, a man would bring the money in a bag into court and would say, 'There is your money; I have always been ready and willing to pay it to you, and you might have had it at any time.' In these times it is paid to the officer of the court, who holds it for the plaintiff, and, therefore, the plaintiff cannot be said to recover that part of his claim." Independently of authority, it appears to me that the plaintiff can only be considered to have recovered that which was in dispute, namely, the sum over and above that portion of his claim which she has drawn out of court, under the 76th section of the C. L. P. Act, 1853. The question here is, not whether the action was within the jurisdiction of the Civil Bill Court, but whether the plaintiff recovered more than 20*l*. The instances of hardship alluded to in argument can be avoided by simply replying to the plea of tender an indivisible demand. The 97th section of the C. L. P. Act, 1856, provides for cases where the plaintiff might be liable to hardship, by enabling him to recover full costs on the certificate of a judge. In this case the result must be to pauperise either the plaintiff or the defendant, and, considering the circumstances under which the action was brought, I should not have given a certificate.

HAYES, J.—In this case the question is on the construction of the 97th section of the C. L. P. Act, 1856, whether the plaintiff in an action of contract has recovered a sum less than 20*l*. I rely on the authority of *Crosse v. Seaman* and *Cooch v. Malby*. The other cases cited not being cases of tender but of unsequel lodgment in court after action brought. *Dixon v. Clarke*, (5 *D. & L.*, 365), is the turning point in the construction of this case. It was held in that case that a tender of part of an entire debt is bad in law, and it was held a good answer to a plea of tender that the amount tendered was only a part of the sum due on foot of a single contract. Wilde, C. J., delivering the judgment of the court, said, "In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension is, that the defendant has been always ready to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able by tendering the requisite sum of money, the plaintiff himself precluding a complete performance by refusing to receive it." This case received further confirmation in *Searles v. Sadgreave*, (5 *El. & Bl.*, 639), where to a plea as to 55*l*. 6*s.*, a tender of that sum, the replication stated that the demand was on one entire contract for a larger sum than that tendered; rejoinder that the defendant had a set-off reducing the amount due to that tendered, and on demurrer this was held a bad rejoinder to a good replication. The whole sum must be tendered or it is no use. The plaintiff here was entitled to recover 63*l*. on a contract, which she could not split. The action was for 110*l*; 45*l* was admitted to be due, and there was also a set-off of 10*l*. The issue was whether there was anything due to the plaintiff over and above the 45*l*, and the jury found that there was, to the amount of 8*l*. In *Dixon v. Clarke*, the tender was insufficient and worth nothing. What a hardship it would be if one were obliged to accept six pence ten

der on a bill of 20*l*. In *Dixon v. Walker*, also, which was relied on by the plaintiff here, the tender was insufficient and worth nothing. *Evdns v. The Great Southern and Western Railway Company* is open to objection; and *James v. Vane* is not in point, as there were two distinct demands in that case on two distinct grounds. I think that the plaintiff here ought to have his costs taxed on the higher scale.

O'BRIEN, J.—I am of the same opinion as my brother Hayes, that the plaintiff is entitled to full costs, and that his application that the taxing officer be directed to tax his costs on the higher scale should be acceded to. The question on the construction of the 97th section in this case is very important. If the 45*l*. had been lodged in court after the action was brought, and the plaintiff continued the action and recovered only 8*l*., there is no doubt that the provisions of the 97th section would not apply to disentitle the plaintiff to his costs, and the plaintiff would have been considered to have recovered not only 8*l*., but the 45*l*. also (*Fewster v. Blogget* (9 Mees. & W. 20); *Hughes v. Guinness* (4 L. C. L. N. S. 314); and *Crosse v. Seaman* (2 Loundes, M. & P. 273), are conclusive on this point. I was surprised to hear it stated in argument that Barons Greene and Pennesfather had come to a contrary decision. No such case as the present was decided or even raised in *Evans v. the Great Southern and Western Railway Company* (5 I. Jurist, 329). In that case the sum demanded was the aggregate of several sums due on several distinct causes of action. The defendant, by his lodgment, admitted that the plaintiff had a good cause of action in the superior court, and the plaintiff was entitled to costs notwithstanding the money lodged. Why should not a similar rule be made here, where the defendant lodged 45*l*., whereas the jury found that 8*l*. more was due. The defendant insisted that the sum lodged was sufficient; the plaintiff draws the sum, but insists that it is not sufficient; the issue was as to the sufficiency thereof; and the plaintiff gets a verdict for a further sum of 8*l*.. The money lodged by the defendant does not disentitle the plaintiff to her costs. *Crosse v. Seaman* twice reported in the 10 C. B. and the 11 C. B., is an express authority in point, as the facts are similar to the present. In *Dixon v. Clark* (5 C. B. 365), it was held that a defendant could have no benefit from a partial tender. In debt or assumpsit the principle of tender is, that the defendant is ready to pay the whole demand; and if he can show that he tendered the full amount, he does not bar the debt but the costs of the action. Tender of a portion of the demand is of no avail. The same argument will apply to a tender of a portion of the demand in an action for damages. It is otherwise where the demand is on several causes of action. There the demand was on one entire continuing contract for five and a half-year's salary; and what right has the defendant to compel the plaintiff to accept a part of his demand. In *Dixon v. Clark*, it was held that the test of the entirety of the sum demanded is, whether it arose on foot of one entire contract. Here, in the declaration, the plaintiff claims one sum; and the plea of tender does not distinguish between the plaintiff's demands, but says only that 45*l*. was due, and no more.

LEWRY, C. J.—This is a most important question,

and the judges and the courts in England are divided on the subject. I concur with my two brethren who have last given judgment; for, it appears to me that reason and common sense, and the preponderance of authority, are in favor of the plaintiff's right to have her costs taxed to the full amount. The spirit and intention of the Act is, to prevent a party who has an opportunity of having his case decided in an inferior jurisdiction bringing his action in a superior court, and thereby entailing extra costs. The Act provides for the case of a party who should not recover, on foot of his demand, a sum exceeding 20*l*. What did the Legislature mean by this enactment? Not that he should have claimed more than 20*l*. in his plaint, but that more than 20*l*. should turn out to be due to him on foot of his demand. Two points only remain to be considered in this case—the intention of the Legislature and reason and common sense—for all the cases bearing on the question have been exhausted by my brethren. The Legislature meant that a party who should bring his action for more than 20*l*. should not be prevented from trying his right in the superior courts. And if the claim be for more than 20*l*., we are not to put upon the enactment any construction short of this, that a party having a demand for 20*l*. or upwards, shall not be prevented from trying his right in the superior courts. On the grounds of reason and common sense, we are to consider what was the claim of the plaintiff before action commenced; and this is to be ascertained, not from the plaint or endorsement thereon. The test is, what was found at the trial to be due on foot of his demand. The demand is liable to be reduced; but has there been any defence here to the effect that there was not 63*l*. due to the plaintiff on foot of his demand? There has been nothing brought before the court here to show that there is any ground for supposing that the plaintiff's demand could have been reduced to a less amount than 20*l*. The plaintiff's demand might have been reduced below 20*l*. during the course of the action by circumstances which he could not have anticipated; but that is not the case here. The defendant admitted that 45*l*., and the jury found that 63*l*., was due by him to the plaintiff; and whether 45*l*. or 63*l*. was the amount in question between the parties, was it the intention of the Legislature that the question was not to be tried in the superior courts? It has been argued, that although the demand was large enough to warrant an action in the superior courts, and though the demand was admitted to the amount of 45*l*., the position of the parties was altered by the fact of tender. But a tender of a less sum than the amount claimed is no bar to the action. What was the effect of the tender here? It has been argued that the tender was pleaded, and the money brought into court. Was the money brought into court when the tender was made? No. It was brought into court when the action was brought. What caused it to be brought in but the action? The confusion in this case arises from confounding the effect of a tender when money is lodged in court at the time the tender is made, with a simple tender, without bringing the money into court. In this case the money was recovered by force of the action, because it was not brought into court until after the action was commenced. If a plaintiff have a *bona*

vide claim for more than 20*l.*, his common law right to sue in the superior courts, which the statute has taken away in other cases, is undisturbed. It appears to me, independent of the cases cited in the argument for the plaintiff which establish the principle, that the payment of money into court, which disentitles the plaintiff to his full costs, cannot be held to mean a payment of money into court after action brought and accompanying the plea. When an action is brought in the superior courts for a sum exceeding 20*l.*, must the plaintiff take whatever sum is tendered to him, and sue for the balance in the inferior tribunal? On the pleadings it appears that the whole sum was due in this case on foot of one entire demand. How, then, would the plaintiff be met in the inferior tribunal? He would be told: You have taken money on foot of all demands, and now you come here to demand more. It is in conformity with authority, and with the spirit, intention, and language of the Legislature that the plaintiff in this case should have his full costs.

Rule accordingly.

Agent for the plaintiff, J. Gleeson.

Agents for the defendant, Wm. Delmege and Ferguson.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

COVERTY v. MCENERY.—Jan. 16.

Pleading—Demurrer.

A defence to an action for goods sold and delivered; that the goods delivered were not according to sample, or were not of the description contracted for, which omits to add that the defendant only kept the goods a reasonable time, and only used a reasonable quantity, is bad on general demurrer.

THIS was an action for the price of a hundred barrels of barley sold and delivered. The defendant pleaded with other pleas,—1. That the only goods sold by plaintiff to defendant were a quantity of barley for malting purposes, which barley was sold by a sample sent and shown by plaintiff to defendant, the plaintiff warranting that the barley to be delivered by him to the defendant would be of the same description and quality as the sample so sent. And defendant says that no barley of the same description and quality as the said sample was ever delivered to defendant; but that the barley delivered being the goods in plaint mentioned, was of a different and inferior description and quality. And defendant says that he used a portion of said barley in making malt, which turned out to be bad and altogether useless, and of no value whatever. Whereof, the defendant immediately, and before action brought, gave the plaintiff due notice; and requested him to take back the remainder of said barley, which, with the malt made with the portion used, still remains on defendant's premises ready to be delivered to plaintiff. 2. That the only goods sold by plaintiff to defendant, were a quantity of barley for the purpose of making malt therewith, and which barley was sold by plaintiff and purchased by defendant for that purpose and no other, the plaintiff war-

ranteeing that the barley to be delivered by him to defendant would be barley fit for making malt therewith. But defendant says that no barley fit for making malt was delivered by plaintiff to defendant; and that the barley delivered being the goods in plaint mentioned, was altogether unfit for that purpose. And defendant says that he used a portion of said barley in making malt; and that the malt made therewith was wholly useless, and of no value. Whereof defendant immediately, and before action brought, gave plaintiff notice, and requested him to take back the remainder of said barley, which, with the malt so made with the portion used, still remains on defendant's premises, ready to be delivered to the plaintiff. To these defences the plaintiff demurred.

Eacham (with him *Serjeant Sullivan*), for the demurrer.—These defences do not allege that the defendant only used a reasonable portion of the barley; and it is consistent with them that he used a great deal. As to the first defence in particular, the description and quality would be both apparent, would be known by looking at it, which became impossible when the barley was turned into malt. The defendant had three courses open to him; to reject the barley *in toto*, and bring an action for the loss he sustained; to keep it and bring an action for damages; and to keep it and give evidence in mitigation of damages. In *Hunt v. Silk* (5 East. 452), Lord Ellenborough said, "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*." Can the defendant say he has done this? Can he give me back what I sent him? In *Chapman v. Morton* (11 M. & W. 534), it was argued that the defendant had sufficiently repudiated the contract; and Lord Abinger, in giving judgment, said, "I was of opinion at the trial, and still think, that this case was a case of sale to the defendant. If the defendant intended to renounce the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person for the benefit of the plaintiff." *Parker v. Wallis* (5 Ellis & Bl. 21) was an action to recover the price of seed sold to the defendant; and after a non-suit, it was held by three of the judges of the Queen's Bench in England, that there being evidence to go to the jury that a cargo of the seed was spread out thin neither because it was hot and mouldy, nor by plaintiff's authority, there was evidence that it was spread out thin as an act of acceptance, and that the non-suit was wrong. And Lord Campbell said, "To make an acceptance it is not necessary that the vendee should have acted so as to preclude himself from afterwards making objection to the quality of the article delivered; but he must have done something indicating that he has accepted part of the goods and taken to them as owner. This may be indicated by his conduct, as when he does any act which would be justified if he was the owner of the goods, and not otherwise." [*Ball, J.*—In that case the defendant dealt with the whole of the cargo.] Undoubtedly; but if the seed was hot and mouldy, the best thing he could do with it was to spread it out. Another case of the sale of seed will be relied on on the other side, *Poulton v. Lattimore* (9 Barnew and Cres. 259); but seed is a different kind of subject-

matter from barley. In *Gardner v. Groul* (2 Com. Bench, N. S. 340), it was held that where goods are sold by sample the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. So in *Lucy v. Monflet* (5 Exchequer Rep. N. S. 229), Baron Bramwell, in giving judgment says, "A vendee is not in general at liberty to take more than a reasonable quantity for the purpose of trying the goods." It is consistent with these defences that the defendant burned far more of the barley than was necessary into useless malt. If a vendee keeps goods an unreasonable time, or does more than is necessary to be done for inspection and examination, he makes the goods his own (Addison on Contracts, p. 242). [*Monahan, C. J.*—The principle involved here is, did the defendant exert acts of ownership which he had no right to exert?] [*Keogh, J.*—Do not both these defences aver acceptance?]

R. Ferguson, (with him, *Clarke, Q. C.*), in support of the plea.—Where a warranty is given and goods turn out to be different from the warranty, the special contract is completely gone; accordingly, the plaintiff here does not support the count in his summons and plaint, because he admits the truth of the plea. *Boake v. McCracken*, (1 Ir. Jur., N. S. 207)—is an authority that the substance of these special defences could be given under a defence denying the contract. [*Monahan, C. J.*—*Boake v. McCracken*, was an action for goods sold and delivered, and the defendant pleaded that no goods were bargained, sold, or delivered, as plaint alleged; and myself and my brother Ball, held, that under this plea the defendant could prove that the sale was by sample, and that the goods delivered were not such as were contracted for. *Torrens and Jackson, J. J.*, differed from this opinion, but there was no question of acceptance. The point was a point of pleading.] The defendant might have turned the whole of this cargo into malt. Suppose it the case of so much as would have made one malting, and that it turned out to be bad, this action would not lie; the plaintiff could recover only a *quantum valebat*, provided the defendant had derived any value, but if he derived none, as in the present instance, then the party breaking the contract is the plaintiff. In *Poultton v. Lattimore*, the buyer sowed part of the seed he had bought and sold the residue, and yet he was allowed to show at the trial that it did not correspond with the warranty. The plaintiff in that case had an element in his favour, which the present plaintiff has not, so that this is a stronger case. All the cases are collected in the notes to *Cutter v. Powell*, (2 Smith's Leading Cases, last ed., page 1); at page 22 the editor says, "The general rule being thus established, viz., that while the special contract remains unperformed, no action of *in debitatus assumptil* can be brought for anything done under it; we now come to the exceptions from that rule. The first of them consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that con-

tract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that, without paying anything." The old rule was diametrically opposite to this. "Thus it was held in *Broune v. Davis*, (1794 cited 7 East, 479), *in nota*, that the plaintiff who had agreed to build a race-booth for twenty guineas was entitled to recover the whole price, although the booth was so badly constructed it fell down during the races, and it was admitted that a cross-action would lie against the plaintiff." Lord Ellenborough in a subsequent case, said, "I now consider this as a correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand." [*Christian J.*, "Though the barley be valueless for malting, it may be of some value for other purposes." Yes, but that is not the test: what would be the *quantum valebat* in the case of a poisonous drug bought by an apothecary who acts upon a guarantee? The question here is, what is the meaning of being of "no value?" In *Tye v. Fynmore*, (3 Campbell, 462)—the plaintiff was not allowed to show that the goods corresponded with a sample exhibited at the time of sale, the sale having been by description in a written contract. In *Street v. Blay*, (2 Barnw. & Adol., 463), a distinction is taken in the case of executory contracts. Where an article sent as being of a certain quality is never completely accepted by the party ordering it, he may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial. *Lucy v. Monflet* is reported in 29 Law Journal, Ex., N. S., 110, and in 5 Exchequer Rep., N. S., 229. It was the case of a cider-merchant who sold to the defendant a hogshhead of cider with a warranty. A hogshhead being delivered, it was tapped and found unfit for use. The defendant at once wrote to the plaintiff that the little he had sold was complained of, and that if it continued to be so, he should have to return it. No notice was taken of this letter for about a month, during which period the defendant was trying to sell it, and found it unsalable. He then wrote to the plaintiff, proposing to return the hogshhead, but the plaintiff refused to assent to this, and sued the defendant for the price. The defendant paid into court the value of the part he had used; and he was held not liable for the residue, and *semble*, says the report, that he was liable for none. [*Monahan, C. J.*—You do not aver the residue of the barley to be of no value at all, therefore the question on the pleading is, have you accepted it?] User of a part on warranty is not acceptance. [*Christian, J.*—The defect, as it appears to me is this: It is consistent with these defences that you may have kept possession of the barley for months, and that its unfitness was discoverable by the sight, the taste, the smell. To rescind the contract you must have returned the goods as soon as you discovered their unfitness.] See also *Gray v. Cox*, (6 Dowling and Ryland, 208); *O'Kell v. Smith*, (1 Starkie, 107)—the observations

of Tindal, C. J., in another case quoted in *Dawson v. Collis*, (10 Com. Bench Rep., 530).

Jan. 25.—MONAHAN, C. J., said, the court would be governed in their judgment by the case of *Lucy v. Moufflet*. In that case there was no delay on the defendant's part in letting the plaintiff know the unsuitability of the cider he had bought. But for the acquiescence implied by the silence of the latter in the defendant's proposition to go on trying to sell the cider, it is clear that the judges would have held the subsequent attempt to dispose of it, extending over a month, to have been too great a delay. In this case of *Coventry v. M'Enery*, the pleas are bad, because they do not aver that the defendant only kept the barley a reasonable time, and only used a reasonable quantity.

Demurrer allowed.

MCCARTHY v. DONOVAN.—Jan. 17.

Executor de son tort.

Where the rightful administrator sues an executor, de son tort, in an action of trover, it is competent to the latter to give evidence of lawful payments in mitigation of damages.

THIS was an action of trover by an administratrix against the defendant, who had dealt with the property of the deceased. The fact of the conversion of the goods was proved when the defendant proffered evidence of lawful payments, for which, as executor *de son tort*, he would have a right to be recouped in damages. To this course the plaintiff objected, when Keogh, J., before whom the action was tried, without ruling the point, decided on permitting the evidence to be given. The evidence proved disbursements in the way of funeral expenses, &c., which, if allowed the defendant, would reduce the amount from £100 to 9s. 6d. A verdict was then had for the plaintiff for £100, leave being reserved to have it reduced to one for 9s. 6d., if the court should be of opinion that the evidence was properly admissible, or to move for a new trial. Accordingly, in Michaelmas term, 1861, a conditional order was obtained, against which

Serjeant Sullivan (with him *Exham*) showed cause. The defendant had no right to go into the evidence; there is no plea pleaded of *plene administravit*. In *Mountford v. Gibson* (4 East. 441), Lord Ellenborough says, and you will observe how cautiously he worded his remarks, "If it were necessary it might be fit to consider whether in any case such a delivery of the intestate's goods to a creditor, by one who had no lawful authority, would be a bar to an action of trover by the rightful administrator. In trespass, it is only said that such payments, if made by executor *de son tort* in a due course of administration, shall be recouped in damages. The passage cited from Mr. Justice Buller's *Nisi Prius* does, indeed, go the length of saying that if the payments made by executor, *de son tort*, amount to the full value of the goods sought to be recovered in the action of trover, the plaintiff shall be nonsuited; but the passage in Carthew, referred to in the margin, is directly contrary to that

position." *Woolley v. Clarke* (5 Barnew and Ald. 744), is an express decision on the point now before the court. There the defendant had acted as executor under a will, the probate of which was afterwards revoked. A second will of later date was proved; and the defendant, with notice of the second will, sold the goods of the deceased, and he was not allowed to give in evidence payments made by him as executor; and it was held that the rightful executor in an action of trover was entitled to recover the full value of the goods sold, and that the defendant was not entitled, in mitigation of damages, to show that he had administered the assets to that amount. [*Monahan, C. J.*—I have an indistinct recollection of a similar point in an Irish case.] That was (*Carrigan v. Mullooney* (in 1 Irish Law Rep.)). The point was not precisely the same; the plaintiff there was a creditor. There is a recent case of *Thompson v. Harding* (2 El. & Bl. 630). It was held in that case that the creditor of a deceased person may retain against the representative of the deceased payments made to him out of the assets of the deceased in due course of an administration by an executor *de son tort*, if the executor *de son tort* was really acting as executor, so that the creditor might reasonably suppose him to be the representative. At p. 634 there is a note of Williams on Executors, quoted where he comments as follows on *Woolley v. Clarke*. "It must be observed, that the authorities in favour of the right of an executor *de son tort* to recoup, in damages, payments made in a due course of administration, were not cited in the argument of this case, nor was the point mentioned. *Ideo quare* whether it must be understood as overruling them." Williams is wrong in saying the point was not raised; it was raised, though the authorities were not cited. *Woolley v. Clarke* is an express decision upon the present point. Most mischievous results might follow if the rightful executor could be taken by surprise at the trial by evidence of this kind in mitigation of damages.

Chatterton, Q. C. (with him *Hickson*) in support of the rule. It was early a principle of our law that an executor *de son tort*, is entitled to credit for such expenses as the present. The only question was, whether in case they amounted to the whole of the assets, this was a bar to the action. There is this distinction, that when an executor *de son tort* is sued by a creditor, it is as executor generally, and he may plead *plene administravit*; but when sued by rightful executor or administrator, it is as a wrong doer, and he cannot plead this. *Graysbrook v. Fox* (Plowden, 282) is an old case; and there Walsh said if the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided but should remain indefeasible; and the reason is, because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he had a color of authority, though it is not a rightful one; and he that has the right suffers no disadvantage, although he be bound by the act of the administrator, for it is no more than he himself was compellable to do; and the administrator having done that which the executor himself was obliged to

do, his act shall be allowed good, because the executor himself is thereby freed and excused from the trouble of doing it. * * * And hereupon he cited the case of *Sands v. Peckam* (in 4 H. 7), where the defendant was not allowed to plead payment of usury, because it was but a thing of conscience. But there it is held that, although he was not executor of right but of wrong, yet if he had paid any debt due by specialty or other thing which the law will force the executor to pay, the true executor should have been bound by it, and should have been obliged to allow it, because the other was compellable to pay it, and the true executor had no prejudice by it, forasmuch as he himself should have been bound to pay it." In an *anonymous case* (12 Modern Reports, 441), Holt, C. J., says, Though an executor *de son tort* pays debts duly with all the assets that come into his hands, yet the rightful executor shall maintain trespass against him; but he may give such payment in mitigation of damages." In *Parker v. Kett* (12 Modern Rep. 71), Holt, C. J., in giving the judgment of the court, laid it down that an executor *de son tort*, who is but an executor *de facto*, if he do lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts the rightful executor shall not avoid that payment; and yet it is an act done by one that has no right. It is true he is not quit against the rightful executor, but he shall maintain trover against him; but what shall he recover in damages? Only for so much as he has misapplied, and all that he has well applied shall be abated in damages." In *Whitehall v. Squire* (Cartwright's Rep. 104), the same learned judge held it for law, "That where trover is brought by a rightful executor or administrator against an executor *de son tort*, he cannot plead payment of debts, &c., to the value, &c., or that he hath given the goods, &c., in satisfaction of the debts, because no man ought to intrude himself upon the office of another; nevertheless, upon the general issue pleaded, such payments shall be recouped in damages." And in *Paget v. Priest* (2 Term. Rep. 100), Buller, J., says, "The courts have gone thus far, that if an action be brought by a rightful administrator against an executor *de son tort*, whatever may have been disposed of in the course of administration as by paying debts, &c., shall be allowed to him in damages." *Mountford v. Gibson* has been cited on the other side, or referred to, and is virtually an authority for the defendant here. And lastly, in *Fyson v. Chambers* (9 M. & W. 468), Lord Abinger says, "Now, it is very true, if an action had been brought in trover by the administrator against the executor *de son tort*, the cases have decided that an executor *de son tort* may recoup himself in damages for all money he has paid *bona fide* on account of the testator." See also 2 Bla. Com. 508, Bac. Abridg. B. 3, title Executor. In fact the only authority in the plaintiff's favor is *Woolley v. Clarke*, as reported in 5 Barnewell & Ald.; and your lordships have already heard the estimate of it in Williams on Executors. But, farther, there was no such question decided by it as that now before the court. It is more fully reported in 1 Dowling & Ryland, 409; and this other report throws some more light upon the nature of the

case; for the facts were these, that the defendant acting under a will which appointed him executor, proceeded to possess himself of the goods for the avowed purpose of retaining for a debt due to himself, and he sold with notice of the existence of a subsequent will. And in *Roscoe on Evidence*, last ed. p. 797, it is observed, in reference to it, that the defendant appeared to have acted *mala fide*. [*Monahan, C. J.*—If the report in Dowling and Ryland be the true one, the case amounts to no more than that an executor acting under a revoked will, or under no will, cannot retain for a debt due to himself; not that he cannot get credit for payments made to third parties.]

Exham in reply—*Woolley v. Clarke* would not, in that case, decide any point; for it was always held that an executor *de son tort* cannot retain for his own debt. [*Monahan, C. J.*—It being always understood that an executor *de son tort* cannot retain for his own debt, *Woolley v. Clarke* may have decided that an executor acting under a revoked will was in no better condition.] In *Thompson v. Harding*, Coleridge, J., said, "There seems to be a distinction taken in Buller's Nisi Prius, 48, that an executor *de son tort*, though he might give in evidence the actual sale of the deceased's goods, and the application of the money in payment, could not retain goods not actually sold on the ground that he had made payment to that amount." This doctrine will apply here. [*Monahan, C. J.*—A perfectly valid argument if you were suing in detinue.] So we are. [*Monahan, C. J.*—No; you go for damages, your action being trover.]

Jan. 25.—*MONAHAN, C. J.*, delivered the judgment of himself and his brothers, Ball and Keogh, Christian, J., having been absent when the case was argued. After repeating the facts, he said—The question here is if an executor *de son tort* can give evidence of lawful payments in mitigation of damages when sued by the rightful executor or administrator in an action of trover. It is admitted that such payments will not be an answer to the action. The defendant has quoted cases dating from an early period, which show that an executor *de son tort* can get credit for such debts of the deceased as he has paid. It is admitted that he cannot retain for his own debt; and it is also admitted that he cannot get credit if the debts exceed the assets, because this deprives the rightful executor of his right to give a lawful preference. Read in Williams on Executors, at p. 236, "With respect to the liability," &c. On the other hand, it was argued by the plaintiff, that *Woolley v. Clarke* is an express decision the other way, and that we were bound to follow it rather than the older cases. What were the facts in *Woolley v. Clarke*? The deceased had made two wills, and in both appointed executors. The executor acting under the earlier one possessed himself of the goods, proved the will, and proceeded to sell the deceased's property; and this last step was taken after he had notice of the subsequent will. The probate of the first will was then revoked, and the rightful executor brought trover against the wrong doer; and according to the marginal note, it was held that the latter was not entitled, in mitigation of damages, to show he had administered assets to the amount sought to be recovered. Thus far the report in 5 Barnewell and Alderson. The coun-

sel who showed cause against the conditional order were very eminent; and in the judgment a distinction was taken between executors and administrators. The authority of this case is questioned by Williams, because the cases deciding the other way were not referred to in the argument. To us it seemed very odd that neither the judges nor the eminent counsel who were engaged in it should have referred to them. Accordingly, we were referred by the defendant to another report of the same case of *Woolley v. Clarke* (in 1 Dowling & Ryland, 409), where these words occur, "in order, as he declared, to retain his own debt." These words are the material words. The judge decided nothing concerning the credits, for this was referred to an arbitrator; and, for anything we know to the contrary, every particle of the monies so expended by the defendant was allowed to him. The point made at the trial was not the point stated in 5 Barnewall & Alderson; it was something else. *Woolley v. Clarke*, therefore, no longer stands in our way, and we are free to follow the older cases. It now appearing by affidavits that a sum of £12 was paid by the defendant while the deceased was yet living; and the parties agreeing upon the amounts, we shall reduce the verdict for £100 to one for £12, as we shall not in any case send this back for a new trial. Each party will abide his own costs of the motion.

Rule accordingly.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law]

RE JOHN O'BRIEN.

Bill of sale—Execution of deed—Act of bankruptcy.

A creditor of the bankrupt had notice of a deed of sale executed by the bankrupt to another creditor, which was in terms a conveyance of all his stock in-trade, but evidence aliunde was given that the residue of the bankrupt's property was of some value. Held, that such deed of sale constituted an act of bankruptcy.

Held, also, that the first-mentioned creditor having had notice of the execution of that deed, had notice of an act of bankruptcy, where the surrounding circumstances were sufficient to draw an inference that the bankrupt's property had been substantially conveyed.

Quære, is notice of an execution of a deed by a trader notice of an act of bankruptcy where the deed, on the face of it, does not disclose an act of bankruptcy?

THIS case came before the court upon charge and discharge, and the questions for consideration might be said to be two, namely—first, whether a bill of sale by the bankrupt, a creditor named Bradley, was a fraudulent preference; secondly, if it were an act of bankruptcy of which the party obtaining the bill of sale had notice. Kernan, Q.C., was for the assignees and Campion for the creditor seeking to uphold the bill of sale.

Kernan relied on the general principles of law that govern such cases.

Campion cited *Linden v. Sharpe* (7 Scott's N. R. 746); *Bird v. Bass* (6 M. & G. 143); *Lackington v. Elliott* (8 Scott's N. R. 746).

LYNCH, J., delivered judgment—He said this case is before me on the charge of the assignees, respecting the goods of the bankrupt taken by Daniel Bradley, under a bill of sale to him by the bankrupt, executed the 1st March, 1860. The charge relies on three matters as giving title to the assignees—first, that this bill of sale was a fraudulent preference; second, that it was an act of bankruptcy; and third, that the possession under the bill of sale was not taken by Daniel Bradley until the 17th March; and that previously to said 17th March, Daniel Bradley had notice of an act of bankruptcy, by the execution of a bill of sale to Mulcahy, on the 27th. The discharge I need no further allude to than to say, that I, on the facts, find there was not a fraudulent preference by the execution of the bill of sale of 1st March. I further find that the bill of sale to Mulcahy conveyed all the property of the bankrupt, and was an act of bankruptcy, and that Bradley had notice of the bill of sale to Mulcahy before he took possession of the goods under his bill of sale. These facts being so found by me, the two questions arise—first, was this bill of sale an act of bankruptcy; and second, was there notice of an act of bankruptcy, by reason of the notice of the antecedent deed of the 27 February to Mulcahy. The latter question as to notice I will first consider, as it is the one opened by Mr. Kernan and very ably discussed by Mr. Campion. The question is this:—A party has notice of a deed conveying certain properties of the bankrupt, but not by its terms professing to deal with his whole property; but it appears by evidence that the property dealt with was his whole property, and, consequently, an act of bankruptcy. Does notice of the deed, which was an act of bankruptcy, amount to notice of an act of bankruptcy? Now, in fact, the deed was an act of bankruptcy, and of this deed the dischargeant had notice, and therefore, in fact, he had notice of the act of bankruptcy. But the notice to him was of an act which was not necessarily an act of bankruptcy, but which was an act of bankruptcy in the circumstances under which this deed was executed; and, therefore, the question is, in such a case as this must the notice be not merely of the deed, which is an act of bankruptcy, or must it also be of the extraneous circumstances which must exist to make it be an act of bankruptcy? A colour is given to the argument by the judgment in the case of *Linden v. Sharp*, cited by Mr. Campion, but that is at best merely negatively an authority on this point; and in this case, equally as in that case, I think the very dealing in this case between all the parties, whereby the dischargeant got the priority conceded to him, was very strong evidence here that Mulcahy's deed was known to contain a transfer of all the bankrupt's property. It is always dangerous to introduce metaphysical distinctions into points of law operating immediately upon the common sense of men, and to be acted on by them. This is called the operation of a penal enactment against dischargeant. I cannot so consider it. Certain transactions are excepted out of the equitable operation of the bankrupt law: that is, *bona fide* transactions—provided that party had not notice of an act of bankruptcy; and it

is part of the care of one claiming the benefit of this exception to be clear of knowledge of the act of bankruptcy committed. In this case, as a fact, I do not think he was clear of this knowledge. Admittedly, in argument, he had knowledge of the act which is an act of bankruptcy; and I think it is far safer to hold that knowledge of the act is enough, without raising the question whether he knew all the concurrent circumstances—a thing hard, indeed, to establish in most cases against a party, and with respect to which he has, by the notice, a means of inquiry for his own protection in acting. If, then I had to decide the case on the point argued chiefly—by knowledge of the deed of the 27th March—I would hold he had notice of an act of bankruptcy; but I further, in fact, find he had notice of the circumstances making it an act of bankruptcy, and this is my principal ruling, as in the case cited. In what I have said, I state grounds for my rule irrespective of the other question, which is a curious one. The deed of 27th February now, it appears, conveyed all the property of the bankrupt, was an act of bankruptcy, and defeated the title conferred thereby. The deed of the 1st March dealt with only a part of that property, and, therefore, only dealt with a part of what was, antecedently, the property of the bankrupt; but yet it is contended that, though a subsequent and weak title, it is to prevail against the title in the assignees by reason of the elder title being displaced. If the deed of 27th February fails by reason of its conveying all the property, I do not see how the deed of 1st March, if operative at all, must not convey all the property of the bankrupt, and I cannot see why a title against the elder deed, then vesting the property in the assignees, can be defeated by a subsequent act of the bankrupt, who had himself validly, as far as he was concerned, parted with all property in these goods. However, it is not necessary I should decide this question; it was not argued before me; and I now merely make this reference to it that it may not appear I acquiesced in the view that in the circumstances of the case the dischargeants could have a title. I make no decision as to this point now, but I rule that the chargeants are entitled to recover the £100 received from the produce of the sale, and the £35, about which there is no dispute. I give nothing by way of damages here, but, of course, the costs must be paid by dischargeant as consequent on my decision against him.

Court of Chancery.

[WESTMINSTER.]

[Reported by C. H. Keene and Thomas Brookbank, Esqrs.,
Barristers-at-law.]

RICKARDS v. GLEDSTANES—Jan. 11.

Insolvency—"Order and disposition"—Assignment of reversionary interest—Notice to solicitors of trustees.

Notice of the assignment of a reversionary interest given to solicitors of trustees, was held by Stuart, V. C. to be a sufficiently good notice to the trustees themselves, so as to take the property out of the order and disposition of the assignor at the time of his insolvency, although such notice had been sent prior

to the insolvency, and not for the express purpose of being communicated to the trustees. On appeal the decision (Law Times 5, N.S., 416), was affirmed.

This was an appeal from a decree of Stuart, V. C., made on the hearing of the cause, and dated Nov. 15, 1861. The appeal was presented by Walter Evans Gledstances, one of the defendants, and the question raised was as to the sufficiency of a notice to the trustees of a settlement and will of an assignment by way of mortgage of certain reversionary interests by the *cestuis que trust*, so as to take the property assigned by him out of his order and disposition at the time of his insolvency. The bill was filed by Edward Henry Rickards, for the purpose of obtaining a decree of foreclosure in respect of the reversionary interest of Thomas Evelyn Venables. Under a settlement, dated 2nd Sept. 1829, he was entitled to a vested reversion in one-fourth of a sum of £15,000, expectant on the death of his mother, unless she should direct the contrary, or on her second marriage. He was also entitled, under the will of his father, proved on the 10th July, 1837, to a vested reversion expectant on the death of his mother (and after payment thereof of the sum of £1,000, as by the will directed) in one-fourth part of the sum of £1,050, stock, then standing in his father's name in the books of the East India Company, and also in one-fourth part of ten shares in the Globe Insurance Office, also then standing in the name of his father. By a deed, dated the 14th April 1860, Mr. Venables assigned the said three reversionary interests to the defendant, Elizabeth Scriven, by way of mortgage to secure repayment of £500, and interest. On the 30th July, 1859, being indebted to the plaintiff, Edward Henry Rickards in the sum of £500, and interest, Mr. Venables further charged the said reversionary interests with that sum, by the following instrument in writing:—

"29, Lincoln's-inn-fields, 30th July 1859.

"Sir,—In consideration of you this day lending me the sum of £150, and of my being already indebted to you in the sum of 350L, I hereby charge and make liable to you all my estate, right and interest under the will of my late father, and under the settlement made on the marriage of my father and mother, with the due payment thereof with interest, and I engage and undertake to make and execute to you any more formal or other mortgage security which you may be advised to require of me; and I authorise and empower you, if you think it necessary for your own interest, to pay off the existing mortgage of 500L, due thereon to Messrs. Bridges and Son or their client, and to take an assignment thereof, and generally to act in the premises in my name.

"T. EVELYN VENABLES.

"To E. H. Rickards, Esq., Lincoln's-inn-fields."

On the 15th June, 1860, the estate and effects of Mr. Venables became vested in the defendant, Walter Evans Gledstances as assignee in insolvency. The bill prayed that an account might be taken of what was due to the above-named defendant, Elizabeth Scriven for principal and interest upon her said mortgage, and that her costs might be taxed; and that upon payment by the plaintiff to the defendant of what should be found due to her for such principal, interest and costs, as the

Court should direct, she might be ordered to reassign to the plaintiff; also that an account might be taken of what was due for principal and interest on the mortgage of the plaintiff, and that the defendants Gledstaues and other incumbrancers subsequent to the plaintiff might be decreed to pay to the plaintiff the amount which should be found to be so due, together with his costs of the suit, by a short day, or in default thereof that the said last-mentioned defendants and all persons claiming under them, might be foreclosed. The assignee in insolvency, by his answer, said that to the best of his information and belief no notice of the assignment to the plaintiff, or of the charges or alleged charges of the other defendants, was ever given to the trustees of the settlement of the 2nd Sept. 1829, before the arrest of the insolvent, and he submitted that as against such of the alleged incumbrancers as had not given notice to the said trustees before the insolvent's arrest, the said reversionary interests were in the order and disposition of the insolvent at the time of his insolvency, and that they were not entitled to any charge as against him, the assignee. The plaintiff deposed that early in July, 1859, Mr. Venables called and requested deponent to lend him 350*l.* in anticipation of a larger loan which he was then negotiating with a reversionary interest society, upon the security of his reversionary interest under the settlement of the 2nd Sept. 1829, and under the will of his father; and Mr. Venables then represented to deponent that Messrs. Bridges and Son were solicitors for the trustees of the settlement, "and that the said trustees and their said solicitors were aware that he was about to borrow money upon the security of his said reversionary interests." Mr. Venables then showed deponent a letter from Messrs. Bridges and Son, dated 28th June preceding, to him, in which they said, "We have seen the solicitors of the reversionary company of which you are desirous of borrowing money on your reversion, and we think on the whole that it may be your best course to raise money in that quarter rather than from an individual. We are given to understand that an insurance on your life will not be required, and that the office will be satisfied with an assurance of the goodness of the trust securities without going to the expense of investigating the titles of the mortgaged estates.....If you should still determine to raise money of the office, we will not object to furnish necessary information, and produce the trust-deeds." The plaintiff also deposed that he requested his managing clerk to take the above letter to Messrs. Bridges and Son, and to make enquiries. The clerk deposed that on the 6th July he accordingly saw Mr. Bridges, sen., and was informed by him that the statements made by Mr. Venables were correct, that the firm of Bridges and Son did act as solicitors for the trustees of the said settlement, and had in their possession the deeds relating to the trusts as the trustees' solicitors. On the same day deponent informed the plaintiff, and the plaintiff deposed that in consequence of this information he advanced the two sums of 350*l.* and 150*l.* On the 1st Oct. 1859, the plaintiff wrote to Messrs. Bridges and Son in these terms: "I have, as I mentioned to you at the Accountant-General's office, a claim of 500*l.*, and to secure which I have an equitable charge;" and a correspondence ensued, in the course of which Messrs.

Bridges and Son spoke of the plaintiff's debt as being "well secured," and as held "upon a reversionary interest of ample amount." On the 3rd Nov. 1859, a copy of the letter of the 30th July 1859, was sent by the plaintiff to Messrs. Bridges and Son. The incumbrancers subsequent to the plaintiff sent in notice of their claims to Messrs. Bridges and Son on the 20th Oct. and the 31st Dec. 1859 respectively. Thus there was abundant evidence of notice having been given to the solicitors; but with respect to the trustees themselves, a letter was put in evidence, written on behalf of Mrs. Venables, one of the trustees and executors of the will, which stated that "to the best of her recollection she had no notice that her son Mr. E. Venables had assigned to him any sum of money or his interest in his father's will, and that she had been all along perfectly ignorant of her son's affairs." The Rev. Mr. King, the other surviving trustee of the will, also said that he had never, to his knowledge, received any notice whatever, either verbal or written, from Mr. Rickards. Mr. Sturt, who was the sole surviving trustee under the settlement, said that he had no recollection of any notice in writing being served on him relating to the plaintiff's security, but on cross-examination he admitted that he had heard of Mr. Venables trying to raise money on the reversion of the fund of which he was trustee; he said that Messrs. Bridges and Son had told him that Mr. Venables had raised money on his reversion. Witness was not aware of any, except to Miss Scriven and Mr. Rickards. He had no positive recollection of the amount of the sum due to Mr. Rickards. He was not aware that Messrs. Bridges and Son told him that Mr. Rickards had advanced money previous to the bill being filed. Stuart, V. C. on the cause coming on upon motion for decree, held that the notice to the trustees by the plaintiff was sufficient. The defendant Walter Evans Gledstaues thereupon brought the present appeal.

Bacon, Q.C. and *Gill* appeared for the plaintiff.

Malins Q.C. and *Freeling* for the defendant Gledstaues.

C. H. Keene for the defendant Robson, a judgment-creditor.

W. D. Gardiner appeared for the defendant William Hudson Hand, another judgment-creditor.

Cases cited:—*Tibbits v. George*, 5 Ad. & El. 107—115; *Foster v. Blackstone*, 1 Myl. & K. 297; *Durand's Trusts*, W. R. 1859-1860, 33; *Ex parte Carbis, re Croggon*, reported in a note to *Ex parte Watkins, re Kidder*, 1 Mont. & Ayr. 693, n.; *re Barr's Trust*, 1 K. & J. 219-234; *Ex parte Boulton*, 1 De G. & Jo. 163; *Smith v. Smith*, 2 G. & M. 231; s. c. 4 Tyr. 52.

The LORD CHANCELLOR, without hearing a reply, said he was clearly of opinion that he ought to affirm the decree of the V. C. It could not be denied that the question for the court to decide was open to difficulty. The law, as settled by decision, had not defined the nature of the notice to be given; it was always, therefore, open to argument whether the notice given in each particular case was sufficient. The law required no definite form of notice, and his Lordship knew of no rule except that the notice to be given must be clear, and it must be shown to have arrived, or that it might be reasonably presumed to have ar-

rived, at the hands of the party for whom it was intended. It had been laid down that notice to the solicitor of trustees must be taken to be notice to the trustees themselves. The solicitor, however, to whom notice was so given must be the solicitor for the trustees acting in the particular matter at the time of the service of the notice. His Lordship thought that it was clearly established by the letters of Messrs. Bridges and Son, particularly the letter of October, that those gentlemen were *de facto* the solicitors for the trustees in the matter of the trust, and that the letter written by the plaintiff was addressed to them in that capacity, and with full knowledge that they were such solicitors. It was a clear, distinct and valid notice to the trustees. The petition of rehearing must therefore be dismissed with costs.

Court of Queen's Bench.

Reported by Walter M. Bourke, Esq., Barrister-at-Law.

BELFAST WATER COMMISSIONERS, APPELLANTS; W. GIRDWOOD, RESPONDENT.—Jan. 14.

Water Supply Act, 3 Vict., c. 79, construction of—Meaning of the word "inhabitant"—Twenty years' acquiescence—Jurisdiction of superior court under 20 & 21 Vict., c. 43.

When public works had been constructed under powers given by the 3 Vict., c. 79, to Commissioners appointed for that purpose, and the inhabitants of Belfast had acquiesced for twenty years in the manner in which they were executed and conducted. Held, that they were thereby precluded from suing the Commissioners, and recovering the penalties imposed on them in that behalf.

Held also, that a filtering basin which adjoins the town basin, though with a different level, was a portion of the town basin within the meaning of the 3 Vict., c. 79.

Held also, that the Court of Queen's Bench had jurisdiction to hear the appeal under the 20 & 21 Vict., c. 43, notwithstanding the provisions of the 3 Vict., c. 79, s. 146.

Held also, per Hayes J., that the term "inhabitant" in the 3 Vict., c. 79, does not necessarily mean resident inhabitant.

THIS was a case stated by the justices of the peace at the Belfast Petty Sessions for the opinion of a superior court, pursuant to 20 & 21 Vict., c. 43. The respondent had sued the Belfast Water Commissioners under the 3 Vict., c. 79, and sought to recover the penalties therein given, because that, on the 7th day of February last, the said Commissioners failed to keep charged with water at such pressure as the town basin would afford, the whole main pipes belonging to them within the limits, &c. It was first complained that the Commissioners did not keep the mains in Bedford-street full on the night in question, on which night a destructive fire had occurred in that street; but, it being contended on their behalf that the pipes in Bedford-street were not mains at all, but service pipes, the respondent abandoned this part of his complaint, but insisted that he was entitled to the pen-

alties sued for, on the ground that the mains were not laid into the town basin, and consequently were not supplied with water at such pressure as the town basin would afford. On this head the magistrates convicted, and awarded the penalties accordingly. On the evidence, which was given before them, it appeared that there were three basins—an upper one, a middle one, called the town basin, and a lower one called the clear-water basin; that the mains were supplied from the clear-water basin, which was often called the town-basin; that the middle basin was usually called the town basin, and was on a higher level than the clear-water basin, and that the middle basin gave a variable pressure, being sometimes as low as the clear-water basin, which gave a constant pressure, and that, if the mains had been connected with the middle, they would have become choked with mud, and would give dirty water. The parliamentary plans were not produced, but the engineer who drew them, and who had constructed the works, proved that the clear-water basin was not marked upon the copy of said plan produced, that details were not generally marked out in parliamentary plans, and that the clear-water basin was part and a necessary adjunct of the town basin, the former being seven feet below the latter; that the pipes were of a larger bore than had been originally intended, and afforded as large a supply as if smaller ones were laid into the middle basin; that his plans had not been carried out in their integrity, but that he had intended originally to supply the town directly from a clear-water basin; that the town basin and clear-water basin were not one and the same thing. The respondent was the owner of premises, not dwelling houses, in Bedford-street, rated at the two penny rate. He carried on business in these premises, but resided beyond the limits of the town as comprised within the limits of the Act.

W. D. Andrews (with him *Law, Q.C.*) for the appellants, argued on the construction of 3 Vict., c. 79, s. 129, that the word *inhabitant* meant *resident inhabitant*; that the distinction between occupiers and inhabitants was shown by the special rating in section 95 for buildings and dwelling houses, and that it was further established by ss. 68, 70, 90, 91.—*Rex v. Nicholson* (12 East. 330,) 43 El., c. 2, s. 1. The 14th section of the Act under which this action was brought, provided for such immaterial errors as the omission of the clear-water basin from the plan. The plan shows the area within which the works were to be constructed, and gives a margin of 100 yards. No levels were specified; the town basin, therefore, is the basin from which the town is supplied. In order to bind the Commissioners to any particular detail, express words to that effect must be used in the Act.—*North British Railway Company v. Todd* (12 Cl. & Fin. 722); *Hodges on Railways*, 465).

A. M. Porter, contra.—The court had not jurisdiction to hear this case, for the provisions of the 146th section are not negatived by the 20 & 21 Vict., c. 43, s. 10. Previous exemptions from the jurisdiction of the court holds against subsequent affirmative and general enactments, though not against subsequent negative enactment.—*Rex v. Pugh* (1 Doug., 188). (The court held they had jurisdiction.) It is not necessary to prove the complainant to be an inhabitant

because any one may sue under the 129th section of the 3 Vict., c. 79. That section refers to the recovery of other penalties when directing the manner in which the penalty here sued for is to be recovered, and, by the 143rd section, any person can recover other penalties. The respondent was, as a ratepayer, sufficiently an inhabitant within the meaning of the Act. The objection that the respondent is not a resident inhabitant is merely formal, and, therefore, by the 146th section, that objection is not to quash the action.—*Rex v. Mashiter* (6 Ad. & El. 153); *Attorney-General v. Parker* (3 Atk., 577); *Attorney-General v. Forster* (10 Ves., 335); *Coke*, 2 Institutes, 702. An owner is a person entitled to the rent—a. 109. An owner or occupier is called an inhabitant in the 129th section; therefore, an owner is an inhabitant whether he reside or not; and, by the 129th section, any person occupying premises and paying water rates is an inhabitant. It has been argued that the Commissioners have a right to erect what works they like, but this would go to prove that they might keep the pipes charged at any pressure, though the town basin had a definite existence under the Act, which the clear-water basin had not. The Commissioners are, by the 14th section, bound by the map and plan, and section 15 specifies the limit of deviation from the plan; but the clear-water basin not having been mentioned in the plan was illegally erected.

LEFROY, C.J.—This action is late, and there are no grounds to sustain it. The inhabitants of Belfast acquiesced in the construction of the works for over twenty years.

O'BRIEN, J.—The first charge brought against the appellants was, that there was no water in the mains in Bedford-street on the night in question. This was afterwards abandoned, and they were charged with not keeping the mains charged with water at the specified pressure. This has not been proved against them. It has been shown that the mains were not laid to the basin generally called the town basin, but it does not appear from the Act that the clear-water basin is not the town-basin. The pressure in the town basin is sometimes greater than that in the clear-water basin, but there is no evidence to prove that it was less on the night of the 7th of February. Moreover, the inhabitants had acquiesced for more than twenty years.

HAYES, J.—Two objections to the decision of the magistrates. First, that the complainant was not an inhabitant. I think he was, and that the word inhabitant does not necessarily mean resident inhabitant, but means an occupier of rateable premises. Secondly, that the charge of not keeping the mains charged at such pressure as the town basin would afford, is sufficiently answered by the fact of the mains being laid into the clear-water basin. But what is the town basin? Power is given to the Commissioners under the Act to erect receivers as well as basins. A basin is a collection of water from which the pipes draw their supply; a receiver is a collection of water from which the basins draw their supply. The upper and middle basins are mere receivers; the lower one is the town basin. The town basin is specified for the purpose of having an equable pressure, but this can

only be had from the lower basin, which is the town basin. Even allowing it to be clear that originally the lower basin was not the town basin, acquiescence for twenty years is sufficient to establish it as the town basin.

FITZGERALD, J.—I give no opinion as to whether the respondent is an inhabitant within the meaning of the Act. The point to be decided is, what is the town basin? I take it that both the lower basins are but one. The Act directs the supply to be taken from the town basin, and the principal object being to give wholesome water, the supply of water in the case of fire was only secondary. The Commissioners have given as wholesome water as they could at the highest possible pressure.

Conviction quashed.

Law, Q.C., applied for the costs for appellant on the authority of *Venables, appellant; Hardiman, respondent* (4 Eng. Jur., N.S., 1108).

Porter resisted the application because of the strong opinion of the magistrates as to the culpability of the Commissioners.

No costs were given.

Agent for the plaintiff—R. Cassidy.

Agents for the defendant—H. & W. Seeds.

RE JOHN PAUL, AN INSOLVENT.—Jan. 31.

Insolvent—Warrant of commitment—Remand—Irish Bankruptcy and Insolvency Act, 1857.

Where the warrant for commitment of an insolvent debtor, who was admitted to bail previous to the hearing, but had been in custody under a ca. sa. issued by the creditor who opposed his discharge, was silent on the causes for which it was awarded—Held, that a writ of habeas corpus did not lie.

A CONDITIONAL order for a *habeas corpus* had been obtained. John Paul, the insolvent, was arrested under a *ca. sa.* for £93 11s. 10d., at the suit of Francis Wallace, on the 11th of January. His petition in insolvency was filed on the 18th of September, and at the hearing, which was on the 24th of October, 1861, his discharge was opposed by Wallace. At an adjourned hearing on the 7th January, 1862, his discharge was again opposed by Wallace, and the following warrant was issued by the chairman:—"Upon adjudication it is ordered, that the said insolvent shall be remanded and detained in your custody at the suit of Francis Wallace, the detaining creditor, for the period of ten calendar months," &c. The order on which the warrant was made, stated the grounds upon which the decision was founded in these words—"In the matter of John Paul, remanded for ten calendar months, for having fraudulently, and with the intent of diminishing the sum to be divided among his creditors, made away with his property." It appeared from the affidavit of Wallace that an application to the Queen's Bench for a *habeas corpus* made on the 23rd November, 1861, was refused with costs, and that a similar application had been refused by the Court of Bankruptcy and Insolvency.

J. Hamilton moved that the conditional order for a

writ of *habeas corpus* to issue to the sheriff of Donegal and governor of the goal of Lifford, to have before the court the body of said J. Paul, together with the day and cause of his having been taken and detained, be made absolute. The insolvent could not be detained under the warrant, and there was no other authority for keeping him in custody.—*Berry's Case* (7 Ir. Jur., 164); *King v. Clerk* (1 Salkeld, 348); Paley on Convictions, 278; Comyn's Digest, Imprisonment.

M. Harrison, contra, cited *Ex parte Knight* (2 Mees. & Welsby, 106; a.c. 13 Jur. Eng., 606); Irish Bankruptcy and Insolvency Act, 1857, sec. 229, &c.

LENNOR, C.J.—We refuse the motion. The order justifies the jailor in detaining the insolvent. The insolvent must blame his own folly for having to pay the costs.

O'BRIEN, J.—The effect of issuing the *habeas corpus* would be, that we should remand the insolvent. He must be considered as in custody under the joint operation of the *ca. sa.*, and the order of the chairman.

HAYES, J.—*Berry's case* has no bearing on the present one; it was well decided under the 3 and 4 Vic., but, since then, there has been a material change in the law, and the order of the court is sufficient authority to the jailor. If we issued the writ of *habeas corpus*, and that the jailor returned the warrant of the 7th January, 1862, it would be an improper return—the return should be the order of the court as it appears in the court books. This may not be in the custody of the jailor perhaps, but that is immaterial; an attested copy of the record of the court would be enough for him. Having all the circumstances before us, we see that no good could come from issuing the *habeas corpus*; we are satisfied that the insolvent is not illegally in custody, and it would therefore be improper to issue the writ.

FITZGERALD, J.—If the warrant be defective it is bad; but if the order be bad, the insolvent remains in custody, for the custody under the *ca. sa.* was never changed.

Motion refused.

Agent for the insolvent—H. McCay.

Agents for the detaining creditor—Hayden and Rogan.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ENRIGHT v. PROMOTER INSURANCE COMPANY.—Jan. 25.

Practice—Plaintiff changing his own venue.

The court will change the venue on the application of the plaintiff when he accounts satisfactorily for having laid it in a place different from that to which he wishes it to be transferred, the defendant failing to exhibit such a preponderance of convenience as would have induced the court to change it, supposing it to have been originally laid where the plaintiff now seeks to have it.

In this case the Promoter Life Assurance Company were sued for the amount of a policy effected on the life of one Crosbie. The venue had been laid in Dublin.

Clarke, Q.C. (with him Sidney), moved on the part of the plaintiff that the venue be changed from

the county of the city of Dublin to the county of Kerry.—The summons and plaint is in the ordinary form; and the pleas put in by the defendants allege that untrue answers had been given to the queries of the Company at the time that the proposal was made. They state the deceased was represented not to have been afflicted with any disorder calculated to shorten life, whereas he was, in fact, afflicted with spitting of blood, with consumption, with dropsy, and with disease of the liver; in short, it appears that, with the exception of half a dozen fatal complaints, he enjoyed ordinary health. To the question whether the deceased's habits were sober and temperate, it had been replied that he did not drink more than a gentleman usually drank. The plaintiff's affidavit states that he had a life interest in lands purchased by him for the life of Crosbie; that the defendants have paid to him the amount of another policy effected by him on the same life; that Crosbie constantly resided in the county of Kerry during his life; that all the material witnesses in the present action reside there; and that the plaintiff laid the venue in Dublin, never expecting that these defences would be put in, or, indeed, that the action would be defended at all.

Hamill, for the defendants, opposed the motion. There is more in the pleas than has been stated to the court. We allege that the plaintiff tried to insure the life of the said Crosbie in other offices, and that it will be necessary to bring over some of the officers of these English Companies. It is with a view to this that the plaintiff asks to have his venue changed. The widow of Crosbie resides in Dublin, and so does the agent of the Britannia Insurance Company, whom we propose to examine. The Clerk of the Hanaper Office can prove that the deceased was twice dismissed from the commission of the peace for intemperance. We do not say that a fair trial cannot be had in the county of Kerry; but we suggest that not so fair a trial is likely to be had in a county in the country, the defendants being a public company. When the plaintiff has laid the venue he has no right to seek to change it.

MONAHAN, C. J.—The defendants in this instance have not made a case sufficient to change the venue to the county of the city of Dublin, supposing it to have been originally laid in the county of Kerry. This being so, and the plaintiff having accounted for his laying it in Dublin, by saying that he did not expect that the action would be defended, we think the venue ought to be changed. As regards the stereotyped representations concerning fair trials not being had in a particular county, we cannot listen to them. The plaintiff will have no costs of the motion; the defendant's costs to be costs in the cause. [It was arranged by consent that the venue should be changed to the county of the city of Cork.]

Rule accordingly.

BRISTOW v. BROWN.—Jan. 25.

Pleading—Demurrer—Equitable Defence.

In an action against the maker of a promissory note, it is competent to him to plead, by way of equitable defence that the note in question was made in con-

consideration of recovering back securities which had been deposited with the plaintiff by the defendant on account of a bill of exchange, of which the defendant was the acceptor, the plaintiff representing to the defendant at the time of the deposit that the defendant was then liable upon the bill of exchange, when, in fact he was not liable, owing to the intervenient acts of the plaintiff.

THIS was an action by one of the directors and registered public officers of the Northern Banking Company to recover from the defendant the amount of two promissory notes for £150 6s. 2d. each, and both bearing date the 10th October, 1860, the one to run for three months, the other for six from that date. The defendant pleaded by way of equitable defence, that in May, 1857, one James Maxwell drew a bill of exchange for £510, and that the defendant accepted it for the accommodation of the said James Maxwell and as his surety, and that the said James Maxwell endorsed the said bill to the Northern Banking Company, and that at the time when it was so endorsed the Northern Banking Company had notice and knowledge that the defendant was a surety, and had accepted the said bill for the accommodation of the said James Maxwell, and took said bill with such notice and knowledge; that the said Northern Banking Company without the knowledge and consent of defendant, and for a good and valuable consideration agreed with the said James Maxwell, to give and did give to the said James Maxwell time additional, and beyond the time for which the said bill of exchange had to run for payment of same; that on the 9th of March, 1859, the defendant was applied to by the attorneys for the said Northern Banking Company, who were also attorneys for the plaintiff for payment of the amount of the said bill of exchange, when the said attorneys represented to the defendant that he was then liable upon the said bill, and proposed to him to deposit certain title-deeds with the said Northern Banking Company, as a security for the payment of same, which he accordingly did; that in October, 1860, the defendant applied to have his title-deeds returned to him, which the attorneys for the said Northern Banking Company refused to do, except upon the payment of £150 upon account, and on condition that the defendant would give his promissory notes for the balance of the said bill, both of which he did, and that the notes so given are the notes in the summons and plaint mentioned; that the defendant never knew till after the commencement of this action that additional time had been so given to the said James Maxwell, and that there was no consideration for the said promissory notes, nor for the deposit of the title-deeds by the defendant with the said Northern Banking Company. To this plea the plaintiff demurred on the following grounds:—1. Because it appears from this defence that the defendant received sufficient consideration for the promissory notes. 2. Because the said defence does not disclose a state of facts upon which a Court of Equity would absolutely and unconditionally enjoin the plaintiff not to sue the defendant on foot of the said promissory notes.

Joy, Q.C., (with him *May*), in support of the demurrer.—This case is peculiar. In all the English

cases which will be relied on as containing precedents for this plea, your Lordships will find the words "fraudulent," "untrue," or "misrepresentation" occurring. They are not here. There ought to be an averment that the plaintiff could have recovered from the principal debtor. Such an averment is in the English cases. How is the defendant prejudiced by giving additional time to James Maxwell? Neither does the plea allege that the representation of liability was made with the privity of the Bank. To come within the cases there must have been a misrepresentation of fact, and this is not stated in the plea. In *Milnes v. Duncan* (6 Barn. & Cres., 671), Bayley, J., says, "If a party pay money under a mistake of the real facts, and no laches are imputable to him, (in respect of his omitting to avail himself of the means of knowledge within his power) he may recover back such money;" but here the defendant was guilty of laches. What existed to prevent him from going to James Maxwell to ascertain his liability? It would prove very injurious to the commercial community if it were decided that the holder of a bill is not only bound to make no misrepresentation, but also bound to volunteer information. *Steele v. Beale* (11 Adol. & El., 983)—decided that duress of goods was no ground for avoiding an agreement. Is there such a state of things here as would induce a Court of Equity to issue an injunction without any further information? By giving his title-deeds the defendant places the Northern Banking Company in a different condition from that in which they were. They might then have sued him, and it might then have appeared, if this defence had been set up, that the Bank had reserved its rights against the surety, or that the surety had waived the point. There is a consideration for these notes on the face of this defence. The plaintiff gave something to the defendant, which he, at the time, considered valuable on the faith of these notes, and there is no fraud imputed, and he cannot excuse a breach of the promise by alleging that the thing given up was not of the value he had supposed. *Haigh v. Brooks* (10 Adol. & El., 309)—The fact that the notes were for three and six months, respectively, and the degree to which this tied up the Bank amount in themselves to a consideration. Counsel referred to *Strong v. Foster* (17 Com. Bench, 201); *Smith v. Monteith* (13 M. & W., 427); *Cornfoot v. Fowke* (6 M. & W., 358).

Andrews, Q.C., (with him, *Pigot*), contra.—This is a good equitable defence. *Pooley v. Harradine*, (7 El. & Black., 431); *Davies v. Stainbank* (6 De. Gex., Macnaghten and Gordon, 679).—In the latter case indorsees of bills of exchange as a security for a floating balance due on the accounts between them, and the drawer had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter, that the existing debt should be liquidated by the drawer, building for them certain ships, and should, in the meantime, be secured by a policy of assurance, and it was held that time was thus given to the principal debtor, and that the surety was released in equity, if not at law also; and that he might institute a suit for equitable relief, and an injunction to restrain the proceedings at law, whether he could or could not use by way of defence

in such an action the giving of time to the drawer, and Knight Bruce, V. C., says, at page 689, "If, then, this agreement became, as I think it did, binding on Messrs. Stainbank and B. Davies, it had, in my opinion, the effect of discharging the plaintiff, if not both at law and in equity, at least in equity, from responsibility to Messrs. Stainbank on the bills, unless the plaintiff assented to it; for it did not reserve to the creditors liberty to proceed, as they otherwise might have done against him." Time given to a principal is not a suspension of the remedy against the surety, it is an absolute discharge. See the observations of Vice-Chancellor Wood in *Newton v. Chorlton* (2 Drewry, pp. 337 and 338), and the decisions of Lord Eldon there referred to. *Strong v. Foster* has been relied on on the other side, but there the truth of the plea was not proved; the facts did not amount to showing that time had been given to the principal debtor. In equity it is competent to a surety to show he is a surety, although apparently a principal on the face of the instrument. *Skip v. Huey* (3 Atkyn. 90); *Reynolds v. Wheeler* (30 Law Journal, Com. Pleas, N. S., 350, observations of Williams, J.) A person who is compelled to pay money in order to obtain the possession of deeds to which he is entitled, may recover the amount as money had and received. *Marriot v. Hampton* (2 Smith's Leading Cases, 356), and the notes, *Gibbon v. Gibbon* (13 O. B., 205); *Oates v. Hudson* (6 Excheq., 346); see also *Close v. Phipps* (7 Man. & Gr., 586); *Mutual Loan Fund Association v. Sudlow* (28 Law Journal, N. S., C. P. 108); *Rawlins v. Wickham* (3 De Gex. and Jones, 304).

Jan., 30.—MONAHAN, C. J., repeated the facts and proceeded.—The first question which arises here is this, supposing an action brought upon the original bills of exchange and not on these promissory notes against the defendant, would the plaintiff's giving time to the principal debtor without the knowledge of the defendant amount to an equitable plea? It is a general rule in courts of equity that if the holder of a bill of exchange, takes away any of a surety's remedies or any of his rights, he thereby parts with his own right of action, 'this is the general rule, and has not been questioned at the bar. It is unnecessary now to consider whether the present plea would be a legal defence to an action on the original bill. *Davies v. Stainbank* was a case decided by the highest authority short of the House of Lords. Let us look at the facts of it. The endorsees of certain bills of exchange entered into an agreement with the drawer, to liquidate the debt by building ships, and by a policy of assurance, they knowing that the acceptor was a surety only, and without acquainting him with this step, they afterwards bring an action against him, and recover the amount of the bills, upon which he discovers this agreement for the first time, and files his bill for an injunction to restrain execution in the action, and the Vice-Chancellor makes the order and, on appeal to the Lords Justices, it is confirmed. Again in *Pooley v. Harradine* (7 El. & Black. 431)—the defendant pleaded in an action on three promissory notes, that he made them as the surety only of John Harradine, and that save as aforesaid there was no consideration for them of

which the plaintiff had knowledge, and that without the knowledge or consent of defendant for a good and valuable consideration he gave time to the principal debtor, and upon demurrer to this plea judgment was given for the defendant, and the plea was held a good equitable plea. There was then a good equitable defence to an action on the original bills in this instance. We have next to inquire if the relation in which Brown stood to the plaintiff is altered by the subsequent facts. The application by the solicitors of the Bank for payment is an application on the part of the Bank, and they represent to the defendant that he is still liable on the bills. It has been truly said that there is no allegation in this plea that the representation was falsely made, but, without doubt, their principals, the Bank, must have known the facts of the case, and knowledge of the principal is knowledge of the agent; this representation, therefore, is as injurious to the Bank and as beneficial to Brown as if made by the directors themselves. Thirdly, and these things being so, can any one doubt that a Court of Equity would relieve the defendant if he filed a bill for relief? Not only so, but had he brought trover for these title-deeds, he would have been entitled to recover them. If money is paid under a mistake of facts it can be recovered. In *Milnes v. Duncan* (6 Barn. & Cros. 671)—a bill of exchange was drawn in Ireland upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in England: the indorsee who was really not liable on it paid the amount of it to the holder in ignorance of the fact that it had been drawn in Ireland, and it was held that he might recover it back in an action for money had and received, and in giving judgment, Bayley, J., makes the reservation about laches, which has been cited at the bar, he says, "If no laches are imputable to him, (in respect of his omitting to avail himself of the means of knowledge within his power)," but this case came under the consideration of the Court of Exchequer, in *Kelly v. Solari* (9 M. & W., 54)—and this reservation was entirely discarded by Parke, B., in his judgment, and by the whole court. In that case an Insurance Company had paid the amount of a lapsed policy, forgetting at the time that it was so lapsed, and though unsuited in a trial to recover it back, the court granted a new trial, and Parke, B., says, "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition, that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice Bayley, in the case of *Milnes v. Duncan*, and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of

the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact." On the authority of these cases it is impossible to doubt that a court of equity would relieve this defendant, and also that trover would lie for the title-deeds. It remains to be seen if the Northern Banking Company are entitled to sue on promissory notes given for the recovery of these deeds. Several cases establish that if a party pay money, though with a knowledge of all the facts, in order to get back his own property, he can recover the money. So *Wakefield v. Newton* (6 Q. B., 276).—In that case the mortgagor of certain lands paid the expenses of the mortgagee's attorney under protest, in order to get his deeds back, and it was held he could recover them in an action for money had and received against the attorney; and this case is important, because Lord Denman, in giving judgment, corrects his own previous judgment in *Skeate v. Beale*. The same point was more recently decided in *Gibbon v. Gibbon* (19 C. B., 205), and *Oates v. Hudson* (6 Exchequer Rep., 346), and the case of *Bell v. Gardiner* (4 Man. & Grainger 11)—differs very slightly from the present. There a bill of exchange was endorsed by the defendant for the accommodation of the drawer, and afterwards altered in a material point with the consent of the drawer, and when the bill was at maturity, the holder made a demand upon the defendant who, ignorant of the alteration, though he had ample means of knowing it, gave the holder a promissory note for the amount of the bill and expenses; and it was held a good defence to an action on the note that at the time the defendant gave it, he was not aware of the alteration in the bill. The present case is stronger, because of the misstatement. This is therefore a good equitable defence, and so there must be

Judgment for the defendant.

Court of Exchequer.

[Reported by L. S. Hamsie, Esq., Barrister-at-Law.]

DEXTER v. CUST.—Nov. 13.

Weighmaster—Oath taken after appointment—52nd Geo. 3, c. 134—Disturbance—Damages.

Where D. was appointed to the office of weighmaster, of the town of T., under the 52nd Geo. 3, c. 134, in October, 1859, but did not take the oath prescribed by the statute till April, 1860, and C. opened a weigh-house in the same town, enticed away D.'s customers, and took the fees allowed by the statute—Held, "that there was a disturbance of D.'s office;" that the word "wherein," in the 6th section of the Act, referred to the words "city, town corporate, and county," in the preceding sentence; "that the oath required by the statute might be taken at the sessions subsequent to the date of the appointment;" and that exemplary damages beyond the mere pecuniary loss of D. might be given.

And Held, by Pigot, C.B. and Hughes, B., "that the appointment was not invalid, because, instead of the words 'I shall continue,' in the Act prescribed, the words of the oath taken were, 'I shall hold,'"
Fitzgerald and Deasy, B.B., dissenting.

THIS was an action to recover damages for the disturbance of plaintiff in his office of butter weighmaster, in the town of Tipperary. The action was brought under the 52nd Geo. 3, c. 134. The summons and plaint contained six counts. The first count averred that Tipperary is a market town; that plaintiff was appointed sole public weighmaster, and was then lawfully possessed of the office and entitled to the fees; that after said appointment defendant exercised the office of weighmaster, and did within the town take certain customs and fees which of right belonged to the plaintiff. The second alleged that plaintiff was solely entitled to said office; and that defendant took and received certain fees, whereby the plaintiff was deprived of certain fees that by right he ought to have received. The third sets forth that threats were employed by defendant, and also the enticement away of the farmers by him from the plaintiff (On this point there was no evidence, and there was a direction for the defendant). The fourth averred that defendant's servants stood near the weigh-house to entice away the farmers, and posted bills, &c., &c., and deprived him of the fees he would otherwise have received. The fifth states a disturbance of plaintiff in his office generally; and the sixth was for money had and received. The defences to these several counts were all simple traverses, except one, applying to all the counts save the sixth, to the effect that plaintiff was not entitled to any fees, and that there was no public weighmaster, because Tipperary was not an export town within the Act. Three questions were involved in the case. The plaintiff was appointed at the October sessions of 1859 in Tipperary; he entered into a *recognizance* before the clerk of the peace, which the latter took instead of the bond, into which plaintiff did not enter till April, 1860. The question now arose on this state of facts, whether plaintiff had any title to the office, as the bond was not entered into the proceeding sessions, as required by the 6th section of the before-mentioned Act. The second question arose from the fact, that whilst the form of oath prescribed by the statute is, that "I do swear that I will diligently and faithfully execute the office of weighmaster, &c., &c., during the time that I shall continue in said office, &c., &c." The word "hold" was substituted for the word continue, in the oath taken by the plaintiff. The third point was on the question of damages. The case was tried at the last Spring Assizes, before the Hon. Justice O'Brien. The plaintiff proved that one Sadlier had acted as weighmaster; that he had succeeded to his place; that there was then no other weighmaster; that when he commenced business in the year 1852, he only made £32; and that in 1859, he made nearly £500 per annum; that he knew the defendant, and was introduced by him in 1858 to a person named Widdington, as the richest man in Tipperary; that he told defendant he, plaintiff, was making over £500 a-year; that he knew James Hayee, Coleman, and Jeremiah Hayes; that he opened a weigh-house in Church-street, and in 1859, attended

the October Sessions; defendant was there on the bench. Plaintiff then enumerated several persons who had been enticed away by defendant; and a letter of the 26th May, 1860, was given in evidence. A point was attempted to be made at the trial that plaintiff was non-resident; but it appeared he appointed a deputy, as he was entitled to do by the statute. At the close of plaintiff's case *Rollestone, Q.C.*, contended that the appointment was illegal; because, firstly, the appointment was in the hands of the Lord Lieutenant; 2ndly, because the appointment by plaintiff of a deputy, was invalid; and thirdly, because the bond and oath were not perfected at the October, but at the subsequent April Sessions. Counsel then called for a direction for the defendant, or a non-suit. This the learned judge declined doing, and told the jury that if they believed the evidence respecting Mænzner's appointment, that of the plaintiff was valid; and upon the issue respecting the bond of April, he told them that if they believed the plaintiff's evidence he was entitled to a verdict. The issues left to the jury were the 2d, 4th, 6th, and 8th, and so much of the 7th as was not conversant with the threats. These issues were respectively—2nd, which had reference to the 1st count, "Was plaintiff public weighmaster, and did he receive fees as such?" &c. 4th, in reference to the 2nd count, "Did defendant open a public weigh-house and receive fees, as in said count alleged?" 6th, "Did defendants employ persons to do the acts complained of in said 4th count, and entice away the farmers, &c., as therein alleged?" 8th, "Did defendant disturb the plaintiff in the exercise of his office as alleged?" 7th, "Did the defendant disturb the plaintiff in any of the ways in said 2nd, 4th, and 6th counts alleged?" Respecting the 2nd and 4th issues, the judge told the jury that they might take into consideration the conduct of the defendant as to opening a public weigh house. Upon this it was objected by defendant's counsel, that unless they believed that defendant did something which plaintiff was exclusively authorised by the Act to do, that there was no disturbance of him in his office; and respecting the enticing away customers, &c., that there was no enticement unless the plaintiff was exclusively entitled to the office. Respecting the damages, the judge told the jury that besides the amount of damages which they might award according to the principle laid down by the counsel for the defendant, they might give such further sum as they thought proper to compensate the plaintiff, regard being had to the circumstance of the case. Liberty was then reserved to defendant to move to have the damages reduced if the court above should be of opinion that the charge was wrong. The jury assessed the pecuniary loss at £149, and the further damages at \$350.

Armstrong, Q.C. (with him *Hemphill, Q.C.*, and *Tandy*).—The action is similar to an action of tort, and the jury were able to take into consideration the loss which had accrued to the plaintiff. [*Pigot, C.B.*—Do you contend that this is one of the class of cases where the jury are at liberty to give prospective damages to the plaintiff for the disturbance of his business? The mere loss of business is not a measure of damages.] All the elements which existed in the case of *Hudson & Mahony* (not reported) are found

in the present. The ruling of the judge seems to come within the case of *Dexter v. Hayes* (11 Ir. C. L. R. 105). Secondly, defendant's counsel called on the judge to tell the jury that unless that they believed that the acts relied on by the plaintiff were an assumption by the defendant of some exclusive privilege of the plaintiff, or was otherwise wrongful that the plaintiff was not entitled to a verdict. The third objection arises on the 52nd G. 3, c. 134, s. 3. In the oath taken the word "held" was introduced in place of the word "continue;" but mere verbal variances are immaterial, *Earl of Mountcashel v. Right Hon. Viscount O'Neill* (5th Ir. C. L. R. 586; 4th Ir. C. L. R. 345; and 2nd Ir. C. L. R. 436); *Regina v. Milner, Clerk and another* (3 Dow & L. 128). In the *Lancaster and Carlisle Railway Company v. Heaton and another* (8th E. & B. 952), the omission of the words, "so help me, God," from the oath to be taken by a tithe valuer, under the 5 Geo. 4, c. 28, did not disqualify from holding the office, being held to be merely indicative of the manner of administering the oath. In the present case the oath was taken at the April Sessions, 1860. The 13th section provides for the absence or misbehaviour of the weighmaster. The word "wherein," in the 6th section, must mean that the oath is to be taken before the magistrates of the county where the appointment is made; the other side want to read it as equivalent to "whereat." *King v. Courtenay* (9th East. 246); *The King v. The Inhabitants of Corfe Mullen* (1st B. and Ad. 211, and section 9 of the Act). The bond and oath are not to be given to the appointers, as, for instance, in the case of lapse of the appointment to the Lord Lieutenant, but to the justices of the county, and *M'Mahon v. Sir T. B. Tennard* (6th House of Lords cases, 970); *Keeble v. Hickeringill* (11th East. 574); *Rogers v. Dutt* (L. T. V. 3, 160). As to the direction respecting excess of damages, the conduct of the defendant, who used every means to entice away the plaintiff's customers, would warrant the jury in giving prospective damages—*Duke of Leeds v. Earl of Amherst* (20 Beavan, 239); *Weller v. Baker* (2nd Wilson, 414); *Blofield v. Payne* 4 B. & A. 410); *Wells v. Watling* (2d W. Bl. 1233); *Williams v. Currie* (1 Com. Bench, 841); *Emblen v. Myers* (30 L. J., N. S. Exch. 71). When nominal damages were given for a wrong, substantial damages may be given for a repetition of the act, though no damage may be proved in the second instance; *Shadwell v. Hutchinson* (2d B. & A. 97). The present being an action *ex delicto*, falls within the principle of *Williams v. Currie*.

Rollestone, Q.C. (with him *Waleh, Q.C.*, and *Johnstone*, contra).—The town of Tipperary was proved to have been in the centre of a butter trading county, and this was proved by the plaintiff himself. There are two points on the 6th section; 1st, the word "wherein" refers to the marking and branding essential before sale. As to not being sworn in in time, *Rez v. The Inhabitants of Corfe Mullen* (1 B. & Ad. 211), was decided on a statute of William and Mary, and does not apply. As to the form of oath, it says, "as long as I shall continue in the office I shall take care to weigh, &c., all casks in such order as they are brought to be weighed and branded." The oath that

is sworn leaves out any mention of a "taster." The case in 3d Dowling & L. p. 128, does not apply to the present. There it was held under the 8th V. c. 10, that the words, "for" and "in" were synonymous, but the proceedings set forth in the forms given in the schedule or others to the like effect were made sufficient. In the case in 8th E. & B. p. 952, the words, "so help me, God," are not a part of the oath at all, but a direction as to the mode of administering. There must be a substantial observance of every statute; *King v. Jefferies* (4th T. K. 767). In *Collins v. Hungerford* (2nd Irish Jurist, N. S. 519), under the 12th Vic. c. 16, sec. 9, the cases as to bills of sale prove the general rule; *Hatton v. English and Williams* (7 E. & B. 94); *Beales v. Tennant* (29th L. J. Q. B. 188); *Pickard v. Bretts* (29 L. J. Ex. 18). As to affidavits, *Mountcashel v. O'Neill* is not in point. As to the question of prospective damages, *Blofield v. Payne* (4 B. & A. 410); *Williams v. Currie* (1st Com. B. 841). As to whether this office is a franchise, a franchise must be expressly stated to be given by the Legislature, *Calcraft v. West* (2nd Jones & L. 123). The cases on trade marks are all collected in *Lawson v. The Bank of London* (18 C. B. 84); *The Collins Company v. Cowen* (3d Kay & J. 428); *Lumley v. Gye* (2 E. & B. 216); *Rogers v. Dutt* (3 L. Times, N. S. 160, and 9th Weekly Reporter, 149).

PIGOT, C. B.—This was an action to recover damages for the disturbance of plaintiff in his office of weighmaster, which he held in the town of Tipperary. There were several counts in the summons and plaint, and several defences. It appears that the plaintiff had acted from the year 1852 to 1859 as weighmaster, a person named Sadleir having acted as such previously, also without any appointment. Before the month of October, 1859, a person who was appointed in the month of July, 1827, but who was old, and had not been acting for many years, executed a surrender of the office for £5, by whom paid did not appear, but on plaintiff's own evidence it was admitted that it had been paid by him. The plaintiff was appointed at the quarter sessions in Oct. 1859; but the oath required by the 52nd Geo. 3rd, c. 134, under which the appointment was made, was not tendered till October, 1860. The oath prescribed by the Act is as follows:—"I, A. B., do swear that I will diligently and faithfully execute the office of public weighmaster of the city of, &c., in the county of, &c., being a place of export or market town of — in the county of — during the time that I shall continue in said office," &c. In the oath taken by the plaintiff in April, 1860, the words were, "while I shall hold said office;" in other respects his oath was that required by the statute. At the close of the plaintiff's case the learned judge was called on by defendant's counsel to nonsuit the plaintiff, or direct a verdict for the defendant, on the ground that plaintiff was not entitled to the fees or duly appointed by law. These points, under the 2nd section of the statute, have been argued before us. That section is, "And be it further enacted, that some time on or before the 1st day of March, 1813, in the city of Dublin, and in every city and town corporate in Ireland, except the city of Cork, the Chief Magistrate or Aldermen, or Chief

Magistrate or Burgesses, where there are no Aldermen, under the seals of their respective corporations, and in every seaport or place of export from whence butter is commonly shipped for exportation from Ireland, such place being no city or town corporate, and in every market town wherein butter is bought or sold, or exposed for sale for the purpose of trade, the justices of the peace for the county or counties in which such seaport or place of export or market town respectively lie, at some general quarter sessions of the peace for such county or counties respectively, or some adjournment thereof, before said 1st of March, 1813, under their hands and seals, where there shall not be a public weighmaster, or joint public weighmaster, appointed under any former Act or Acts, or where any vacancy shall happen," &c., &c.; and then provides, that "in case such an appointment shall fail to be made in any such city, town corporate, seaport, or place of export in Ireland, before said 1st of March, 1813, then herein directed, such nomination shall be vested in the Lord Lieutenant, or other chief governor or governors of the Privy Council of Ireland for the time being." Under this section it was argued by defendant's counsel that the appointment here was vested in the Lord Lieutenant. The second section is not accurately worded; but it appears to us on a reasonable construction of the words that the appointment is vested in the magistrates; and by the 4th section, he is removable by the magistrates for misbehaviour. Other parts of the Act show that a continuing authority of the Lord Lieutenant was contemplated. The 7th and 8th Geo. 4, c. 61, which abolished the office of "taster," referred to these sections of the Act of Geo. 3. The 10th Geo. 4, c. 41, contemplated the continuation of the office, but expressly says that nothing herein contained shall extend to oblige persons to have empty casks braided, or to bring casks of butter to be weighed before they are exposed for sale or exported. The Legislature, therefore, contemplated the continuance of the exercise of the office; but if the construction of the 2nd section of the 52nd Geo. 3, c. 134, contended for by the defendant's counsel be correct, no appointment could be made to the office of weighmaster under the subsequent statutes. I do not think that the second objection to the judge's charge can be maintained. The third objection arose on the 6th section of the Act of Geo. 3. That section is, "That each and every public weighmaster or weighmasters, his or their successor or successors, taster or tasters, to be nominated and appointed by virtue of and in pursuance of this Act, before he or they, or any of them shall enter on the execution of said office, shall perfect a bond with sufficient security to the mayor of each city, chief magistrate of each town corporate, and justices of the peace in each county at their county sessions, wherein such public weighmaster, taster, or tasters, shall be so appointed and nominated, &c., &c.; and that said weighmaster or weighmasters, and their deputy or deputies to be by them employed, together with the taster or tasters, shall take and subscribe before the said mayor, chief magistrate, or justices of the peace, the oath following (given above). The ground of objection at the time was, that although the appointment had been made the oath was not taken till the subsequent ses-

slow; and for the defendant it was argued that the oath should be taken at the same sessions at which the appointment is made, because of the inconvenience of there being an interval between the two acts, and the penalty imposed by the 12th section. For the plaintiff, on the other hand, it was argued that there was no absurdity in holding that the oath should be administered after the appointment. The best mode of interpreting the statute is, by giving the words contained in it their ordinary signification. Defendant's case is, that the word "wherein," in the 6th section, refers to the mayor, chief magistrate, and justices of the peace at their county sessions; whilst for the plaintiff 'tis said that it refers to the words, "city, town corporate, and county," in the preceding sentence. It appears to me that this latter is the correct construction. The words, "shall be so appointed," seem to me to refer to the words, "city, town corporate, and county." If that be so, and the word "wherein" refers to the city, town corporate, and county, there is no objection to the oath being administered at sessions subsequent to those at which the appointment is made. A further objection was to the form of the oath, the word "hold" having been used instead of the word "continue," it was urged that plaintiff was not entitled to the office, or to receiving the emoluments. I think that the reasoning was too minute to warrant the learned judge in refusing to receive the verdict for the plaintiff. The plaintiff could not continue without holding the office. None of the cases cited by defendant's counsel apply to the case before us. *Hart v. Lovelace* (6th T. R. 471), was decided on the ground that by the Annuity Act, 17 Geo. 3, c. 26, the Legislature intended that every circumstance relative to the annuity should be disclosed, and that more information was likely to be obtained on the subject, if the memorial of the annuity contained the names of all the witnesses to the different instruments rather than some only. In *Lovelace v. Curry* (7 T. R. 631), there was a total departure from the statute; in *Hatton v. English and Williams* (7th E. & B. p. 94), there was a total omission of what the Act of Parliament required; and in *Collins v. Hungerford* (2 Ir. Jur. 519), the ground of objection was similar. In *Miller v. Salomons* (7th Excheq. 475), it was held that there was an omission of what was required by the Act of Parliament, and therefore the case does not apply. Three cases were cited for plaintiff, and of these the case of *The Lancaster and Carlisle Railway Company v. Heaton and another*, has a close analogy to the present, where the court held that the oath under Geo. 4th, c. 28, had been properly administered though the oath subscribed omitted the words, "so help me, God," because the words omitted were no part of the oath. In *Regina v. Milner, Clerk, & another* (3d Dow. & L. 128), Judge Coleridge, in giving judgment, says, "I think the object of the Legislature in passing the 8th Vict. c. 10, manifestly was to discourage such objections as the present. Without meaning to say that "in and for" are synonymous terms, I find on reference to the forms given in the Act that they seem to be used there as such, and I therefore think this objection cannot be sustained. In the first of these cases the court held the words might be omitted, because

they were no part of the oath; in the second, that they might remain modified, because the previous words could not otherwise have effect. In the case before us the words taken appear to me to be synonymous with what was required by the Act of Parliament. The next objection was with respect to the disturbance of the plaintiff in his office. This refers to the direction given to the jury respecting the 2nd, 4th, 6th, and 8th issues. The second issue was whether the plaintiff was public weighmaster, and whether he received fees as such; the fourth, did defendant open a public weigh-house and receive fees, as in said (2nd) count alleged; sixth, did defendant employ persons to do the acts complained of in said fourth count, and entice away the farmers, as therein alleged; and eighth, did defendant disturb the plaintiff in the exercise of his office as alleged. All these issues together signify whether or not the defendant disturbed plaintiff in his office by the means alleged in them, viz., by opening a weigh-house, by taking the fees, by enticing the farmers not to sell and bring their butter to the plaintiff, and in the several other ways alleged. The charge of the judge respecting the 2nd, 4th, and 6th issues was,—I told the jury that respecting the 2nd and 4th issues, they were at liberty to consider the conduct of the plaintiff and the evidence respecting the establishment of the plaintiff's weigh-house; and respecting the 6th issue, I told the jury that plaintiff's office was one having, by Act of Parliament, fees attached to it, and that the disturbance of that might be by enticing away customers. Respecting the direction of the judge as to the 2nd and 4th issues, the objection of defendant's counsel was, that the judge ought to have told them that unless defendant assumed to do some act which the plaintiff was privileged to do, there was no usurpation (the question of usurpation is not in terms involved in the issue). A second objection was, that the acts complained of would not be a ground of action unless the acts of the defendant were an assumption of some privilege possessed by the plaintiff. To every part of the affirmative of the issues there was clear evidence of disturbance, for the plaintiff proved that before 1852 he acted as weighmaster. It appeared that during that period disputes had arisen, and a weigh-house was established by the butter merchants of Tipperary. In October, 1859, the appointment was made; between 1852 and 1859 the business had greatly increased. After the opening of the weigh house by the butter merchants, plaintiff proved that his business had decreased. Actions were then brought, and one of them was tried in 1860. Plaintiff proved that a proposition was made that he should execute an appointment as deputy to Riordan, who was appointed under the 6th of Anne, which was different from the appointment of a weighmaster under the 52d Geo. 3, plaintiff to get a per centage of 10 per cent. This plaintiff refused. Defendant in the spring that plaintiff's weigh-house was opened, opened a weigh-house within fifteen yards of plaintiff's; the trial took place on the 15th July, and on the 18th the defendant in that action attended a meeting of the butter merchants. Several of the customers of the plaintiff were examined at the trial. One of them, a Mr. Henderson, proved that on one occasion defendant came

into plaintiff's weigh-house and proposed that if he would come to defendant's weigh-house they would supply Henderson with the cost of carrying his butter to the railway, that was about one farthing a firkin. A similar proposition was made to another customer, to the value of £50 a year. Defendant then said, I must do more than that to get the traders from plaintiff's weigh-house. It was proved by persons in plaintiff's employment that men did invite the farmers into defendant's weigh-house; that placards were posted up; that the defendants weighed the butter free of charge. After that a considerable number of customers left plaintiff; and about a month subsequently there was another placard posted up, stating that defendants would in future charge two pence per firkin, the fee allowed by the statute. The plaintiff proved also that he was left without a single customer; that he had scales and beam, and all necessary appliances. If there was nothing more in the case but that, I think there was sufficient evidence of disturbance for the jury. But, further, defendant himself proved the facts stated by the plaintiff, admitted the inference and stated his intent; that he was agent for the Smith Barry estates; that he had acted for them. On the 29th of May, 1860, after one of the interviews deposed to by plaintiff, defendant wrote a letter to the plaintiff, containing the following passage *inter alia*:—"Or in the event of my driving a successful opposition." On cross-examination, defendant says,—I believe that a person named Murray was the weighmaster of the associated butter merchants, and he is mine now; also many of the persons who were in plaintiff's employment are in mine. I believe that the opening of my weigh-house took away the customers from the plaintiff. The weighing of the butter referred to in my letter of the 29th of May to the plaintiff was carried on. These show that plaintiff's design was to draw the business away from the plaintiff; that what he did had that effect; and thirdly, that he did take fees. These are the three propositions the plaintiff contends for. It appears to me that there was ample evidence of disturbance, and that the direction of the judge on these issues was correct. It is not necessary to cite authorities as to what is a disturbance. This office was a Parliamentary franchise; to it were annexed certain statutable fees; it therefore amounted to a statutable freehold, the infringement of which is ground for an action. Questions have arisen in modern times on the franchise of holding a market; and there cannot be a doubt that where there is immemorial usage there is a perfect right to sell. In *Mosley v. Chadwick & others* (note, p. 47, 7 B. & C.), which was an action on the case brought by Sir J. P. Mosley against defendants. This action was for depriving and defrauding the plaintiff of the profits and emoluments of his market, by erecting another market in a certain place near plaintiff's market, for selling and exposing to sale flesh meat, for hire and reward, without the licence and against the will of the plaintiff. There was a special verdict, and the result of it was, that the plaintiff was seized of a franchise for holding a market; and that defendants erected about 140 stalls very near his market, but they took no toll; they had no pretence of a pie-poudre court; they had no clerk of the market; and they only took money as

rent for the stalls which they had erected. The question was whether this action would lie, or whether it was a damage? and the special verdict finds that there was a diminution of the plaintiff's profits arising from the market, to the amount of £90; but the sum is not material, and the great question which arose out of the special verdict was, whether an action would lie by the owner of such a market against another who only made a rent of his own land applied to the use of setting, which was a lawful act, and took nothing that amounted to an usurpation of a franchise upon the Crown. Upon consideration, we are of opinion that we are bound by the authorities cited in this case to say that this was a damage that carried with it that sort of injury that is sufficient to support the action. In B. Abr. tit. Prescription, pl. 98, there is cited a case from the year books of the 11 Hen. 6, pl. 13, &c. (his lordship here quoted the above-referred-to in full). Here defendant has not only opened a weigh-house, and done the business gratuitously and without fees, but he has also received fees. There are two modern cases on the subject, *Prince v. Lewis* (5 B. & C. 563), and *Mosley v. Walker* (7 B. & C. 40). The very act alleged here is calculated to have the effect ascribed to it by the plaintiff, and amounts to a fraud—*Huzzey v. Field* (2nd Cr. M. & R. 432), where the marginal note seems to me to state what is laid down by the court. Now, Lord Abinger in that case states, "A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or villa, or highways leading thereto. The right of the grantor is in the one case an exclusive right of carrying from town to town; in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers must be injurious. For instance, if anyone should construct a new landing-place a short distance from one terminus of the ferry and carry passengers over from the other terminus, and there landing them at that place from which they pass to the same public highway on which the ferry is established before it reaches any town or vill, and by which the passengers go immediately to the first and all other villa to which that highway leads, there could not be any doubt that such an act would be an infringement of the right of the ferry, whether the person so acting intended to defraud the grantor of the ferry or not." In *North and South Shields Ferry Company v. Barker and others* (2nd Exch. 136), the law is laid down to the same effect. In the present instance there was the intent to deprive the plaintiff of the benefit of his estate for the purpose of exhibiting the old house as a rival to the new one; it therefore seems to me that in this respect the judge's charge was correct, and this evidence applied to the issues. Respecting the amount of damages, the judge told the jury that the conduct of the defendant before and after the weigh-house was opened, were for them to consider, and the damages might be ultra the pecuniary loss. Was there a right in the jury to assess those damages, and in the judge to direct them to do so. I have no doubt that there was. *Emblen v. Myers* (30 L. J., N. S. Exch. 71),

shows that exemplary damages may be given with reference to the designs of the defendant; and if ever there was a case that called for exemplary damages this is that case, whether the defendant acted for his employers or to benefit himself and the town, at the expense of the plaintiff, from the acts employed and the means used; I don't like to use a strong word, but by what was almost bribing plaintiff's men and customers to leave plaintiff's establishment, it appears to me that the judge was at liberty to go beyond the mere pecuniary loss. Plaintiff has been put to an amount of annoyance far beyond the mere amount of money abstracted from him by the suspension of his business—the length of that suspension during the whole of the summer. The whole injury accruing and actual loss could not be estimated by the mere loss of the fees, therefore the charge of the judge is not, in my opinion, open to the objections urged against it.

FITZGERALD, B.—On the question of disturbance I concur with my Lord Chief Baron in thinking that defendant disturbed the plaintiff in his office for the purpose of depriving him of the fees that otherwise would have come to him; but the judge's charge as directed to that issue was not such as to enable them to estimate the damages. On this question of damages the charge is to be considered with reference to the objection of defendant's counsel. It appears to me to proceed much too far. I quite concur with the Chief Baron in his construction of the Act of Parliament as to the time at which the oath may be taken. But it seems to me that the words omitted from the oath taken by the plaintiff here are part of the oath that should have been taken. The Act of Parliament itself directs the oath to be taken in *hæc verba*, and that has not been done here.

HUGHES, B. concurred with the Chief Baron in all his views.

DEASY, B., concurring with Fitzgerald, B., dissented from the rest of the court as to the oath. The statute is imperative that the weighmaster should take the oath it sets out. The oath the plaintiff took omits two words; and I can find no authority that a party can substitute a word for the words contained in the oath required of a party to be appointed under a statute. On the other hand, I find strong authority for the other proposition; and finding that authority, and none for the other proposition laid down by the Chief Baron, I with very great regret cannot hold that a party can translate the language of the Legislature and say that his translation of the language is correct. I concur with my brother Fitzgerald, and am sorry that the plaintiff, either through his own fault or the neglect of those acting for him, has failed to take the oath. I think that the plaintiff has suffered the disturbance, though I regret that upon the technical point I cannot agree.

The court being equally divided, the verdict had for plaintiff stands.

Consolidated Chamber.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

BEFORE MONAHAN, C. J.

HUGHES v. MURRAY.—March 10.

Attorney—Costs—Reference to Taxation after twelve months—Special circumstances.

Where an action has been brought by an attorney for a sum of £68, balance of untaxed costs, more than twelve months after the delivery of the bill thereof; and it appeared that, before action brought, the attorney had offered to take a sum of £40 in full. Held that it was a proper case for a reference for taxation, and the special circumstances were sufficient, under the 12 and 13 Vict., c. 33, sec. 2.

O'Driscoll, on behalf of the defendant, moved that the proceedings in the action be stayed, and for a reference to taxation of the bill of costs, the subject of the action, the defendant offering to lodge the money. The costs were incurred, and the bill duly delivered, upwards of twelve months prior to the commencement of the action; but it appeared, from the affidavit of the defendant, that prior to the bringing of the action, the plaintiff had offered to take 40*l.* in full of the amount claimed, and had afterwards served his summons and plaint for the full balance, viz., 68*l.* The affidavit also relied on the ill health of the defendant, and his absence, on that account, from town; but this was contradicted by the plaintiff's affidavit, but the offer to settle for the 40*l.* was not denied.

Lawless, Q.C., (with him, *McKenna*), submitted that no special circumstances were shown, sufficient to justify an order under the statute, 12 and 13 Vic., c. 53. In *Re Barnard* (2 De G. M. & G., 359); *Re Whicher* (13 M. and W., 549), were cited. They also urged that, if the order should be made, it should provide that the plaintiff should have the costs of taxation and the costs of the motion, even though more than one-sixth should be taken off.

MONAHAN, C. J.—The mere circumstance of the attorney here offering, just before he brought his action, to take a sum of 40*l.* in full, of a sum of 68*l.*, and then bringing his action for the latter sum, is, in my judgment, amply sufficient "special circumstance" to bring the case within the statute. Let further proceedings be stayed; the defendant to bring in and lodge the sum of 68*l.* within a week; refer the bill of costs to taxation; and reserve the costs of taxation and of the motion for the Court.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., Barrister-at-Law, and H. Fawcett, Esq.]

[BEFORE JUDGE HARGREAVE.]

THE MATTER OF JAMES FENTON AND EDWARD JONES, OR EITHER OF THEM, OWNERS; EX PARTE, MATTHEW GEORGE O'REILLY, PETITIONER.

Practice—A petition filed by a creditor for the sale of certain lands for the payment of his debt, pending a petition by a vendee under the 47th section of the Act, for the specific performance of a contract for sale of the same lands.

A petition for the specific performance of a contract for sale of an estate does not bind up a creditor upon the estate, so as to prevent him from filing a petition for sale of the estate to realise his debt, as the proceeding in the former case will not necessarily eventuate in the payment of the debt.

Where there is any unnecessary delay in a proceeding to carry into effect a contract for sale of any lands, the proper remedy for an incumbrancer is to present a petition for sale of the lands for the payment of his incumbrance.

The practice adopted in the ordinary case of a petition for sale of applying for the carriage of the proceedings where there is any unnecessary delay in the matter, appears to be inapplicable to the case of a petition to carry into effect a contract for sale.

THIS case was brought before the court on a motion by the petitioner, to make the conditional order for sale absolute, notwithstanding the cause shown to the contrary by Edward Jones, who is named in the title of the matter as owner in the alternative with James Fenton. It appeared that James Fenton was, prior to the month of January, 1861, owner of the lands of Cloneen, comprised in the petition; and that on the 22nd of that month he contracted to sell them to Edward Jones for £1550. But previous to this contract for sale, Mr. Fenton had created certain incumbrances upon the lands, amongst which was a judgment registered as a mortgage for the penal sum of £260, vested in the petitioner, Matthew George O'Reilly. Edward Jones presented a petition to the court for a specific performance of the contract for sale on the 29th of May, 1861; and on the 24th of June an absolute order was made to carry into effect the contract. It appeared that certain negotiations had been entered into between Edward Jones and Matthew George O'Reilly, out of court, with a view of paying off O'Reilly's judgment; but these negotiations having come to an end without such payment, Mr. O'Reilly brought forward a motion in the matter wherein James Fenton, the vendor, was named as owner, and Edward Jones, the vendee, petitioner, seeking for an order upon Edward Jones to bring into court the sum due to Mr. O'Reilly on foot of his judgment. Mr. Jones did not attend on this motion, and counsel for Mr. O'Reilly pressed for the order, contending that the petition filed by Edward Jones for the specific performance of his contract with James Fenton, had the effect of tying up the creditor and preventing him from proceeding actively for the recovery of his debt; and that the proceedings in the matter had been virtually abandoned, or were purposely delayed, as no step had been taken in the matter beyond the absolute order on the petition, which had been made fully six months ago. Judge Hargreave refused to make the order, being of opinion that the court had no jurisdiction to compel the vendee to bring the amount of the judgment into court at that stage of the proceedings. The title to the lands had not been investigated by the court. The title, on investigation, might turn out bad, and then the court would not execute a conveyance, and the proceedings would fall to the ground. Besides, the court would not hold that the proceedings on a petition between vendor and vendee prevented the creditor from taking steps to recover his debt. He might

present a petition for sale of the lands; and if there was the least unnecessary delay in the vendor and vendee's petition matter, this was the proper course for him to adopt. And in refusing the motion, it was made part of the terms of the order, that it should be without prejudice to the applicant filing a petition for sale, or taking such other steps as he might be advised for the recovery of his judgment. Accordingly, Matthew George O'Reilly filed his petition for sale of the lands of Cloneen on the 11th of January, 1862, on which the court granted a conditional order, directing service thereof on the owner by his solicitor, who had filed his petition for specific performance of the contract for sale. The vendee, Edward Jones, showed cause against this conditional order for sale; and the petitioner instituted this motion to make the order for sale absolute notwithstanding the cause shown by Mr. Jones.

Mr. Sherlock, Q.C., for the petitioner.

Mr. Lawless, Q.C., for Edward Jones.—The question to be considered is, whether the court will entertain a petition presented by a creditor where there is a petition pending before the court which will eventuate in the payment of his demand. If the proceedings in the matter for the specific performance of the contract for sale are duly prosecuted, Mr. O'Reilly must be paid his demand: for the court has not jurisdiction to execute the conveyance to the vendee unless the purchase money is to be applied in payment of the charges on the lands, and is sufficient for this purpose. If the petition for specific performance is not proceeded with, or any unnecessary delay occurs in the matter, the creditor has a sufficient remedy in the practice adopted in the case of ordinary petitions for sale, the right to apply for the carriage of the proceedings. There is no ground for the allegation that there has been unnecessary delay in Mr. Jones' petition matter.

JUDGE HARGREAVE—There is this great distinction between a petition for specific performance of a contract for sale and an ordinary petition for sale:—the former is substantially a proceeding between two parties, and may be abandoned by them at any time. A creditor can never rely with certainty on being paid in such a matter. If it should turn out that the incumbrances exceeded the amount of the purchase money, or the title to the lands should not be made out to the satisfaction of the court, the vendee would abandon the matter altogether. In the case of an ordinary petition for sale of an incumbered estate, the petition is filed for the benefit of the creditors; and if the proceedings are delayed or abandoned by the petitioner, any other creditor may take them up and carry them on to a sale. But this practice is inapplicable to a petition to carry into effect a contract for sale, a mere proceeding between the vendor and vendee. I cannot hold, therefore, that such a proceeding can bind up a creditor and deprive him of his remedy to recover his debt, by presenting a petition for the sale of the lands upon which it is a charge. I will make the order for sale absolute. But as the abstract of title in the matter of Mr. Jones's petition has already been before me and will, I think, be finally approved of very soon, if Mr. Jones will undertake to bring into court a sum of money sufficient to pay Mr. Reilly's demand, so soon as I shall have finally approved of the title, I will stay the further proceedings in this matter.

Order.—The conditional order for sale to be made absolute, with costs, but all further proceedings in the matter to be stayed, Mr. Jones undertaking to bring into court a sum of money sufficient to pay off the petitioner's demand so soon as the court has approved of the title.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law]

[BEFORE BERWICK, J.]

RE WILLIAM ANSELL DAY.—February, 1862.

Trading in England—Act of Bankruptcy in Ireland—Filing petition for adjudication to rid the bankrupt of his liabilities without any benefit to creditors.

Where a person who has traded in England comes to reside in Ireland, after such trading had discontinued, and never traded in Ireland, and then, after a residence of three years here, commits an act of bankruptcy, by filing a declaration of insolvency, and then a friendly petition for adjudication is presented; this is not a trading that will support such adjudication. But even if all the requisites of trading existed, if the bankruptcy is had recourse to to rid the bankrupt of his liabilities, and not for any purpose beneficial to his general creditors, the Court, in the exercise of its equitable jurisdiction, will annul the bankruptcy upon the petition of creditors dissenting, although some of the creditors may be in favour of the bankruptcy proceedings being continued, and the petitioning creditor will have to pay the costs.

This case came before the Court upon a petition to annul the adjudication, presented on the part of several English creditors, upon the ground that there was neither a trading nor a residence in Ireland to warrant a proceeding in bankruptcy there, and that whatever assets the bankrupt had were in England. The bankrupt was originally an English attorney, who appeared to have been, at one time, in considerable practice, but a few years since, having got into the trade of brickmaker, he became embarrassed, and came to reside in the west of Ireland. It was alleged that the bankruptcy was had recourse to merely to enable him to get rid of his liabilities.

Purcell was in support of the petition to annul. He cited *Hitchcock v. Sedgwick* (2 Vernon, 161); *Alexander v. Vaughan* (Cowp. 148); *Dodsworth v. Anderson* (Lord Raymond's Reports, 176.)

Kernan, Q.C. and Douce were for the assignees and bankrupt.

The facts appear in the judgment.

JUDGE BERWICK delivered judgment. His Lordship said—In this case a petition has been presented by several creditors of the bankrupt, praying that the adjudication made thereon should be annulled, and that the costs of this application should be paid by the creditor on whose petition the adjudication was made. The petition contains a full statement of the grounds on which the application is founded, and I have heard the case fully argued at both sides, each party contending that important principles are involved therein affecting the general jurisdiction of this Court. The petition has been supported by a number of English creditors of the bankrupt, repre-

senting debts to a considerable amount, the principal of whom is Mr. John W. Holgate, the father-in-law of the bankrupt; and it has been opposed not merely by the bankrupt himself, but also by the creditor's assignee, Mr. Patrick Daly, described as of Salemterrace, Dublin, engineer and surveyor, who insists that there are no grounds for annulling the proceedings already had, and that they should be conducted in this country under the direction of this Court; and, on their part, it is insisted that if I grant the prayer of the petition, I shall make a decision for which no precedent can be found. I cannot, however, say that I give the same weight to the opinion of the trade assignee in this case as I do in ordinary cases, inasmuch as I cannot find Mr. Patrick Daly's name among the list of the creditors of the bankrupt at all; and he appears to have been appointed at a meeting, held in a few days after the adjudication was made, at which time no creditor had appeared except the petitioning creditor, who is the brother of the bankrupt, on whose petition the adjudication was made. The agent for the commission, however, produced, at the hearing of this argument, letters of authority from several of the creditors, acquiescing in the proceedings taken in this country, and proofs have been made on their part and placed on the file of the Court since the argument was closed. On behalf of the present petitioners, it was alleged that these creditors were really not interested in the proceedings, as they were all secured creditors; while, on their part, it was asserted that, although their debts were secured, the securities were not of sufficient value to reach the full amount of their claims. The facts of the case are, after all, extremely simple and uncontroverted. They are contained in the several documents on the file of the court, which include the deposition of the bankrupt himself and the present petition, which has been verified by the oath of the petitioners, and to which no answering affidavit has been filed. It appears that the bankrupt was a trader in England, from September, 1855, to the latter end of September, 1858, as a manufacturer of bricks; having been previously an attorney. His trading, such as it was, was exclusively carried on in England during the whole of that time; nor does he appear to have ever bought, or sold, or traded in Ireland, nor was a single debt ever incurred by him in Ireland in the way of trade. It is stated in the petition, and not denied, that he had never visited Dublin while a trader. Previous to September, 1858, he became embarrassed in his circumstances, and in that month he stopped business, and shortly after, in the following month of October, he came to Ireland, admittedly to avoid his creditors, and went with his family to reside in Westport, in the county Mayo, where he continued to reside till the beginning of last October. During the whole time he resided in Ireland he never was engaged in any trade whatsoever. The affidavit of trading, on which the adjudication was made, places these facts beyond doubt, for, after setting forth the fact "that the said William Ansell Day was engaged in trade as a brickmaker, from September, 1855, to September, 1858," it proceeds to state "that he was resident in Ireland since November, 1858, and has not been in business during such his residence in Ireland, or since the month of September, 1858." It appears

that in October, 1861, being in hopes of settling with his creditors in England, the bankrupt left Westport and went over to London. He had previously made an arrangement with his landlord to give up his house at Westport at the end of the current quarter; and, shortly after his departure, an auction was had of all his furniture there; his wife and family were removed by his father-in-law, Mr. Holgate, to another residence in the same county, where they have since lived. His house was shut up till the quarter expired, on the 26th December last, when the landlord took possession of it; and there can be no doubt that he ceased to have any residence in Ireland, and had not, when he left this country in October last, any present intention of returning thereto. It appears that the bankrupt resided in London, in lodgings, from October, 1861, to the 22nd December following, and having then found it impossible to settle amicably with his creditors there—some of whom had in the interval proceeded against him to judgment—and being apprehensive that execution would be issued against him, he on that day came over to Dublin, with the admitted object of evading his creditors, and for the purpose, as he himself alleges, of instituting the present proceedings in bankruptcy, having been advised that Ireland was the proper place to file a petition to have himself adjudged a bankrupt; and, accordingly, he filed, on the 23rd December, the day after he arrived in Dublin, a declaration of insolvency, which was the act of bankruptcy on which the adjudication in this case was afterwards made, and which contains this statement—"I, the undersigned, William Ansell Day, of Westport, in the county of Mayo, brickmaker and scrivener, do hereby declare that I am unable to meet my engagements with my creditors." Consequent on this, by arrangement for that purpose, the petition for adjudication was presented by the bankrupt's brother, the Rev. Henry George Day, by whom it was signed and duly verified on the 26th December. He describes himself therein as "of Sedburgh, in the county of York;" it is executed at Brighton, and commences thus—"Showeth, that William Ansell Day, of Westport, in the county of Mayo, brickmaker and scrivener, being a trader, is indebted to your petitioner in the sum of 1,700*l.*," &c.; and the usual affidavit is annexed thereto, in which the petitioner swears "that the several allegations in his petition are true." An affidavit of trading, to which I have already alluded, was filed on the 3rd of January, 1862, made by "John Bowman, of London, brickmaker," and on those documents the adjudication, now sought to be annulled, was made, by my colleague, Judge Lynch, on the 11th January. I mention these facts with more minuteness than might otherwise be necessary, to show that the adjudication was made when the real state of the case was not before the Court, for if they were, it is perfectly clear that there would have been no adjudication. I must, however, express my regret that these documents were framed in such a manner as not to fairly represent the true facts of the case. As I read them, they represent the bankrupt as then residing at Westport, and the declaration of the bankrupt and his brother's petition certainly appear to treat him as then being a trader as brickmaker and scrivener. On the 24th January the first meeting was held, pursuant to advertisement in the *Dublin Gazette*

and Mr. Patrick Daly was proposed on the part of the petitioning creditor, and chosen trade assignee. On the 3rd February following, the bankrupt filed his schedule. His debts are therein represented to amount to 97,132*l.* 1*s.*, and, with the exception of four debts, amounting in the whole to 66*l.* 10*s.*, which were incurred in the year 1861, long after he had ceased to be a trader, and which appear to be due to shopkeepers in Westport for household expenses, the whole of his debts are due to English creditors. None of these four Irish creditors have proved their debts in this court, or sought to take the benefit of these proceedings. The available assets are represented to amount to about 87,348*l.* 18*s.* 4*d.*, and consist exclusively of property in England, of which 30,062*l.* 19*s.* is now vested in English Consols, standing to the credit of the cause of Day v. Day, in the English Court of Chancery. Of the residue, 48,880*l.* is described to be "the value of certain freehold and leasehold estates in England," which appear to be mortgaged very nearly, if not fully, to this value; and 8,405*l.* 19*s.* 4*d.*, which is set down as the amount of the good debts, and is almost entirely composed of a claim against Mr. Le Blanc, one of his creditors, on foot of an old unsettled partnership account. As far as I can judge, the property in the schedule appears to be either vested by mortgage in the creditors as security for their debts, or placed in the hands of trustees for certain specified demands. The gross profits arising from the trade of brickmaker for the period comprised in his schedule is 138*l.* 10*s.* 7*d.*, and the trade disbursements for the same time are stated to be 231*l.* 13*s.* 6*d.* In fact, compared with his other dealings and engagements, the trade of brickmaking appears to be wholly insignificant; and, with the exception of the four debts due to the Westport shopkeepers, of 66*l.* 10*s.*, the schedule is exclusively conversant about English creditors, English property, and English trading. On this state of facts I am called upon by a number of the English creditors of the bankrupt to annul the proceedings thus taken in this country, on two grounds—first, on the ground that the adjudication is invalid, this Court not having, as the case is now presented to it, any jurisdiction to uphold the adjudication, or deal with the case; and, secondly, even supposing the abstract right to exist, yet that the adjudication was obtained in fraud and abuse of the bankrupt laws, for the personal benefit of the bankrupt, and not for the purpose of distributing any estate amongst the bankrupt's creditors, or for any purpose useful or beneficial to them, and, therefore, under the equitable jurisdiction existing in this Court, the proceedings should not be allowed to stand. And, after the best consideration I can give to the case, it appears to me that, on both grounds, it is my duty to yield to this application, and annul the adjudication and all proceedings had thereon. In the first place, my present opinion, on a consideration of all the cases to which I have been able to refer, is, that the jurisdiction of this Court over traders is confined to those who have traded in or to Ireland; or, at least, have incurred some debt in the way and in the course of their trade in Ireland. I certainly was a little startled when I was told that nothing was necessary to give this Court jurisdiction over all traders, no matter in what country their trade was conducted, except

that such trader should come over to this country for a temporary occasion and file a declaration of insolvency, or commit some other act of bankruptcy; and that it was wholly unnecessary to show that he had ever traded in or to Ireland, or had ever incurred a debt in this country in the way of his trade. Nay, it appeared to me that the argument led to this conclusion, that in such case this Court had, under the 31st section of the Irish Bankruptcy and Insolvency Act, an exclusive jurisdiction, and that the English Court of Bankruptcy had no power to interfere therewith. I must say that the first impression produced on my mind by the case of *Alexander v. Vaughan* (Cowper, 398) was, that the Court there held that a trading in England was not necessary to give jurisdiction to the English Bankrupt Court against a Scotch trader; but that an act of bankruptcy committed in England by any trader was sufficient for that purpose. But on looking more accurately at that case, and more particularly on reading it by the contrast of the cases of *Hitchcock v. Sedwick* (2 Vern., 161), and *Dodsworth v. Anderson* (Lord Raymond's Reports, 376), it appears to me that the Court only intended to decide that it was not necessary that the party should be a resident trader in England, but that it was sufficient if he either bought or sold in England in the way of his trade. In *Dodsworth v. Anderson*, the question was distinctly raised and decided, and there the Court defines what is meant by "trading," in order to show that the party there had, in fact, traded in England, though he carried on his business at Dublin, and that he was thereby capable of being made a bankrupt in England. In the note to *Hitchcock v. Sedwick* (in 2 Vern., 161), the result of that and the other cases is summed up by the compiler, and it is broadly laid down "that the trading and the Act of Bankruptcy must both be in England," and that it is the concurrence of both which gives the Court of Bankruptcy jurisdiction. It has been, however, pressed on me that the 31st section of the Irish Bankruptcy and Insolvency Act gives to this court an enlarged jurisdiction, which includes within it such a case as the present, and that residence in Ireland is all that is now necessary to render every trader amenable to the Irish Bankrupt Court. Even if this were so, I should be inclined to decide that in this case there was no such residence of the bankrupt in this country as was contemplated by that section; but I do not think that the 31st section was intended to make any alteration in the general principles by which the jurisdiction of the court is to be governed. It merely was intended to give to the court an exclusive jurisdiction where the trader (otherwise amenable to the law) was a resident in Ireland, or conducted his business exclusively in Ireland as such trader, and was, therefore, more properly to be dealt with by the Court of Bankruptcy in Ireland. In the present case, it is admitted that there never was any trading by the bankrupt in or to this country at all; and, therefore, although the act of bankruptcy was committed here, I conceive that this alone does not confer jurisdiction in the court, and that the adjudication cannot be supported and should therefore be annulled. But, even supposing I am wrong in this view of the case, nothing can be clearer to my mind than that this case comes fully within the class of authorities in which

the equitable jurisdiction of this court has been applied to prevent the process of the court from being abused, and to confine its proceedings to the legitimate objects for which it was originally created and intended. The petition states that the adjudication was obtained "with the fraudulent object of ridding the bankrupt of legal proceedings then pending against him in England, of avoiding opposition on the part of the creditors, and with the view of enabling the bankrupt to discharge himself from his liabilities without being exposed to the searching examination to which he would have been subjected if proceedings had been instituted in England, where the debts were contracted, and where the creditors reside, and not for the purpose of distributing any estate among the bankrupt's creditors, or for any purpose useful or beneficial to them;" and this the petitioners declared on their oath. Is it possible to draw any other conclusion from the proceedings in this case? The bankrupt was exclusively an English trader, his creditors all reside in England, his debts were all incurred there, his debtors all reside there, every particle of his property is there, it must be there realised; the greater proportion of it is under the immediate control of the English Court of Chancery, the bankrupt is defendant in at least two suits in that court, in both of which decrees are pronounced against him, in one of which he and his co-trustees are directed to bring into court a large sum, which appears to be due by them as defaulting trustees and to be part of his wife's separate estate; but it is declared "that as between the co-trustees the present bankrupt is to be considered the party primarily liable to the funds thereby ordered to be invested." Besides this, the petition states that the assets returned in the schedule are "illusory," and that the bankrupt has in fact no property to be distributed among his creditors, and on this part of the case, the bankrupt has instructed his counsel to make use of very hard language towards the principal petitioner, his father-in-law. I should have wished not to be called on to pronounce any opinion on this matter at present, as of course I have very inadequate information to arrive at the whole truth; but this is an ingredient in the case on which I am bound to form the best opinion I can on the documents before me; and I am not sorry to throw the result of my scrutiny of the schedule into the scale to relieve the petitioner, as far as I can, from the charges made against him; and I am bound to say that so far as a distribution under a Court of Bankruptcy among the general creditors of a bankrupt is concerned, it appears to me very likely that the winding up of the case will show that it is "wholly illusory." The property consists of three-fourths of a sum of Consols, standing to the credit of the cause of *Day v. Day*, in the English Court of Chancery. I find from the schedule that this sum is mortgaged specifically for at least 23,452*l.*, independent as I believe of the securities mentioned in the deed of 1855. The freehold and leasehold properties are valued by the bankrupt at 48,880*l.*, and they are mortgaged to the amount of 44,408*l.* 5*s.* 2*d.*; and unless the schedule is incorrect, there is a depreciation in the property to the amount of about 8000*l.* The only general assets appearing to be available for the general creditors is the sum of 8,405*l.* 1*s.* 4*d.*, stated in the schedule

to be "good debts." But when I look at what these debts consist of, it appears that 7,700*l.* 4*s.* 9*d.* consists of unsettled balances of alleged partnership accounts with a Mr. Le Blanc, commenced in 1852 and 1853; and I am very much deceived if these same balances do not form the substance of the good debts returned as due in January, 1858, and for the recovery of which no proceedings appear to have ever been taken, and one can easily judge what likelihood there is to make these stale unsettled claims available at this period of time. But supposing the assets to be more tangible than I now imagine, what can I conclude from the hurried appointment of Mr. Patrick Daly, of Salem-terrace, architect and engineer, as the assignee, to manage for the real benefit of the English creditors these complicated and difficult English proceedings, and collect these English assets, not being himself a creditor, or shown to have the slightest connection with, or to be conversant about, such affairs. It is impossible for me to say that the legitimate object of an adjudication was present to the mind of the parties with whom these proceedings originated. I can draw no other conclusion from them than that the sole object of obtaining this adjudication was the personal benefit of the bankrupt, and therefore that it comes within all the authorities which call upon me to set them aside. It is true that several of the creditors have now come before me, and expressed a wish that the proceedings, as they have been now instituted, should be proceeded with in this court; but independently of the opinion I entertain that the adjudication is wholly invalid, and also of the fact that after all these creditors only represent a small portion of the unsecured debts, the case of *ex parte Bourne* (2 Glyn and Jameson, 150), before Lord Eldon, and also the case of *ex parte Wade*, referred to in page 140 of the same work, show me that if I am satisfied that at the time the adjudication was obtained the purpose was wholly personal, and not with the intent of operating under the bankrupt law, the adoption of a right purpose afterwards will not, and ought not to destroy the effect of the wrong purpose in which it originated. Certainly, however, if I saw clearly that the case was within the jurisdiction of the court, and that the large proportion of the creditors desired it to be conducted here, and that I had the means of working it effectually, I should be slow to refuse the aid of this court to any parties seeking its assistance; but I honestly confess it appears to be a case which no exertions of this court could bring to a satisfactory conclusion, and I must therefore act on the grounds I have already stated, and direct that the adjudication shall be annulled, and all the proceedings consequent thereon; and it is, in my opinion, my duty to direct that the costs should be paid by the petitioning creditors.

Attornies — Messrs. Lawes and Howe, and Mr. Meldon.

Court of Quarter Sessions.

reported by Charles H. Foot, Esq., Barrister-at-Law.]

HAGERTY v. HAGERTY.—October, 1861.

WICKLOW SESSIONS.

[CORAM J. W. J. LENDRICK, Esq., Q.C., CHAIRMAN OF QUARTER SESSIONS.]

Where a person perfectly answers the description given in the will of the intended legatee, parol evidence of

the testator's intentions and declarations is not admissible for the purpose of showing that another person imperfectly answering such description, was the object of the testator's bounty.

Hilary Sessions, 1862.—LENDRICK, J.W.J., Esq., Q.C.

—The process in this case was brought in the name of John Hagerty, a minor, by Robert Hagerty, his father, and next friend, against Betsy Hagerty, administratrix with the will annexed of her father, Martin Hagerty, for the arrears of an annuity bequeathed to the plaintiff by the will of the said Martin Hagerty, in the following words:—"I further leave and bequeath to my nephew, John Hagerty, a yearly sum of ten pounds sterling, to be paid half-yearly to him on every 25th day of March and 29th day of September in each year, during the term of his natural life, and no longer, to be paid out of my said lands and property of Bolarney, and the rents of same." It appeared from the evidence given before me, that the testator had lived near Wicklow, and was possessed of a leasehold property called Bolarney; that Robert, his brother, lived in the county of Kildare; that the plaintiff John is his son, and therefore unquestionably the nephew of the testator, and thus answering both in name and character to the description given in the will of the object of the testator's bounty. On this point no controversy whatever arose; but it was contended, on the part of the defendant (who is, as has been stated, the personal representative of her father), that the person whom the testator intended to make his legatee was a man who had lived with him for many years; that this man also bore the name of John Hagerty, and was also his nephew; and that he, and not the plaintiff, be came, on the death of the testator, entitled to the annuity. The evidence as to both these points, viz., the name and relationship to the testator of the person who lived with him, was conflicting. As to the name, it was sworn on the part of the plaintiff that this man (who, I may observe, has died since the death of the testator) was generally known as John Gorman, and not John Hagerty. This was contradicted by some of the defendant's witnesses; and, on the whole, I came to the conclusion, although not without some doubt, that this deceased man's name was John Hagerty, and not John Gorman. But as to the relationship I felt quite satisfied, upon the evidence produced on both sides, that he was not the nephew of the testator; he may have been his cousin (indeed he was said to be nearly as old), but his nephew he certainly was not. Some evidence (but of a very unsatisfactory nature) was given that the testator had sometimes spoken of him as his nephew; but the evidence of the testator's daughter (who was produced as a witness for the defence) proved that not only she herself knew that the man who lived with them was not her father's nephew, but that her father knew it too and admitted it to her; but accompanied the admission with an expression of his intention, which, for the reasons hereafter given, is not admissible in evidence. Defendant then tendered further evidence of the expressions, intentions, and wishes of the testator, to show that the John Hagerty who lived with him, was the real object of his bounty. To the reception of this evidence the plaintiff objected, and the admissibility of it was the only question in dispute before me. Mr. Taylor, in the commencement of the 19th chapter of his valu-

able work upon evidence, says, "Perhaps the most difficult branch of the law of evidence is that which regulates the admissibility of extrinsic parol testimony to affect written instruments." With this remark everyone will be inclined to agree who has carefully studied the vast number of perplexing cases which have been decided upon this subject, especially those with regard to wills. It is extremely difficult to collect from them any rules of universal application. Even the canon laid down by Lord Bacon, that parol evidence is inadmissible in the case of patent, but receivable in the case of latent ambiguities, is, as to the latter branch of it, now no longer considered as a safe guide, and is rejected as such by Taylor in his *Treatise on Evidence*; by Jarman in his *Book upon Wills*; and by Sir James Wigram (late Vice-Chancellor) in his work on the same subject. The case before me is, however, a simple one; and I think certain propositions or rules to which no real exception exists, may be collected from the decisions on this subject, which will afford a safe guide to a right decision on the question before me. The first general rule which may be laid down is, "that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a will." As the will must be in writing, the necessity of such a rule is apparent; and it has been recognised accordingly in every treatise, and in almost every case on the subject. Of course it is not to be understood that no parol evidence of any kind is to be admitted to influence the construction of wills; on the contrary, it is absolutely necessary to resort to it in certain cases, in order that the will should be understood. This brings me to what I call the second rule, which is laid down in the following terms by Sir James Wigram in page 65 of his *Treatise on Wills*, and supported by numerous cases cited by him:—"For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will." In *Doe v. Martin*, (1st Nev. & Man., 524)—Judge Parke (now Lord Wensleydale), says, "The court may take such things into consideration, so as to put themselves in the place of the testator, and then see how the terms of the will affect the property." In *Guy v. Sharp*, (1 Myl. & K. 602)—Lord Brougham says, "I may, however, observe generally on the reception of extrinsic evidence, with a view to aid the construction and give explanation, not to alter or to control the sense, (a purpose for which it never can be received) that there is a manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstances, by the knowledge of which the court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning." But, whatever be the extent to which the court may have a right to inquire into the "surrounding circum-

stances," (as they are called) it must never be forgotten that it is still the will that is to be construed. In the words of Lord St. Leonards—*Attorney-General v. Drummond*, (1 D. & W., 367).—"When the court has possession of all the facts which it is entitled to know, they will only enable the court to put a construction on the instrument, consistent with the words; and the judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear." Suppose now, that the evidence so given of all the material facts and surrounding circumstances of the case, has raised an ambiguity, by disclosing the existence of more than one object or subject, to which the words are equally applicable, the uncertainty as to which of these was meant by the testator would, if further investigation could not be made, necessarily render the bequest inoperative. Thus, for example; if in the present case, "it were proved, (as I am disposed to think it was) that each of the claimants was named John Hagerty, and if it had been also proved, (which it certainly was not) that each was the nephew of the testator—what is to be done? If no further inquiry can be made, it is impossible to determine which of those two persons the testator meant by the words "John Hagerty my nephew." This brings me to the consideration of what I may call the third rule, and which may be thus stated:—"Where the object of a testator's bounty is described in terms which are equally applicable with legal certainty to two or more persons, extrinsic evidence of the declarations, instructions, and intentions of the testator is admissible." The admissibility of such evidence in such a case has been finally established by the cases of *Miller v. Travers*, before Lord Brougham, assisted by Chief Justice Tindal and Lord Lyndhurst, then Chief Baron—in (8 Bing., 244), reversing the previous decision of the Vice-Chancellor—*Good v. Needs*, (2 M. & W., 129), and *Doe v. Hiscocks*, (5 M. & W., 363); and the rule, as I have given it, is found in substance in the treatises of Sir James Wigram, Mr. Jarman, and Mr. Taylor. But this admission of extrinsic evidence is not to extend beyond the necessity which required it; and in the rule the qualification is necessarily implied, or rather indeed, expressly stated. Accordingly, in *Doe v. Chichester*, (4 Dow., 65, 91, 93; 3 Faucet 147), it was laid down that, "Extrinsic evidence is admissible to explain the intention of a deviser in his will, only where an ambiguity is raised by extrinsic circumstances; and there it is admitted from the necessity of the case, because the will cannot have effect without it." The clearest view of the law on this subject is given by Lord Abinger in pronouncing the judgment of the court in *Doe v. Hiscocks*, (5 M. & W., 363). After stating the general rule that the meaning of a will may be explained by evidence of all the circumstances surrounding the testator, his Lordship goes on to observe. "But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now there is but

one case in which it appears to us that this sort of evidence of intention can properly be admitted; and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things or which of the two or more persons, (*each answering the words in the will*) the testator intended to express. It appears to us that in all other cases parol evidence of what was the testator's intention ought to be excluded upon this plain ground that his will ought to be made in writing, and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." This case has been always considered as of the highest authority, and is referred to as such by Sir James Wigram, Mr. Taylor, and Mr. Jarman. The latter says, 1, 364. "This case is generally considered to have settled the law upon this subject, and to decide that the only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application to each of the several subjects." It necessarily follows, that if the description in the will applies *perfectly* to one individual and *imperfectly* to another, this is not a case for the admissibility of extrinsic evidence; and, accordingly, what I may call the *fourth* rule on this subject is thus enunciated by Mr. Jarman (1, 365):—"A person to whom the terms of the description are imperfectly applicable may not, by parol evidence of facts tending to prove an intention in his favour, support his claim against another person exactly, or more nearly, answering to all the particulars in the description." This position is fully supported by several cases of the highest authority. In *Delmare v. Robello* (1 Ves., Jr. 412), Lord Thurlow rejected evidence to prove that the testator intended one of two sisters to be the object of his bounty whose name did not correspond with that in the will; and this evidence was rejected, inasmuch as there was a sister answering to the name in the will. In *Andrews v. Dobson* (1 Cox. 425), the name of the legatee in the will was James; and it appeared in evidence, that Thomas and James were both sons of the same person—Thomas by his first wife, who was a relation of the testator, and James by the second wife, who was in no manner related to the testator. It seemed, therefore, probable, that the testator meant that Thomas, whose mother was his relation, should be his legatee, and not James, whose mother was not related to him at all. Thomas, accordingly, claimed the legacy against his half-brother, and sought to give evidence of the testator's intentions in his favour; but Lord Kenyon (then Sir Lloyd Kenyon, M.R.) refused to permit him to do so, and dismissed the bill. On this decision, Sir James Wigram observes, p. 29,—"To have admitted the claim of a son who did not exactly answer the description in the will, as against a son who did, would have been in contravention of the rule of law contained in the above proposition." In *Holmes v. Custance* (12 Ves. 259), testator left a legacy to the children of Robert Holmes, "late of Norwich, but now of London." It appeared that at the date of the will, the testator had no relative named Robert; but that a person of this name, who was related to

the testator, and had gone from Norwich to London at the age of 14 or 16, had died in London a few years before, leaving a child. It was contended that the legacy did not apply to the child of this person, but to the children of George Holmes, who was a relative of the testator; had been formerly of Norwich; and was then resident in London, and had several children, some of whom were in habits of intimacy with the testator. But Sir W. Grant held that the description was not so inapplicable to Robert, as to let in evidence that George was the person intended; that the sense of "late" was not "recently," but "formerly;" and as to his being dead at the time, that the testator might not have known or might have forgotten it, he being at a distance. Now, in this case, it is manifest that the probability was, that the testator *did* intend the children of George, rather than those of Robert, to take the legacy, the latter being strangers to him, and the former intimate with him. This decision of Sir W. Grant is, therefore, a very strict enforcement of the rule now under consideration. Again, in the still more recent case of *Wilson v. Squire* (1 Y. & C., C. C., c. 54), testator bequeathed a legacy to "The London Orphan Society, in the City Road;" and it appeared that there was no institution precisely answering this description, but there was one in the City Road called "The Orphan Working School," which claimed the legacy. Evidence was tendered, that there was a society called "The London Orphan Asylum," at Clapton, and that the testator was many years a subscriber to it, and, in his lifetime, avowed his intention of leaving it a legacy. But Sir J. Knight Bruce held that "The Orphan Working School" was sufficiently described by the will, and, therefore, rejected the evidence tendered of the testator's intention in favour of the other institution. In each of the last two cases, it may be observed, that the party in whose favour the Court decided did not exactly answer to every minute particular of the description given in the will. It was sufficient, in the opinion of the Court, that he substantially, and much more nearly than the other party, answered to all the particulars in the description; and, accordingly, Mr. Jarman, in the above quoted statement of the rule, introduced the words "or more nearly;" suggested, doubtless, by the two decisions last cited, which are, indeed, authorities of an *a fortiori* character as bearing on the case now before me; in which there is no doubt that plaintiff answered exactly and perfectly the description given in the will of the object of the testator's bounty; whilst, on the other hand, his deceased rival answered it but imperfectly. The plaintiff is, undoubtedly, John Hagerty, the nephew of the testator; the other may have borne, and, I think, did bear, the name of John Hagerty; but, by the evidence before me, it was certainly shown that he was not his nephew; and, therefore, under the terms of the fourth rule, parol evidence cannot be given of the intentions and declarations of the testator, to support the claim of the deceased John Hagerty against that of the plaintiff, who exactly answers the description. As I have already said, the only question before me was as to the admissibility of such evidence; and, as I am of opinion, for the reasons I have given, that such evidence is not admissible, my decision must be for the plaintiff.

Exchequer Chamber.

[Reported by WILLIAM WOOLLETT, Esq., Barrister-at-law.]

REGISTRY APPEALS.

CORAM BALL, O'BRIEN, HAYES AND FITZGERALD, JJ.,
AND DEAST, B.

JOHN M'KEOWNE, APPELLANT FOR SELF AND OTHERS;
SAMUEL BRADFORD, JUN., RESPONDENT FOR SELF AND
OTHERS.—Dec. 3, 4, 9, 1861.

*Stat. 13 & 14 Vict. c. 69, s. 58—Appeal—Omission
of appellant's place of abode from indorsement—
Mandatory and directory provisions.*

*The provision in the 58th section of the stat. 13 & 14
Vict. c. 69, requiring the Assistant Barrister to in-
dorse upon every statement of a case the place of
abode of the appellant and respondent in the appeal,
is directory only, and not mandatory, and therefore
Held that the court will entertain an appeal notwith-
standing the omission of the place of abode from the
indorsement upon the statement of the case.*

*Wanklyn v. Woollett (4 C. B. 86) considered and
distinguished.*

THIS was a case stated by John Leahy, Esq. Chair-
man of Quarter Sessions for the County of Louth.
Counsel for the appellant was about to begin, when
three preliminary objections to the case being heard
were made on behalf of the respondent. The first ob-
jection was that the case was not indorsed as required
by section 58 of stat. 13 & 14 Vict. c. 69, as the in-
dorsement did not give the places of abode of the ap-
pellant and respondent. The indorsement upon the
case was, "County of Louth, Baronies of Ardee, Fer-
rard, Upper Dundalk, Lower Dundalk, and Louth,
John M'Keowne, appellant for self and others, Samuel
Bradford, jun., respondent for self and others. Dated
24th October 1861, John Leahy, Chairman of Quar-
ter Sessions of County of Louth." It is necessary
with respect to this objection to state that in the sche-
dule to the case, in which were given the names of the
persons whose right to remain upon the register was
affected by the chairman's decision, three persons ap-
peared of the name of John M'Keowne, and that for
anything that appeared in the case, it was uncertain
which of them was the appellant; it further appeared
that some 250 persons were affected by the decision
of the assistant barrister. The second and third pre-
liminary objections were abandoned, and the deci-
sion of the court did not touch them, so that it be-
comes unnecessary to state anything with reference
to them.

*M'Donough, Q.C. (with him Chatterton Q.C., and
J. C. Lowry,)* for the respondent, in support of the
objections.—The requirements of the 58th section of
the statute have not been complied with here. That
section requires that the assistant barrister shall in-
dorse on the statement of appeal the Christian name
and surname, and place of abode of the appellant and
of the respondent in the appeal. The decisions shew
that the provisions of the section are not merely direc-
tory but mandatory. There are three John M'Keownes
mentioned in the schedules to this case, and it is uncer-
tain which of them is alluded to in the indorsement.

It may be said that the 58th section is applicable only
to single appeals, and that this is a consolidated appeal;
but this is not a consolidated appeal, but a joint ap-
peal. Sections 60 and 61 are those conversant with
consolidated appeals, and from their provisions it is
plain that this does not come within them. The case
of *Wanklyn v. Woollett*, (4 C. B. 86) shews that the
sections in the English Act analogous to the 58th sec-
tion of 13 & 14 Vict. c. 69, is mandatory, and that
the indorsement is essential to the appeal. It was
there decided that the court had no jurisdiction to hear
the appeal unless the indorsement had been signed by
the revising barrister, and signed in court. *Pether-
bridge v. Ash*, in the same way shews that another
branch of the section is mandatory. In that case it
was held that the notice stating an intention to appeal
must be signed by the appellant himself, and not by
an agent, the section of the English Act 6 & 7 Vict.
c. 18, requiring such signature. The indorsement of
the place of abode is essential for the purpose of iden-
tification in case costs are given against the appellant.
Woollett v. Davis, (4 C. B. 115) shews the strictness
with which the English Act is construed in the case
of notices of objection; and at least equal strictness
ought to be observed in the case of appeals. *Winch
v. Williams*, (12 C. B. 115) on the 3 & 4 Wm. 4,
c. 42; and *Hatton v. English*, (7 El. & Bl. 94) on the
Bills of Sale Act, also exemplify this strictness of con-
struction. There are no means of supplying the de-
fect in the present case. Under the statute there are
but two modes of remedying defects: the one is by send-
ing back the case to the barrister; that cannot be done
here, as the indorsement must be made by the assis-
tant barrister in court when the case is read to the ap-
pellant, and the case can only be sent back, when the
statement of the matter of appeal is not sufficient, sec-
tion 78; that is not the objection here. The other mode
is by referring to different portions of the case itself;
that cannot be resorted to here. This is a special
power delegated by the statute to the barrister, and
the power must be strictly followed.

Serjeant Sullivan and Coffey, in support of the
appeal.—We submit that the words of the statute are
directory only, and not mandatory, in the present in-
stance. In *Wanklyn v. Woollett*, the point whether
the words of the section are directory or mandatory
was not argued; besides, that case differs from the pre-
sent one in this important respect, that there the de-
fect was, that there was no signature of the revising
barrister to the indorsement, and thus the indorsement
was altogether valueless; while in the present case we
have an indorsement signed, and signed within the
proper time. We submit that the cases cited on the
Bills of Sale Act, and on the 3 & 4 Wm. 4, c. 42,
cannot be held to be applicable in the present instance.
In several respects the English Act, 6 & 7 Vict. c. 18,
has been held to be directory only; not mandatory.
Thus in *Morgan v. Parry* (17 C. B. 324) the Court
of Common Pleas held that the 13th section of that
statute requiring the lists of voters prepared by the
overseers to be signed by them, was in that respect
directory only. *The King v. The Inhabitants of Bir-
mingham* (8 B. & Cr. 29) cited in *Morgan v. Parry*,
is important upon the distinction between mandatory
and directory words. See too *Osle v. Green* (6 M. &

Gr. 972.) and *The King v. The Mayor of Norwich*, (1 B. & Ad. 310.) None of those cases were cited in *Wanklyn v. Woollett*. *Cole v. Green*, where the provisions of a statute were held to be directory only, was decided on the ground that the statute did not contain any negative words, the same reason applies in the present case. The judgment of Taunton, J. in *Peckus v. Morris* (2 Ad. & Ell. at p. 96) has always been considered to contain the best exposition of the law upon this subject. He says, "I understand the distinction to be, that a clause is directory where the provisions contain mere matter of direction and nothing more, but not so where they are followed by such words as are used here, viz., that any thing done contrary to such provisions shall be null and void to all intents." To the same effect are Lord Tenterden's observations in *The King v. The Justices of Leicester*, (7 B. & Cr. at p. 12.) *The Mayor of Rochester v. Rag.* (4 Jur. N. S. 1227.) If the words of the section are mandatory, can the assistant barrister, by refusing to sign the indorsement deprive a party of his right of appeal, or can the Court of Queen's Bench after the time for signing has passed grant a mandamus to compel the chairman to sign the paper? How can the court grant the mandamus, unless the words are directory? The 75th section shows what the appellant himself is to do, and this throws a good deal of light on the matter. The indorsement of the place of abode is not for the purpose of costs. In the case of consolidated appeals the party who acts for all must sign a declaration, section 60, but it is not stated that he must give his place of abode, in the declaration. [Ball, J.—That is a very good reason for the place of abode being given in the indorsement. O'Brien J.—If the place of abode was necessary, it is more likely that the Legislature would have required it to be given in the declaration which the party himself makes, than in the indorsement which is made by the assistant barrister.] We have here a duty imposed upon a public officer. Is a party to be prejudiced in consequence of the miscarriage caused by that officer? In the 77th section where the Legislature intends that non-compliance with the acts there required should invalidate the appeal, it uses negative words. Negative words are also used in the 78th section, and the Legislature thus expressly provides for the cases in which the court shall not be put in motion, and shall not act. When it has to deal with acts to be done by the appellant himself, it provides by negative words, that if those acts are not done, the appeal shall not be entertained, but when it deals with acts to be done by the assistant barrister, no such words are given. No practical difficulty can arise as to costs by reason of the absence of the statement of the place of abode, because the parties come into open court, and in presence of each other sign the document by which they consent to become appellant and respondents; and the party ordered to pay costs would be described in the order and sufficiently identified, as "John M'Keowne the appellant in this case;" that would obviate all difficulty. The Common Law Procedure Act, of 1853, throws some light on the matter. The 9th section of that Act requires the residence and description of the parties to be given in the summons and plaint, but it has been held that the section is directory only—*King v. Hop-*

kins, (13 M. & W. 685); *Ross v. Gaudell* (7 C. B. 766).

Chatterton, Q.C. in reply—As to the last argument used, the 16th & 24th sections of the Common Law Procedure Act, which provide for technical errors and omissions, control the effect of the 9th section. *Wanklyn v. Woollett* is an express authority on the case. No distinction can be taken as to what may have been in the mind of the Legislature, when it required a number of things to be done. Either the court must hold that the whole of the section is directory, and that the indorsement may be altogether omitted, or that the whole of the section is mandatory. It is not necessary that there should be negative words to make a section of an Act of Parliament mandatory.—Dwarris on the Statutes, 610. There are two cases in which words merely affirmative must be held to be mandatory. The first is where words are necessary for the purpose of giving a new right, or founding a jurisdiction, but where acts are required to be done by a functionary whose acts are incapable of being controlled, in that case, to prevent the subject from being oppressed by the neglect of the functionary, words seemingly mandatory are held to be directory only. I submit that *Wanklyn v. Woollett* is, in fact, an authority to show that the words here are mandatory. That is not at all an analogous case to that of *Morgan v. Parry*, which is a case falling within the second class which I have enumerated, but that is not this case. As to *Wanklyn v. Woollett*, I do not know whether the distinction was taken in terms by counsel as to whether the words there were mandatory or not. [Fitzgerald, J.—Is there not this distinction between that case and the present one, that in *Wanklyn v. Woollett* there was nothing in the body of the case, apart from the indorsement, to shew who the parties appellant and respondent were, or to shew whether they had any interest or not, while that is not the case here? O'Brien, J.—Is the indorsement any part of the statement?]. No; but there is nothing in the argument that the party is not bound to send up the indorsement with the statement to the Exchequer Chamber, because what he is to forward is the document which he gets from the Assistant Barrister, namely, the statement "with such indorsement thereon." *Wanklyn v. Woollett* decides that the signature to the indorsement is essential; that is the same as saying that the direction of the Act is mandatory. *Collins v. Hungerford* (7 Ir. C. L. R., 581), shows that the court will require a literal compliance with the statute. In all the cases cited on the other side the requirements of the statutes were things to be done by public functionaries, and the party affected by them had no control over them. Of this kind is *Morgan v. Parry*, which is totally different from the present case. Here the thing required by the statute is the act of the party. The appeal is his, and the case is stated for his benefit, and the things which he is required to see to are not matters of law, but plain matters of fact, which he can judge of as well as any lawyer. [Deasy, B.—Suppose the barrister cannot ascertain the appellant's place of abode, what will the consequence be?]. The appeal must fail then, and it will be the appellant's own fault. [O'Brien, J.—Suppose the respondent's ad-

dress is not ascertained: his abode must, under the Act, be stated as well as that of the appellant]. No injury can arise in that case, as the court has power to appoint an officer as a formal respondent. As to the arguments raised upon the words of the 77th sec. there are similar words in the English Act, and, therefore, the argument would be against the decision in *Wanklyn v. Woollett*. [Ball, J.—In that case a great many arguments which might have been urged, appear to have been omitted]. If the 58th, 68th, 75th, 76th, and 77th sections are, as they ought to be, all read together, then the negative words of 77th section will be imported into the 58th.

Dec. 9.—The court now delivered judgment.—BALL, J.—In this case a preliminary objection has been taken by the respondent to the appeal being heard on the ground of the omission of the places of abode of the appellant and respondent from the indorsement upon the statement of facts prepared by the Assistant Barrister, pursuant to the 58th section of the Irish Registration Act. There were two other objections also taken, but it is with that only which I have just mentioned that we have to deal. The objection is purely technical. It is not suggested that any loss or inconvenience whatever has been sustained by the respondent by reason of the omission of which he complains, but he insists that it is well founded in law, and if that is so he is entitled to have the benefit of it. On behalf of the respondent it is insisted that the omission of the barrister in not specifying the places of abode is fatal to the appeal, simply by reason of the provisions of the 58th section of the Act requiring the statement of the places of abode, being mandatory and not merely directory. On the other hand it is maintained on behalf of the appellant that the terms of the section are directory only in this respect, and that the non-compliance with them does not invalidate the case. To sustain this view the appellant resorts to the doctrine that where the words of the statute are in the affirmative only, they are, generally speaking, merely directory; and he insists that it lies on those who say that they are mandatory to establish that position as the result of some peculiarity in the case, and he appeals to the fact that where the statute prescribes certain acts to be done by the appellant himself it uses negative words, thereby rendering the previous mandatory in respect of acts to be done by the appellant himself; whereas the acts to be done by the public officer and not by the appellant are expressed in affirmative words only, and he says that, therefore, the directions in that respect are directory only. Again the appellant appeals to the authority of, and relies on the class of cases which have been cited by him, wherein certain acts required by statutes to be done within a limited time or with certain forms, have been held valid, though not so performed, the words of the enactments being, as here, in the affirmative only. Further, the appellant relies on the case of *Morgan v. Parry* to shew that the enactment in this case is directory only. In that case the words of the English Registration Act, 6 & 7 Vict., c. 18, on which the question arose, were, that the overseers of boroughs shall prepare lists of the voters of such boroughs, and sign the same, and deliver the lists to the revising barristers. The ques-

tion was, whether a list made by the overseers, and published and delivered, but not signed, was a valid list or a nullity; or, in other words, whether the provision of the statute requiring the lists to be signed was mandatory or directory only. The court in that case held the provision merely directory, and decided that the list, although unsigned in violation of the express provisions of the Act, was valid. It is to be observed that the words of the Act there were affirmative only, and the court, taking in view the object of the statute, and considering that it was to afford to all parties an opportunity of objecting to claims, thought that that object could be attained by the publication of the lists, although the overseers had omitted to comply with the direction as to signing. The court, therefore, observed that if the terms of the section were to be deemed mandatory, the omission would have the effect of disfranchising a number of voters, and intimated that it could not be held that the Legislature had intended such a consequence to follow from the neglect of the overseers. It is insisted that the judgment in that case rules the present one. The requirement in the present instance, it is contended, is not in any way of the substance of the case. If the object of the section is the identification of the appellant, that object, it is argued, is attained by the formal appearance of the appellant before the barrister, his acceptance of the office of appellant, and the delivery to him of the case to be by him transmitted to this court. Then, it is asked can this court impute to the Legislature the intention of allowing the two or three hundred ratepayers concerned in this appeal to be disfranchised, owing to the omission of the barrister? Now, to all this what do we find opposed by the respondent? Simply and solely the case of *Wanklyn v. Woollett*, to which recourse has been had by the respondent's counsel in every difficulty that has arisen, as well as to supply every want. As to that case, although the judgment of the court appears open to criticism, and though the decision is hardly consistent with the current of the authorities, and appears to be at variance with the case of *Morgan v. Parry*, and the principles there acted upon, I do not consider that I am reduced to the alternative of either overruling it, or of adopting it in its integrity, as I am of opinion that it does not touch this case, and is therefore of no authority upon it. I pass over the somewhat remarkable circumstance that, in a discussion where, as in the present one, nearly all the argument has been conversant with the doctrine of directory and mandatory words, a judgment should be relied on as of paramount authority, wherein no mention of that doctrine is made; and it appears that neither at the bar nor in the judgment of the court was that doctrine thought of at all in that case. But to come to the point, that case has been cited as an authority for the position that the words of the statute are mandatory, and consequently that the omission on the part of the barrister is fatal. Now, I presume to say that no such decision was made in that case, nor anything approaching to it. What was decided there was a matter which can admit of no question; to use the words of Wilde, C. J.—“My brothers Oresswell, Williams, and myself are of opinion that to make the appeal effectual, and to enable the court

to hear it, it is essential that the indorsement should be signed by the barrister." But what were the contents of the indorsement? No such question was raised in the case. The barrister had omitted to sign the indorsement. We have no evidence of what the indorsement was. It may have been strictly in conformity with the terms of the statute, or it may have violated them all. The only thing certain is, that the only objection was the want of a signature, and that objection alone was decided on by the court. That decision does not touch the present case as the indorsement here was signed, and accordingly beyond that it is no authority in any case. It was then argued that inasmuch as this provision of the statute was contained in the same section as other provisions which were admittedly mandatory, as for instance the signing of the case, all the requisites so circumstanced must be held to be mandatory also. Now this is quite a gratuitous proposition, unsustained by authority, and contrary to decided cases. In the case of *Burton v. Brooks* (11 C. B., 41), it appears the revising barrister had omitted to sign the case which he was bound to have signed immediately. On the appeal being called on it was found that the case had not been signed, and thereupon the court ruled that they could not hear the appeal. It was then suggested by one of the judges that the case might go back by consent, and it was so decided. Now, that decides two propositions; first, that the direction of the statute as to the time of signing is merely directory, for if it was mandatory the consent of the parties could not give the court jurisdiction to make the order, and afterwards to hear the appeal; and it decides also that, the direction for the signature being mandatory, and this mandatory direction to the barrister to sign being contained in the same sentence as the direction to sign immediately, that circumstance did not disable the court from holding that the latter provision as to the time of signing was merely directory. Such is the view substantially which I have been disposed to take of the case; but since we came into court another circumstance has struck me which I think may be relied on as tending to corroborate that view; that is, that, in the 75th section of the Act, there is a direction to the officer to keep a book, and enter in it every appeal. In practice, the officer tells me that is done thus:—He enters the names of the parties, and the date as they appear on the indorsement, and the date of the receipt of the case, and all these matters he enters in pursuance of the section. Now it is quite possible that what the Legislature had in view in giving these directions to the Clerk of the Errors, and what it had in view in enjoining the barrister to indorse the case with the several matters specified in the 58th section may have been neither more nor less than this—for the facility of reference, and the convenience of the officer having to make the entry, by his not having to do more than to look to the back of the case; and certainly it appears to me that it may have been for no purpose but this, the mere convenience and simplification of the duties of the officer of the court. If he had to look into every case, it is clear that in a great many appeals he would have a vast deal more trouble than he actually has by the present system of looking only at

the back of the document. That may be one way of accounting for the provision, but whether it is correct or not, my opinion upon the whole case is that the provision is not mandatory but merely directory. The court is unanimously of opinion that this is the view we should take, but the reasons which I have suggested are mine only, and my brothers will now state theirs.

O'BRIEN, J.—I concur in the opinion of my brother Ball, that this preliminary objection, the others having been abandoned, must be overruled. As my brother Ball has remarked, the whole argument of the respondent rested upon the case of *Wanklyn v. Woollett*. If that case did not exist, I think it is perfectly clear, having regard to the principles upon which the courts have always decided whether the provisions of a statute are mandatory or directory, that there could be no difficulty in coming to the conclusion that the provision before us is only directory. The provisions of a statute may be made mandatory by express words. The statute also may use negative words, or it may declare that any act contrary to its provisions shall be null and void, or it may make the effects of any acts conditional upon the party's doing certain acts, or it may give efficacy to a certain instrument, as to a bill of sale, upon its containing certain particulars, and it may enact that, in default of its containing those particulars, the instrument shall not have any efficacy, on account of its non-compliance with the required particulars. The case of *Hutton v. English* (7 El. & Bl., 94) was of this latter description. There the statute provided in express terms that, in the case of a bill of sale, the bill, or a copy of it with an affidavit, should be filed within twenty-one days, or, in default thereof, that the instrument should be void. It is only necessary to state that provision to shew that the case of *Hutton v. English* does not apply here. Cases also have arisen on the Registry Act, in which it has been held that the priority which by that Act is given to deeds, of which a memorial shall be registered, is conditioned upon the formalities required by the statute being complied with. But in the case of *Morgan v. Parry*, a case, it is true, not argued by the respondent, but argued by the court, and most carefully considered by it, it was held that a provision far more important than that before us in the present case was only directory and not mandatory; and what was that provision? That the list of voters for the year, the very foundation of the proceedings of the revising barrister, should be signed by the overseer of the borough, and so delivered to the barrister. The importance of that provision appears from the consideration that the list was the document which the barrister was to revise, and Chief-Justice Jervis suggested that the reason of the necessity for the signature was, to identify the list delivered to the barrister as being the same as that made out by the overseer. He and the court, however, held that that might be proved by other evidence, and, to use his own words, that "it would be unreasonable to treat that as essential to the list which is no part of it, but merely added to authenticate it." What is the indorsement which is required by the statute in this case? Does it state any facts, or a question of law?

It is merely a mode resorted to for the convenience of having the appeals entered, and also, perhaps, it may be suggested, with a view to an identification of the parties by the barrister. Can it be suggested that that indorsement is not sufficient, because the barrister does not state in it what is nowhere required to be stated in the case itself? It was well put by the appellant's counsel, that in the sections relating to consolidated appeals, where a very particular form of declaration is prescribed to be signed by the party who consents to act as appellant, there is no mention made of the place of abode. That is in the 61st section. Under the 58th section, all that the appellant has to do is to say, "I undertake to appeal." Nowhere is the appellant himself required to state his residence: and then we are told, that where the barrister is required to state the residence of the parties, the statute is mandatory. Several matters were put forward in argument upon which it is not necessary to give an opinion. I think it was contended by counsel, that the effect of the 61st section, which enacts that all consolidated appeals shall be subject to the same rules as single appeals, was not to incorporate the section with regard to single appeals. Counsel referred to the 58th section, which prescribes what is to be done in the case of single appeals. It is not necessary to pronounce any opinion upon that, nor how far the former provisions of the 58th section, and the express provisions of the 61st, as to the preparation of the case and the signature by the barrister, are mandatory or directory. The case referred to by Mr. Justice Ball shows that the time mentioned for the signing is only directory, because it is plain, that if that provision as to time was mandatory, the consent of the parties could give no jurisdiction; and yet the court held that they had jurisdiction upon consent to let the signature be added *nunc pro tunc*. There is a variety of other cases in which it has been held, that though as to the act required to be done a statute is mandatory, yet, the provision as to the time within which the act is to be done is directory merely. There is a case in *Strange*, to which Lord Mansfield refers in *The King v. Knox* (1 Bar., 445), and in the last-mentioned case Lord Mansfield lays down the principles, upon which these questions should be all decided. He says that "there is a known distinction between circumstances which are the essence of a thing required to be done by an Act of Parliament, and clauses which are merely directory. The precise time, in many cases," he says, "is not of the essence. In the case of *Rex v. Sparrow* (2 *Strange*, 1123), the justices had been guilty of a neglect in not appointing overseers within due time, and this court issued a mandamus to compel them to do it afterwards, for the sake of the poor. The poor could not have had a specific remedy in that case, unless the justices might do it after the precise time, in obedience to the mandamus." Upon these grounds, independent of that case upon which so much so reliance has been placed, I think that these provisions are directory merely, and not mandatory. The section to which Mr. Coffey called our attention is strongly confirmatory of the view we are taking, because the 75th section requires that, along with the statement, the appellant shall send a notice,

signed by him, stating his intention to prosecute the appeal, and shall also send a notice to the same effect to the respondent; and the 77th section then says that except such notice is given the appeal shall not be entertained. Now, where the Act of Parliament, in express words, makes one provision mandatory, and omits to do so in another provision, I do not mean to say that that other may not be mandatory also, but it is a circumstance not to be lost sight of in construing the Act. Well, against all this, the only matter to be relied upon, is the case of *Wanklyn v. Woollett*. Now, as Mr. Justice Ball has observed, the exact decision in that case does not rule the present one, unless we are bound to hold that all the provisions of the section are mandatory because the court has decided that one of them is. Now, if that case decided the proposition which is contended for, I would still consider it both contrary to the cases previous to it, and overruled by the subsequent decisions of the court; and also by the principles laid down in the case in 17th Common Bench. Now, in that case in 17th Common Bench, the court decided that the signature to the case might be supplied. Well, the signature to the case is of at least as much importance as the signature to the indorsement, so that the decision in that case seems inconsistent with the decision in *Wanklyn v. Woollett*. Well, in the argument of that case, the question of mandatory and directory was never touched upon. The whole of the argument, and the greater portion of the judgment was taken up with pointing out the expediency of stating in the case how the appellant came to be interested in the matter. Upon these grounds, I do not think the case one which is applicable in the present instance. If the facts were the same, I, for one, should not think that the case ought to be followed, and I, therefore, think that the preliminary objection should be overruled. I should say, too, from what has occurred in this case, that it would be convenient that notice should be given, apprising the party of the preliminary points, if any, intended to be relied on.

HAYES, J.—The Court of Common Pleas in England being a court of *dernier ressort* in registry cases, I think it important that its decisions should be received with gravity, and not lightly found fault with; and I confess, in this case, that I think the case of *Wanklyn v. Woollett* is not fairly open to all the arguments which have been used against it. In my opinion, so far as it decides what it does, I think it a right and well-decided case, and one that I am disposed, at present, to stand by. But while I give that opinion, I wish it to be clearly and definitely understood, that I entirely concur in the judgment of this court; and that I think the present case essentially distinguishable from that of *Wanklyn v. Woollett*. Now, my brother O'Brien, in the course of his judgment, has referred to the principles relating to the difference between mandatory and directory words; and he has, I think, put the case upon the right ground. I do not intend to go through all the cases in which this question has been discussed, but I will go to the principle which, I think, ought to be at the root of the cases. The Legislature frequently has both an end to provide and, also, means to that end; and those

means and that end are frequently expressed by precisely the same words in an Act. However, it becomes persons who construe the Act not to be altogether insensible to the ends and the means the Legislature has enacted; and if they will only bear this in mind, that what is the end is always mandatory, while the means are often only directory, they will be likely to come to a right conclusion. I think this is something which may be of use in interpreting statutes, and, bearing it in mind, let us turn to the 58th section and those following. The Legislature here, in this series of sections, has to provide for appeals in registry cases. Let us see what they enact. First, the Assistant Barrister is to state the case. It is evident that that is necessary. What more is he to do? He is next to read the statement. But the next step which he is to take, after having stated and read the case, is to appoint the parties. There is no party as yet on the record, save one, the appellant, who has signed the case and made himself one party. But then, the Legislature throws on the Assistant Barrister the duty of appointing parties, and he is to appoint the person who is to be respondent. The 59th section gives the direction how the respondent is to be appointed in ordinary cases. These two duties, of stating and reading the case and of appointing parties, are both equally essential and important; and it is not until both have been done, and until the Assistant Barrister has, by his signature to the indorsement, attested that both have been done, that there can be said to be an appeal; and that signature is a very important one, for the signature to the indorsement is a very essential matter in this whole proceeding; it is the signature attesting that he has settled the case and the parties, and he signs this as what he sends to the court above. It is a most essential part of the whole proceeding; without this, the court can do nothing. It is what authenticates the statement of the *judex a quo* that these are the parties, this is the appeal, and that he sends it, as such, to the *judex ad quem*; and this is what is decided by *Wanklyn v. Woollett*, which I consider to be a good case, and one which I am disposed to stand by. But it is very far from ruling the present. Now, I should say that the provision which we have to consider is purely directory; and I think that there are other instances of the same kind in the same section, where the Legislature never intended that the validity of the whole matter should be periled by the non-observance of its directions. We are told that there are here three persons of the same name. Well, be it so. What can be the reason of requiring the statement of the place of abode? There is none, but for the information of the parties; and if the parties do not require that information, what reason have they to complain? The provision to sign then and there is a matter of purest direction. It is like the direction to read the statement in open court. Suppose, in that respect, the appellant were to say—"Give me the statement, and I will read it myself;" suppose he is deaf; will the absence of reading the case invalidate the appeal in these cases? The case referred to by Judge Ball, shows that the case may be signed *nunc pro tunc*. That shows how important the signing is. The court could not go on without it; but

by their decision, they showed that, though it was important to have it, it did not signify when it was made. These are my short views. I think the preliminary objection ought to be overruled; and that *Wanklyn v. Woollett* is clearly distinguishable from the present case.

FITZGERALD, J.—I concur with the judgment of the court, and the reasons, given by the judges who have preceded me, for overruling the preliminary point. We were pressed with the fact of their being nothing in the case but for the authority of *Wanklyn v. Woollett*, which was urged upon us with good ground, for, undoubtedly, there is reasoning in the judgment of the court in that case, which would go to the effect that the whole of the section was mandatory. I say there is language which is represented to come from Chief Justice Wilde, which would have the effect of showing that the omission of any one of the requirements of the section would be fatal. There is language which goes to that effect; and which would make *Wanklyn v. Woollett* a case in point; and it was stated in argument that the necessary consequence was this, that if, in place of the case being indorsed, the matter which ought to be in the indorsement had been put at foot, that would not be a compliance. If I could understand it as going to that extent, the question would be, whether we were to overrule that case, and it was pressed upon us that we should not disturb that decision. No doubt the language of Channell, B., in *Morgan v. Edwards* (5 Hurl. and Norm., p. 418), shows how cautious we should be in overruling decided cases. The question there arose upon the statute enabling justices to state a case for the opinion of the superior courts; and a case of *Woodhouse v. Woods* was referred to as deciding the point then before the court. Channell, B., says: "The decision being one from which no appeal would lie, we should not feel ourselves so strictly bound by it, as if it were open to appeal. Still, we should not differ from it, except upon strong and cogent grounds. We have, therefore, felt it necessary to investigate the question for ourselves." In the same way, if it was necessary to overrule *Wanklyn v. Woollett*, I would say that it is a decision of a court of co-ordinate jurisdiction, from which no appeal lies, and one which we should not overrule without strong and cogent grounds; but then, I say further, that there are those strong and cogent grounds here, which require us to overrule it. But when we come to look at it, we find that there is no necessity for overruling it, for I understand it as deciding only this, that those matters which are essential to the appeal, and without which the court could not proceed between the parties, should be identified by the signature of the judge below, and the case proceeds altogether upon the absence of the signature, or, rather, upon the absence of all indorsement, as an indorsement not authenticated by signature is no indorsement; and what was the decision? When you come to look at it, it is plain that, until you call in aid the indorsement, you had not that which would enable the court to give judgment; for until you did so, you did not know who were the appellants or respondents; or, if it was a consolidated appeal, whether the party had any interest. I take *Wanklyn v. Woollett* to be a case in which the court arrived at a sound conclu-

sion for erroneous reasons. Such is the short ground upon which I concur with that case. There is this, also, observable in the present case, that the strongest reasons ought to exist before we withhold from the party the benefit of his right to appeal. The objection here is purely technical. There is nothing, although the portion of the indorsement giving the places of abode is wholly omitted—there is nothing wanting to enable the court to determine the question; and we cannot shut our eyes to this, that it would be not only deciding this appeal, upon a technical ground, against the nominal appellant, but that we may, also, possibly, be depriving of the franchise some two or three hundred parties, who may be entitled to it, not one of whom had a shadow of control over the judge;—who were not even entitled to look at the case, for the case is entrusted to parties over whom they had no control. I am happy to say, that we are arriving at a conclusion which will do injustice to no party. As to consolidated appeals, it is unnecessary to offer any opinion. Undoubtedly, in the case of *Wanklyn v. Woollett*, the Chief Justice appears to have acted on the ground that the whole of the provisions of the section analogous to the 58th section of the Irish Act, apply to consolidated appeals. If it was necessary to give a decision on this point, I would have grave doubts, save as to this, that the names of the parties ought to be authenticated, at the foot of the case, by the signature of the judge; but, beyond that, I would have great doubts upon the subject. We were pressed with the language of the 60th section, namely, “that the chairman shall state, in writing, and read the case, and sign the same, as hereinbefore mentioned;” but it is plain that these words refer to the signature and writing of the case, and not to the indorsement, because in the same section we find that, at the foot of the case, the appellant shall sign the memorandum which is given, but nothing is said as to the indorsement. We were further referred to the language of the 62nd section. However, it is unnecessary to say more, than that if it was necessary to decide this question, both on the language of the Act and on the reason of the thing, I should entertain great doubts upon it.

DRAST, B.—I concur in the judgment of the court. We are called upon to come to the conclusion, that some two hundred and fifty persons, who claim to be electors, are not to have their case heard, because of an omission purely technical, and which is the act, not of the nominal appellant, but of the judge from whose decision the appeal is brought. It is to be observed, that the partiality of the omission of which is relied upon, is the only one which the statute has supplied the Assistant Barrister with no materials to ascertain, because it will be found that there is nothing to compel either the appellant or the respondent to state his place of abode. Now, when the Legislature required that statement to be made by the Assistant Barrister, we must suppose that it meant the place of abode of the party at the time the appeal was brought; and there are no materials to enable him to supply that provision, and there are many cases in which he could not ascertain the fact. No more could he comply with the provision, if the respondent withheld his place of abode. And, then,

we are called upon to hold that that omission, which may have been caused by that inability, but which is, at any rate, the omission, not of the appellant, but of the judge, is to deprive these parties of the right to have their case heard. Before yielding to such an objection as that, we should see that it is well founded in point of law. There is nothing in the words of the statute to support the objection, as they are affirmative only, and may be merely directory. The only decision in its favour is that of *Wanklyn v. Woollett*. As to that case, it is quite sufficient for me to say, that it is not a binding authority on the present case, and proceeds on grounds which are distinct and intelligible. They are, that the provisions analogous to those of the 62nd section here had the effect of applying the provisions of the 58th section to consolidated appeals; and that the indorsement on the case was a condition necessary to be complied with; and that in the absence of that there was no appeal. There was nothing in that case to shew that the condition, which the court held to be essential, was complied with; or, that the party who claimed to be heard was entitled to be the appellant. That element exists here. We have the signature of the barrister, showing that he had entertained the case. I think it is sufficient to state that, in order to distinguish this case from *Wanklyn v. Woollett*, and though I concur with my brother Hayes, that there ought to be an uniformity of decision in these appeals, I do not think that by overruling this preliminary objection we are infringing on the decision of *Wanklyn v. Woollett*. If it will be necessary to do so at any time, it will be necessary for the party to contend, that though it is an authority, it is not binding on this court. All I say is, that I, for my part, think it is clearly distinguishable from the present case, and, on that ground, I concur with the other members of the court.

JOHN M'KEOWNE, APPELLANT FOR SELF AND OTHERS, SAMUEL BRADFORD, RESPONDENT FOR SELF AND OTHERS.
Dec. 9, 10, 12, 1861; Feb. 22, 1862.

Franchise—Occupation—Letting in Conacre.

Held that a letting in Conacre, is not such a parting with the occupation of land as will deprive the owner of his franchise. (Dissentiente, Hayes, J.)

THE preliminary objections in this case having been disposed of, as above reported, the court now went into the consideration, of the legal merits of the case itself. It was stated by John Leahy, Esq. Chairman of the County Louth, and was as follows:—“County of Louth, Revision Court for said County.—1861. The names of the several persons in the schedule herunto annexed, appeared in the lists of voters for revision, as rated occupiers in the several baronies of said County of Louth, set opposite to their names in said schedule, at sums exceeding respectively £12, and were on the last register of voters. All said appellants were duly objected to by voters, and said objections were severally heard by me. It appeared before me in evidence, that all said rated occupiers, (herein called the appellants) were severally included in the last poor rate as occupiers of their respective holdings

of land, and were tenants thereof for twelve months, and upwards, previous to the 20th of July, in the present year; and it also appeared in evidence, that they had respectively in or about the month of May last, and in this present year allotted and pointed out in some fields or parts of fields on their holdings, ploughed ridges or drills for persons who were either their own labourers, or other persons resident near them to whom they give permission to plant potatoes, as conacre, as it is so called or known, and which potatoes were accordingly set or planted by said conacre holders with manure belonging to the appellants, and put by them on the land which was ploughed and prepared therefor by said appellants. It also appeared in evidence, that said conacre holders were to pay for said crops of potatoes, either in money or in labour (as money's worth,) or in consideration of manure to be used in the crops, to get them free of charge, and that all said crops were to be removed at maturity. It also appeared that the said parts of said lands, during the time said crop was to be in the ground, were to be protected by the appellants from trespass, and were under their general care and charge in common with the other parts of said fields, but that said crops were to be weeded and looked after by the holders or owners of them, until after they arrived at maturity, (which was necessarily after the 20th of July last); I was satisfied upon the evidence, that there was no actual giving up of the possession or occupation of such parts of said lands by the appellants, or any agreement or intention on their part so to do, (as far as I could judge,) nor any parting with the possession, save so far as the foregoing facts may, in themselves, lead to such a conclusion. It also appeared that there were no fences or divisions separating the said parts of said fields from the other parts thereof in the possession of the appellants. I was also satisfied by the evidence that in no case could the quantity of land sown with potatoes, upon any valuation by possibility reduce the value of the holding of any of the appellants below the sum of £12, and very many of the appellants were some of the most extensive occupiers of land in the county, with whom the practice of letting small parts of their land for conacre, upon the terms aforesaid to their own labourers and others is very general. On the part of the objector in each case, it was contended before me, that the above facts shewed that the appellants respectively had not such a sufficient occupation and possession of the whole of their rated holdings as entitled them to be registered, and on the part of the appellants it was contended that the above facts did not shew that there was such a parting of possession of, or ceasing to occupy any part of the said rated holdings as ought to deprive them of the right to be registered. Having regard to the decisions of the Court of Exchequer Chamber (as the appellate Court of Registry) in *Barnard's Case*, and in the Cases of *Brangan*, appellant, *Driscoll*, respondent, and *Comiskey*, appellant, *Bourne*, respondent, I considered that the appellants, respectively, were not entitled to be registered, and I therefore allowed the objection in each case, and expunged the names of all said appellants from the lists, to which decisions they have given notice of appeal. The question for the opinion of the court, therefore, is whether under the circumstances mentioned in the

foregoing statement of facts, the names of the appellants were rightly expunged from the said lists of voters. If the court should be of that opinion, the said lists are to stand as they are, without any alteration; but if the court should be of a contrary opinion, then the said lists are to be altered and amended by inserting therein, in their proper places, the names of the said several appellants, and I hereby declare that all the said appeals ought to be consolidated, as they all depend on the same decision, as aforesaid, and I hereby name John M'Keowne for and on behalf of the said appellants, (he and they so consenting) to be the appellant in this consolidated appeal, and Samuel Bradford, jun. to be the respondent, the objector so desiring and consenting.—Dated this 24th day of October, 1861, JOHN LEAHY, Chairman of Quarter Sessions for County of Louth—I for myself and on behalf of all the other persons who are interested as appellants in this matter, and whose names are written in the schedule hereto annexed, do appeal against the above decision and agree to prosecute this appeal. Signed on behalf of said appellants, all rated occupiers as above, this 24th day of October, 1861—John M'Keowne I for myself and on behalf of all persons interested as respondents in this matter, do hereby agree to appear and answer this appeal, dated 24th October, 1861.—Samuel Bradford, jun." Then followed a list of 251 persons, whose claim to remain upon the registry, depended upon the decision to be come to upon this statement. There was a cross appeal raising the same question, but the appeal upon the case above given was alone argued, as the principles were the same in both cases.

Coffey, for the appeal.—The first section of the statute 13 and 14 Vic., c. 69, is that which relates to the present question. It enacts, that every person "who shall occupy, as tenant or owner," any lands, and shall be rated as therein enacted, shall be entitled to vote. We also refer to statute 10 G. IV., c. 8, s. 2, which creates the £10 freehold franchise, and to the oath of the freeholder registering a freehold of that value, which is given in schedule 6 to that statute. That franchise was preserved in the Reform Act, 2 and 3 Wm. IV., c. 88; and see the form of oath in schedule C, No. 46. The word "occupation," which is essential to this franchise, is also found in the Poor Law Act, 1 and 2 Vic., c. 56, ss. 61 and 71. The words used in the 13 and 14 Vic., c. 69, s. 1, are precisely similar to those used in these statutes. The contention here, on the part of the respondent, is, that the occupiers, by giving to other persons permission to plant potatoes in part of their lands, have parted with their occupation. The first argument that we use is a negative one, namely, that there is no case to be found upon any of those statutes in which a conacre holder has been rated as an occupier; and, until *Barnard's case* (7 Ir. C. L. R., 374), there is no case in which it was held that a conacre letting amounted to a parting with the possession; the whole current of decision down to that case shews that the party holding land in conacre was not looked upon as having an interest in the soil. In *Closs v. Brady* (Jo. & Car., 187), Pennefather B. says that, in his opinion, "the letting of land to conacre tenants is but a mode of tilling it; and the rents paid by them are

but a part of the produce of the land in the hands of the inheritor." *Lord Westmeath v. Hogg* (3 Ir. L. Rep., 27), and the observations of Doherty, C. J. in that case, are strongly in our favour. *Dease v. O'Reilly* (8th Ir. L. Rep., 52), is a case which we rely upon as of great authority. *Close v. Brady* was there approved of, and it was held, that a conacre letting was not a demise of the land, but only a disposal of the profit derivable from it. In *Mulligan v. Adams* (8th Ir. L. Rep., 132), a grazing contract was held not to amount to a letting. Unless the exclusive occupation of the land is in the conacre holder, it cannot be held that he is the tenant; and the owner of the land has full control over it, except to prevent the conacre holder from doing what he has a license to do. [*Ball, J.*—Could he enter on the part of the land which is let in conacre?] He could walk all round it, and could prevent the tenant from using it in any other mode than that agreed upon; he could plant between the drills. The first case contrary to these views is *Barnard's case* (7 Ir. C. L. Rep., 374); but it is not to be considered as an authority, as the judges expressed their dissatisfaction with the way the case was stated, and wished to remit it to the Assistant Barrister, but counsel on both sides preferred to have it decided as it was. There was no statement there as to what was the contract between the parties, or their intention, but a mere statement that the owner gave the land to the conacre holder. *Greenslade v. Tapscott* (1 Cr. M. & Rosc., 55), cited in *Barnard's case*, is distinguishable from the present one. [*Fitzgerald, J.*—It appears that there was an absolute parting with the land in that case, as it is stated that, at the end of six months, the land was delivered up again.] The next case which may be relied upon, on the other side, is that of *Brangan v. Driscoll* (5 Ir. Jur., N.S., 333). [*O'Brien, J.*—I find from my notes that the conacre question was not argued at all in that case, and it does not apply here.] Then comes *Comiskey's case* (6 Ir. Jur., N.S., 109). It is distinguishable from the present one as there is a finding here that the parties did not give up, or intend to give up, their possession. On the other side, they will have to go to the length of arguing that there is an exclusive possession and occupation of the land by the conacre tenant. *Hare v. Celey* (Cr. Eliz., 143) is a strong case in our favour. It was held that the dealing in that case, which was in many respects a conacre dealing, did not amount to a lease of the lands. Then there is a class of authorities, beginning with *Crosby v. Wadsworth* (6 East., 602) and ending with *Jones v. Flint* (10 Ad. & Ell., 753), which are too conflicting to furnish us with any certain rule. *Evans v. Roberts* (5 B. & Cr., 829); *Jones v. Flint* (10 Ad. & Ell., 753). *Booth v. M'Manus* (6 Ir. Jur., N.S., 367), expressly decides the point in our favour. The word "occupation," in the present instance, means that of some person whose occupation is inconsistent with that of any other person. What is given to the conacre holder is a mere license, and the person who gets the license is not a tenant of any kind. In *Sheridan v. McCartney* (11 Ir. C. L. Rep., 506) dissatisfaction is expressed with the decision in *Barnard's case*. *The King v. The Inhabitants of St. Nicholas, Rochester*

(5 B. & Ad., 219); statute 23 and 24 Vic., c. 154, s. 18; statute 6 Geo. II., c. 57; 59 Geo. III., c. 60. *Duigenan's case* (Alc. Reg. Cas., 114); *Phillips's case* (Alc. Reg. Cas., 20).

F. M'Donagh, Q.C., and *Chatterton, Q.C.* (*J. C. Lowry* with them), for the respondents.—We submit, in the first place, that this appeal should not be entered upon at all; but that if it is, the law is settled. This court is as final in its decisions as the House of Lords; such a court cannot permit the re-discussion of a question once decided by it. See Lord Campbell's judgment in *Bright v. Hutton* (3 H. of L., pp. 391, 392). There is no real distinction between the present case and those previously decided. *Barnard's case* is a clear authority here, and has since been always followed. [*Ball, J.*—What do you say to the expression there, that the owner "gave the land" to the conacre holder? That shows that there was an actual transmission of the land.] It was given only for a specific purpose, and when that was fulfilled, the land was restored. It was a letting in conacre. *Comiskey's case* cannot possibly be distinguished from the present one. If there is any hardship in those decisions, let the Legislature remedy it. Would it not be a strong thing to say, that an owner of fifty acres of land might hand over all his land to conacre tenants, and yet be able to say that he remained in occupation? Can it be said that the present appellant was in occupation, within the meaning of the statute? [*Ball, J.*—Has there ever been an attempt to rate the conacre occupier to the poor?] No; but we will show, that if he continued to occupy the same land for two or three years, he might insist on being rated. Our proposition is, that the party who takes in conacre, acquires an intermediate occupational interest in the land while the crops are growing to maturity, and before they can be gathered. We do not characterise it as a tenancy of any sort. He puts his own crop in the ground, and thenceforward, and till maturity, and even after that, till the crop is removed, he has a special possession and right to enter on the land and take the crop. Our next proposition is, that the status of the conacre tenant towards the land is of a more exclusive character than that of a person who, for a time, takes the exclusive pasturage of the land; the conacre tenant's status is more exclusive, because the crop, his own property, is growing on the land. If the landlord entered and destroyed the crop, he would be a trespasser. [*Fitzgerald J.*—If, in the present case, the landlord entered and walked between the drills, without doing injury, would that be a trespass?] No; if he goes between the drills so as not to interfere with the growing crop; but if he walks upon the drills, then there is trespass. Our next proposition is, that the effect of the dealing is not merely that the conacre tenant buys a crop either at maturity or in process of growth: *Parter v. Stanoland* (11 East, 366); *Wilson v. Macbreth* (3 Bur., 1827)—even if *Barnard's case* and *Comiskey's case* had never been decided, yet the law is, that the conacre tenant has an intermediate possession, and can maintain trespass for injuries to his property. *Crosby v. Wadsworth* (6 East., 603). The conacre tenant then takes the land to rear his crop in; he is an occupier for his own

benefit, not a permissive occupier for the benefit of another; he is, therefore, the exclusive occupier, and there is a severance of the occupation of the person who lets him the land, and that person cannot qualify in the manner required by the statute. *Lord Bute v. Grindal* (1 T. R., 343). It is unnecessary to characterise the possession of the conacre tenant as under any head of tenancy. *Dease v. O'Reilly* (8 Ir. L. Rep., 52) shows that it does not come under any such ordinary head of tenancy. [Ball, J.—Is it so clear that the tenancy is not for a determinate period?] The period is perfectly capable of being ascertained; the *terminus a quo* is when the tenant enters and plants his crop; the *terminum ad quem* is when the crop comes to maturity, and is reaped. *The King v. Watson* (5 East., 485) proves that occupancy and possession are similar. While the occupier in conacre can maintain trespass, the owner cannot. [Deasy, B.—What do you say to the fact which is found in the case, that the lands were to be under the care of, and protected by, the appellant?] The same element existed in *Comiskey's case*. [Deasy, B.—If the landlord can exclude trespassers, it cannot be said that he cannot bring trespass.] *Greenslade v. Tapscott* (1 Cr. M. & R. 55) is a strong authority in our favour. All the cases cited on the other side are distinguishable; some of them are decided upon peculiar words, others on a totally different state of facts from that in this case. [Ball, J.—How is it necessary that the tenant should have any interest in the lands? All he need have is an interest in the crop.] It is essentially necessary for the ordinary right of protecting the crop, and because, having put his own seed in the ground, it is reasonable he should have an interest in the land. [Ball, J.—If your reasoning is right, and a man, having put his own seed in the ground, has an interest in the land for the purpose of protecting his property, will not the same reasoning go to prove, that if you buy the crop in the ground, you will acquire an interest in the land in precisely the same way?] No: in the one case the crop is purchased just as if it was in a warehouse; but that is very different from getting the land and putting the seed in. In *Booth v. M'Manus*, one of the judges dissented. Even if that decision is what it is represented to be, we submit that it is not law, and that the Court of Exchequer could not have considered the case of *Greenslade v. Tapscott* (1 Cr. M. & R., 55). The case cannot control the decision of the Court of Exchequer Chamber. In *Hare v. Celey*, the facts were very different from those here. It is a case of a peculiar partnership between landlord and tenant. At all events, the question is already decided, and this court ought, like the House of Lords, to abide by its own decisions: *Sussex Peerage case* (11 Cl. & Fin., 808); *Beamish v. Beamish* (6 Ir. Jur., N.S., 401). Fixity of law is of more importance than original correctness of decision: *Cox v. Glue* (5 C. B., 533); *Pitts v. Smedley* (7 M. & Gr., 85); *M'Mahon's case* (Ir. Circ. Rep., 443); *Lord Bute v. Grindal* (1 T. R., 333); *The Queen v. Ponsonby* (3 Q. B., 14).

Sullivan, Serjeant, in reply.—There is no difficulty in holding, that a person with a conacre interest has no more than a license to go in upon the land for a certain purpose, and that the occupation still remains

in the owner. *Barnard's case* was not decided upon the conacre system; the occupation by the tenant was assumed there. Suppose the case of the owner of a concern near a town, and his allowing the proprietor of a circus to erect a tent in his yard for a month, and exhibit there, is the owner of the tent the occupier of the yard so as to deprive the owner of his franchise? The 18th section of the recent Landlord and Tenant Act shows that there is a distinction between sub-letting and letting in conacre. [Ball, J.—Is not that section a legislative declaration, that these conacre settings are lettings of the land?] No; if the Legislature had thought that a letting in conacre was a sub-letting, it would not have used the word conacre at all. [Deasy, B.—It was because of the decisions that settings in conacre were not lettings of the land, that the word conacre was introduced into the Act.] The Irish decisions have settled, that a person holding land in conacre is not a tenant: *Hogg v. Lord Westmeath* (3 Ir. L. Rep., 29); *Dease v. O'Reilly* (8 Ir. L. Rep. 52). It is said that *M'Mahon's case* (Ir. Circ. Rep. 443) is opposed to those decisions; but there the tenant had the exclusive right to the field and to enter thereon. The court is not bound by its former decisions. There is a wide difference between it and the House of Lords, which is a court which decides for the whole realm. The late Irish cases of *Booth v. M'Manus* and *Sheridan v. M'Cartney* are contrary to *Barnard's case*. *Hare v. Celey* answers the argument, that no case is to be found in which the allowing a party to take a crop has been held not to give an interest in the land. Giving a right to enter on a bog and cut turf, will not deprive the owner of occupation; and yet, the soil itself is taken away. *Hurdy's case* (4 Ir. Jur., N.S., 125) is an authority in our favour. The meaning of the word "occupy" is considered, by Lord Denman, in *The King v. The Inhabitants of St. Nicholas, Rochester* (5 B. & Ad., at p. 227). The cases cited as to bringing actions of trespass do not apply here.

February 22.—The judges now delivered their judgments.

DEASY, B., said that the case came before the court upon appeal from the decision of the Chairman of the County of Louth, who had held that the appellant and a great number of others were disentitled to be upon the registry of voters for that county by reason of the facts which he had stated. The Chairman considered he was bound by the decisions of this court in *Barnard's case* and *Comiskey's case*; and it was now contended before the court that it was bound by its own previous decisions. In support of this contention the doctrine of Lord Campbell in *Bright v. Hutton* was cited. Lord St. Leonards in the same case had expressed a contrary opinion. In a case the argument in which had been published since the argument in the present case—*The Attorney-General v. The Dean and Canons of Windsor* (8th H. of L., 369),—Lord Campbell expressed again the same opinion. No notice was taken of it by either Lord Cranworth, Lord Chelmsford, or Lord Wensleydale, although Lord Kingsdown referred to it. It was not now necessary to express any opinion on the question, as the reasons which applied to the decisions of the

House of Lords did not apply to those of this court. The decisions of the House of Lords were binding upon every other court, but this was a special court for registry cases only, and its decisions were conclusive upon the revising-barristers, but not upon the other courts, each of which might come upon any point to a different conclusion, which conclusion might be upheld both by other superior courts and by the House of Lords. That was a circumstance which in his Lordship's opinion made a wide difference between the position of this court and that of the House of Lords, and enabled this court to review its own decisions. Coming then to the cases which had been relied upon by those who opposed this appeal, his Lordship did not consider that *Barnard's case* necessarily decided the point as in that case there was a statement that the respondent "gave" the land to a person for the purpose of taking a crop, and on that statement the case was decided. In *Brangan v. Driscoll*, it seemed that the judges pronounced no opinion upon the general question. *Comiskey's case* certainly was adverse to the present case. Since that decision was pronounced, the subject had been discussed in the Common Pleas and in the Exchequer, and the result of the discussion in each had been unfavourable to the decision of this court. *Booth v. M'Manus* in the Exchequer decided that a letting in consacre was not a parting with the land. In the same way in *Sheridan v. M'Carney*, the Chief Justice of the Common Pleas had taken a view adverse to *Comiskey's case*, and further, there was a decision of this court itself, which appeared to be difficult to reconcile with *Comiskey's case*; that was *Hardy's case* (4 Ir. Jur., N. S., 125). Those decisions rendered it necessary for this court to reconsider the general question, and the conclusion at which his lordship had arrived was that the decision in *Comiskey's case* was erroneous. The appellants had been on the registry for the previous year, and the ground of objecting to them was that by reason of their letting portions of their lands in consacre, they had parted with the occupation of those portions, which under the 1st section of the Statute was necessary to entitle them to the franchise. In considering the question it was necessary to have regard to the state of the law previous to the Act of 1850. The Statute 10, G. 4, c. 8, gave a £10 freehold franchise for counties, but it was made necessary for the person claiming the franchise to swear that he was in the actual occupation of the freehold. The Reform Act also gave other franchises, and the effect of both acts was that actual occupation was in a great number of instances a condition necessary for the enjoyment of the county franchise. When one considered the fact that the numbers of persons entitled to vote was then much smaller than now, and that the right to vote was, consequently, much more eagerly contested, it was strange that there was no decision to be found prior to the Act of 1850, upon the effect of a letting in consacre. *M'Mahon's case* (Ir. Circ. Rep., 443), did not touch the present one. Upon the borough franchise there were *Phillipps's case* and *Ditigervan's case*. Such was the state of the law in 1850. No man had been deprived of the franchise by reason of this letting in consacre. The object of the Registry

Act of 1850 was to extend as well as to simplify the franchise. It would be strange if such an Act passed with such an object was so framed as to disqualify a large class of occupiers by reason of this dealing in consacre. It would be strange if the Legislature had framed the law, so as to disqualify a large farmer, because he allowed his labourers to take a crop off a portion of his land. His Lordship was confident that such was not the intention. Under the 1st section of the Act the conditions of the franchise were: first, occupation; secondly, rating to a certain amount; thirdly, a continuance of that state of things for twelve months, and payment of all poor-rates. It was not disputed that the appellants were rated to the proper amount and had paid all rates, and he did not think that the facts stated show that they had ceased to occupy. The persons who take the land in consacre do not occupy as owners, and it would be contrary to the decision in *Dease v. O'Reilly*, to hold that they occupy as tenants. Mr. M'Donough argued that they had acquired a special possession. But if they did not occupy as tenants or as owners the persons previously in possession must do so. That view was upheld by the facts stated by the Chairman. So that, in fact, all that the appellants had done was, instead of putting in a crop themselves, to allow other persons to do so and remove the produce. The authorities established that the sale of a growing crop did not confer any interest in the land. *Evans v. Roberts*; *Jones v. Flint*. The words used at page 757 in the judgment in that latter case were applicable here, for there was in the present case no agreement as to the possession of the land, and there were stipulations which it would be difficult to give effect to if the possession did not remain in the owner of the land. If it was the duty of the court only to give effect to the agreement, it would do so by holding that an easement was all that was granted. The object of the contracting parties in the present case and in those referred to was the same, that the purchaser should have the crop, nothing more, and that the vendor should continue to have the land. There was another test; that was the continuing liability of the owner of the land to the rates. If the owners had continued liable to poor-rate, it would be difficult to hold that they were not entitled to the franchise. Then was it the effect of the transaction to render the purchasers of the crops liable? No instance had been given in which that had been held to be the case. It would be introducing great confusion into the Poor Law, if the court held that such a letting introduced a change into the liability to the rates, and if it did not introduce that change, they should hold that the occupation remained the same. He was of opinion that the appeal should be allowed.

FITZGERALD, J.—I concur with my brother Deasy in the opinion which he has arrived at, and I am prepared to adopt as mine the reasons expressed in his clear and elaborate judgment. It would not be fitting for me to add a word to what he has said, if it were not that I was a member of the court by which *Comiskey's case* was decided. I then dissented from the other members of the court, and I was of opinion that *Barnard's case* had been erroneously decided, but the reasons for which I so dissented have not been re-

ported, and the note of the case does not convey any accurate idea of the grounds upon which my judgment then proceeded. The criticisms made upon *Barnard's case* at the bar and by my brother Deasy seem to me to be well founded, but I prefer to assume that the court there intended to decide the abstract proposition that a consacre letting amounts to such a parting with the possession that the owner of the land thereby ceases to be the occupier. Such was the interpretation put on that case in *Comiskey's case*, and even in that light, my opinion is that it cannot be upheld. The Registry Act seems to me to contemplate that every portion of land shall be represented by some person, and that every rated owner or occupier who has been rated under that Act continues to possess the right of being on the register, until some change has taken place, by which another person is substituted under such circumstances as would entitle him to be rated for his occupation. In my opinion, a consacre holder is not the occupier within the meaning of the Act. He is not liable to be rated; his position is only that of a person who has derived a right to the profit of a single crop. Whether *Barnard's case* was well decided or not, it is still open to criticism. *Barnard's case* was decided on the authority of *Greenlade v. Tapscott*. That case may have been properly decided; but it arose on a question between landlord and tenant. It is also open to this remark that it appears from it that there was there an actual change of occupation. It appears there that the plaintiff had permitted persons to take possession of the lands. The land is stated to have been delivered up again in the month of October, so that the case showed an actual change of possession. That makes a great difference. I am now assuming that the decision in *Barnard's case* was right. Even so, it seems to me that it would not rule the present appeal, which is founded upon a very different state of circumstances. The claimant here was rated as occupier, and *prima facie* his title continues. The onus rests with his adversary, who rests his case upon the consacre transaction. There can be no doubt that it was in the power of the parties to regulate by contract their rights, and to guard against what might be the effect of letting in consacre. But it seems to me that it was intended by the parties that the contract should not operate to affect the occupation or change the possession, and that the party should be limited to an easement to take the profit to be derived from the particular crop. The case also states that the parts so let were during the time the crop was to be in the ground, protected by the appellants from trespass, and were under their general care and charge in common with the other parts of the fields, and that there was no actual giving up of the possession or occupation of such parts of said land by the appellants, or any agreement or intention on their parts so to do; or any parting with the possession, save, so far as the facts stated in the case, might, in themselves lead to such a conclusion. It seems to me, therefore, that even if *Barnard's case* is to be considered as rightly decided, on the special circumstances of the present case the appellant is entitled to our judgment. In the course of Mr. Chatterton's very able argument, he relied on the fact that there was

no case in which a right to sow and dig a crop was not held to be an interest in land within the meaning of the fourth section of the Statute of Frauds. I do not intend to go into all the distinctions which have been taken upon this point. *Crosby v. Wadsworth* was cited, and also *Jones v. Flint*. It is difficult if not impossible to reconcile all the cases. I assume that Mr. Chatterton's proposition is well founded. But in the present case there was, it is to be recollected, no actual change of possession, or any constructive change, unless that change was effected by force of the agreement, which, according to the respondent's counsel, embraced an interest in land. We have the agreement stated in the case, and if Mr. Chatterton's argument is well founded, it was an agreement for an interest in land. If so, it was inoperative, as there was no writing, and the entry was permissive only. The barrister expressly states that otherwise than by inference from the agreement which he has set out, there was no agreement for a change of possession. Counsel was asked during the argument if the consacre holder could, while the crop was growing, maintain trespass, *quare clausum fregit*, against a trespasser upon the land. This seemed to afford a convenient test, whether the result of a consacre letting was to give a right to an exclusive possession for the time being. In reply we were referred to *Crosby v. Wadsworth*. That case, however, when properly considered, affords no real answer to the question put. *McMahon's case* was also referred to: there the party had set the field for one season for grazing, and the true point appears in the judgment of Mr. Justice Barton. *Hare v. Coley* seems more in point on this question, and appears to go to the extent of deciding that the consacre tenant could not maintain trespass, because he had nothing in the land. I refer to the report in (1st Leonard, 315)—where it is given under the name of *Hare and Okelle's case*. As the case is there stated, Michael Hare and others brought an action of trespass against Okelle for breaking of their close, and carrying away of their corn, and upon not guilty, it was found by special verdict that the said Michael Hare was sole seised of the said close where &c., and so seized *exposuit ad culturam, anglice*, did put forth to tillage the said land to the other plaintiffs in form following, viz., that the said Michael should find one-half of the corn sowed, and the other plaintiffs the other half, and that the said land should be ploughed and tilled, and the corn thereof coming should be reaped and cut at the charges of the other plaintiffs, and so cut, should be divided by the shock, and the said Michael to have the one-half, and the other plaintiffs the other half, &c. And it was the opinion of the whole court, that notwithstanding these words (*exposuit ad culturam*), that no estate in the soil passed to the other plaintiffs, but the said Michael did remain sole seised as before, but by Anderson upon the severance of the corn, peradventure a property in the said corn might be in all the plaintiffs. But, because it appeared that Michael was sole seised and the other plaintiffs had not anything in the land, therefore, it was adjudged that they could not join in the action of trespass for breaking of the close, and therefore, it was awarded that the plaintiffs should take nothing. Now, if the

result of the dealing in that case had been to convey to the other plaintiffs a possessory interest, they might have joined in the action. The attention of counsel was called to this, and the case was treated very lightly. I think it is a case of very high authority. I have taken it from the report in Leonard, as being that of the highest authority. I find that Lord Nottingham says it is one of the best books that had come out; and Chief Justice Treby expresses himself about it in the same manner. The case is referred to in 4th Bac. Abr., 778; and, again in 7th Bac. Abr., 658, where the reason for the decision is given, "because he is not in the possession of the land." The former reference gives Baron Gilbert's view of it, and so the case seems to me to be an authority that the conacre tenant cannot maintain trespass. We were pressed with the authority of the decision of this court in *Comiskey's case*, and it was urged that that decision was binding upon us, and that we ought not to permit the case to be overruled. I agree on this part of the case with my brother Deasy, and I may further refer to the language of the 79th section of the Act, to show that we are not absolutely bound to follow our previous decisions in new cases. *Morgan v. Edwards* (5 Hurl. & Norm., 418) seems to me to point out the true rule. There the Chief Baron says, "The decision being one from which no appeal would lie, we should not feel ourselves so strictly bound by it as if it were open to appeal. Still, we should differ from it except on strong and cogent grounds." I think so too; but those strong and cogent grounds seem to me to exist in the present case. The circumstances in which courts overrule their former decisions should be rare; but on the other hand, very great evils may arise if we should always consider ourselves bound by our previous decisions. I may observe too, that since the decision in *Comiskey's case*, its authority has been shaken by the cases which have been decided in the Court of Common Pleas and of Exchequer. Those cases alone would form a ground for making this an instance in which we should reconsider, and if necessary overrule our former decision. I therefore am of opinion that our judgment should be for the appellant.

HAYES, J.—I am of opinion that the appeal in this case should be dismissed, and the decision of the chairman affirmed; and that for the two following reasons,—first, because the question has been in substance and in fact twice decided by this court, which is the highest tribunal for cases of this description; and secondly, because those decisions are, in my opinion, correct. As to the former reason I can do little more than repeat what I endeavoured to convey in *Comiskey v. Bourne*, when that case was before us. I apprehend that there is nothing in the constitution of this Court to prevent it from reviewing its decisions; and it might be convenient that it should sometimes do so. Thus, for instance, if a party did not appear; or if, for other reasons, the case was not fully argued; or if, after our decision, the point in question had received a different interpretation from the House of Lords; these would form reasons for submitting the point for reconsideration. But I do not think that the *obiter dicta* of any judge, however eminent, not necessary for the decision of the court upon the question before

it, or even the solemn decision of one or more of the three Courts of Law should be held sufficient to induce this Court to depart from the decision at which it had arrived after mature consideration. It has been said that the 79th section of the Act makes the judgment of the Court final only upon the particular case, and that, therefore, we are at liberty to reconsider, and, if necessary, to overrule a decision at which we have arrived; but I do not so read the Act. No doubt, it states that every judgment is to be final in the particular case, but it does not stop there. It also says that the decision is to be binding on every committee of the House of Commons appointed for the trial of every petition complaining of an undue election. These words are not confined to the particular case in question, but seem to convey that in every case the House of Commons shall be bound by the decision of this Court. Does it not then become us to be cautious alike in making our decisions, and in overruling them? It is far better when a principle is enunciated by this Court that it should be abided by, than that year after year it should be submitted to reconsideration, and so that no settled principle should ever be arrived at. But the substantial question having been considered in *Corcoran v. Barnard*, and in *Comiskey v. Bourne*, it has been brought before us again now; and my opinion is, that those former cases were well decided. It is plain, from the language of the first section of the Statute, that the appellant is not entitled to be upon the list of voters unless he has occupied the entire of the holding out of which he claims to be registered during the entire of the year previous to the revision. If he has parted with the occupation of a single perch for a single day, he has not fulfilled the condition on which the Legislature has thought fit to bestow the franchise upon him. Has he then, by letting part of his land in conacre, ceased to occupy as by the Act he is required to do? And this brings us to consider what is the substance of this conacre dealing, and what is the substance and effect of the dealings between the parties. It appears to me to be an agreement between the landowner and another, by which a certain portion of land marked out by metes and bounds is let to the tenant for the purpose of the tenant growing upon it a crop of potatoes which is to be removed by him at maturity and applied to his own use; and in consideration of this, and of the landowner protecting the crop in the absence of the tenant, the latter agrees to pay in money, labour, or manure. This is the substance of the agreement; and it is plain that in the absence of any stipulation to the contrary, the tenant is to be at liberty to put in his crop when and how he likes; and while it is in the ground he may cut, mow, reap, or dig it without any right of interference by the landowner; for the protection which the landowner is to contribute is for the tenant's benefit and may be dispensed with by him. It has been said that the landlord has a right to plant between the drills in which the tenant's crop is planted; but I apprehend that in the absence of contract or custom he cannot do so, and that the meaning of the agreement is, that the tenant may plant as he likes, and may occupy every inch of the ground; and that while the crop is in the ground it is entitled to the benefit of all the nutriment that can be

derived from it. So also does it appear to me that if the tenant found that a portion of the crop had misseed he would be entitled to supply its place. On the other hand, if, after the ground was let, the tenant should refuse to put in a crop, he would nevertheless be bound to pay his rent. We have been referred to a number of authorities, one class of which establishes that if A. deals with B. for a crop of the *fructus industriales*, the distinguishing character of which is, that they are liable to be seized under a writ of *fi. fa.* and go to the executor, the purchaser does not deal for an interest in the land but for a mere chattel. But, on the other hand, another set of authorities shows that when a person purchases a crop of that nature which is not planted by man, and is of such a character as to go to the heir, such a purchaser is considered as dealing with the interest in the land or soil. I notice this class of authorities because they have been relied upon, though they do not appear to me to have any great bearing upon the present case, because here there is no question of a dealing for a crop. The dealing here is in respect of land to be applied by the purchaser to the raising of a crop. Having regard then to the matter of the contract, I asked was it not plain that the conacre holder was to have the occupation. Serjeant Sullivan says he was only to have an easement. In the case before us the conacre tenant is licensed to enter on the land, not merely for the purpose of cutting and carrying away the crop, but also for the purpose of planting and sowing, and even of renewing his crop if necessary, and managing it so as will best conduce to his profit. If this be so, how can it be said that it is not intended to exclude the landlord by this letting? If authority was wanting upon this part of the case, I might quote Lord Denman's words in *The Queen v. Ponsonby* (3 Q. B. 14), where he says, referring to the circumstance of there being pictures in Hampton Court Palace, which were exhibited to the public, "It cannot be said that this circumstance, or the placing of sentinels about the premises shows an occupation by the Crown." I see no purpose which is to be served by the landlord retaining the occupation, while I see that the tenant cannot have the full benefit of his agreement unless he has at once the *dominium utile* and the *dominium directum* while the crop is growing, so as to be able to protect himself against trespasses committed even by the landlord himself. But it is said that there is authority both here and in England for the proposition contended for by the appellants. The case of *Closs v. Brady* in this country, is cited for the expression used by Baron Pennefather—the same Baron Pennefather who delivered the judgment of the court in *Corcoran v. Barnard*. It is unfortunate, I must say, alike for a judge and for justice when an expression used by him, and apposite to the case before him, is wrested to the purposes of another case to which the expression never was intended to apply. *Closs v. Brady* was a case of an attachment against a person for receiving rent from conacre tenants. But that case does not bear any analogy to the present one. In the one case we have an attempt to escape punishment for an offence, in the other the party seeks to be invested with a franchise. Then in *Dease v. O'Reilly*, Mr. Justice Crompton seems to have fallen into the error which I have spoken of. Even there,

however, he admits that there is a special possession in the conacre holder for a particular purpose. If this be so in the case before us, how can it be said that the appellant, having parted with the special possession, retains the full right of occupying as tenant or owner which the Legislature requires? The next case is that of *Booth v. M'Manus*. That was an action for a penal rent upon a proviso not to part with the possession of lands. Upon the trial, before the Lord Chief Justice, evidence was given for the defendant as to the custom of the country, and the meaning of the words "conacre letting;" and there was evidence that persons holding in conacre were not considered to have the possession of the land. The plaintiff's counsel called on the judge to direct a verdict for the plaintiff. The Chief Justice refused to do so, and left the case to the jury on the evidence, and required them to say whether they thought there was a parting with the possession. The majority of the court sustained the judge; and though there is no doubt that the two judges who composed that majority expressed their dissatisfaction with the decision in *Corcoran v. Barnard*, yet that case is not inconsistent with the decision in *Booth v. M'Manus*, which is merely that a party cannot call upon a judge for a direction upon the effect of the evidence which he has allowed to go to the jury. Then a case which was decided in England three hundred years ago, was strongly pressed upon us. I mean the case of *Hare v. Celey*. The facts of that case, so far as the present point is concerned, are these. [His lordship here stated the facts of *Hare v. Celey*, which have been already given]. The Court held, without hesitation, that no estate in the land passed; and that, as I apprehend, on this principle that by the common law an owner of land cannot convey to himself and others. This is the doctrine which we find in Perkins, S. 203. It might be taken that the parties being aware of this state of the law, intended that they should all join in a partnership indenture, each contributing to the stock, as might happen at present. If this be the true explanation of *Hare v. Celey*, it sufficiently distinguishes the present case from it. Then we come to *Hogg v. Lord Westmeath* (3 Ir. L. Rep.). There the Chief Justice avoided the question; and the decision was based upon this, that from the peculiar wording of the instrument in question in that case, the parties had not in contemplation a letting in conacre. But in *Greenslade v. Tapscott*, it is decided that a dealing very like the present one was, if not a subletting, at least a giving of land to be occupied. That is the very case here. I am willing to abide by that decision, which has never been overruled; and I am induced to do so by the consideration that it is not impossible that the Legislature had these dealings in view, and by insisting upon an occupation may have wished to discourage a bad and lazy system of farming.

O'BRIEN, J.—It has been pressed upon us that, as the Court has already decided the question before us in *Barnard's Case* and in *Comi-key's Case*, it should not permit the point to be argued, though of opinion that its previous decisions were erroneous. I concur in the reasons stated for holding that the court has the power to re-consider questions, and is not conclusively bound by a decision of its own. The very

reasons assigned by the Lord Chancellor in the House of Lords, for holding that the House of Lords was bound by its decisions, shew that the rule or the reasons of it cannot be contended to apply to the Court of Registry Appeal. The question, then, is, whether the court, having that power, the present case is so circumstanced, and is of that character which should induce us to exercise the power. Now, it appears to me that the very circumstance of there being no appeal in any particular case against the decisions of this court, but of its being in the power of any of the other Superior Courts to question and overrule, if they think fit, the decisions of this court on a point of law arising in Registry Appeals, that circumstance ought to be a consideration for our exercising that privilege, and re-investigating a case upon which, to say the least, considerable doubt has been thrown by some cases which have since arisen. I would say also that the very circumstance that this court consists of different members of all the Courts of Common Law, is a fresh reason to lead us to that conclusion, for would it not be inconsistent and absurd to say that sitting in our respective Courts of Queen's Bench, Common Pleas, or Exchequer, we should be at liberty to question our decisions in this Court, but that when sitting here, we should be bound by them. Well, cases have since been decided—namely, *Booth v. M^cManus*, and *Sheridan v. M^cCartney*. The former especially is completely at variance with the decision of this court in *Barnard's Case*. By the Chief Justice's report of the trial, it appears that one of the issues was, whether the defendant, who held under a lease from the plaintiff, had parted with the occupation of the land which he held, or ceased to occupy the same, and suffered some one else to come into occupation. It was proved at the trial that various persons had taken portions of the land, and ploughed and sown the same, and cut and carried away the crops. It was also proved that the defendant's steward kept the key of the gate by which the lands were entered—a circumstance like what we have here. Now, at the close of the trial, the plaintiff called upon the judge, not generally to direct a verdict, but to tell the jury that if they believed the facts stated were true, that the defendants had disposed of the lands in consacre, the defendant had thereby ceased to occupy such portions as he had so disposed of, and they insisted that the judge should, in that event, direct the jury to find a verdict for the plaintiff on that issue. If the decision of this court upon *Barnard's Case* and *Comiskey's Case* was correct, it appears to me beyond doubt that the plaintiff in *Booth v. M^cManus* was entitled to the direction which he asked for, and that he would not have lost that right by reason of his having given evidence as to the custom of the country, which, if the proposition laid down in those cases be correct, would not affect the question. The Chief Justice, however, left the entire question to the jury, declining to give them any special directions as to the facts proved amounting to a change of occupation. The jury found for the defendant, and upon an application for a new trial, the majority of the Court of Exchequer came to a conclusion in favour of the defendant. It is true that there was evidence in the case of a custom that the

crop should not be removed till it was paid for, and that the Chief Baron, in his judgment, relied on that evidence, and considered it as a further ground for his judgment; but, in the report furnished to us by the reporter of the court, it appears that his judgment was formed independently of that evidence of custom. Then we have the judgment of Chief Justice Monahan in *Sheridan v. M^cCartney*, and we have the decision in *Hardy's Case* of this court. In that case it was held that, on the facts stated in it, the claimant did not lose his right to the franchise. That case was not referred to in *Comiskey v. Bourne*, and therefore we have here the decisions of two other courts, conflicting with that in *Barnard's Case*, and further a decision of this court itself, which it is difficult to reconcile with it. I have already, in the course of the argument, stated that it is a mistake to suppose that the question was decided in *Brangan v. Driscoll*. That case went upon a different point, and it was expressly stated in it that it was decided without reference to the consacre question. It seems to me, therefore, that there are here ample grounds for our re-considering our former decision, and it would be a grievous hardship upon persons in the position of the appellants, if, being satisfied that our decisions were erroneous, we were yet to consider them as binding upon us. *Comiskey's Case* was decided upon the authority of *Barnard's Case*, it having been admitted by the counsel that the facts in both cases were identical. It was my opinion at the time that *Barnard's Case* was rightly decided, and I considered it as within the principle of *Crosby v. Wadsworth* and *Parker v. Staniland*. In the first of those cases, though it was decided upon another ground, Lord Ellenborough stated it as his opinion, that the plaintiff who had agreed to purchase a growing crop of grass for the purpose of being mown and made into hay by him, would become entitled according to the terms of his contract, to the exclusive enjoyment of the close on which the crop was growing, and that accordingly he might, in respect of such exclusive right, maintain an action of trespass *quare clausum fregit* even against a person entering, and taking the grass with the assent of the owner, although it appeared that the actual possession of the land was not given to the plaintiff, but was retained by the owner, and Lord Ellenborough therefore held that the contract was one for an interest in the land within the fourth section of the Statute of Frauds. The case of *Parker v. Staniland* was one of a contract for the sale of a crop of potatoes. The potatoes there were in a mature state of growth, and were to be dug immediately by the defendant, and it was decided by Lord Ellenborough and Mr. Justice Bayley, that the contract was not one for an interest in land, and that the case was not within the principle of *Crosby v. Wadsworth*, but the reasons given by those two learned judges were, that in *Crosby v. Wadsworth*, the contract was for a sale of a growing crop, so that the purchaser had an intermediate interest in the land; whereas in *Parker v. Staniland* the potatoes were in a matured state of growth, and were to be dug immediately, and it was, therefore, quite accidental if they derived any further advantage from the land. The purchaser, therefore, it was held, had only an easement for the purpose of

taking up and carrying away the crop, but that gave him no interest in the soil. Now, it appeared to me that the inference from these two cases taken together was, that the test whether a contract for the purchase of a crop sown in the land, did or did not give a right to exclusive possession of the land, depended on the fact whether the crops were in a growing state, or had reached maturity, and accordingly that a contract for taking land in *conacre*, where the crop has not reached maturity, and is not even in the ground at the time of the contract, ought, as well as the contract in *Crosby v. Wadsworth*, to be considered as one for an interest in land, conferring a right to the exclusive possession; and if this were so, the owner of the land would be excluded, and the party taking it, and not the owner, ought to be considered as the occupier until the maturity of the crop. Such were the grounds that appeared to me at the time to warrant the conclusion at which I arrived; but I think that the subsequent cases of *Jones v. Flint* and *Evans v. Roberts*, which were not referred to in *Comiskey's Case*, are at variance with the conclusion to be drawn from the observations of Lord Ellenborough and Mr. Justice Bayley, in *Parker v. Staniland*, and upon considering these and other authorities, I have come to the conclusion that the decision in *Barnard's Case* was not correct, and that the Court of Exchequer in *Booth v. M'Manus* was right in dissenting from it. Those cases decided that a contract for a sale of growing crops which had not reached maturity was not a contract for an interest in land. This is, as it appears to me, not an unimportant consideration for the question before us, because if it is true that a *conacre* contract would be a contract for land, if under it the party taking it was to have the exclusive right to the land till the crop reached maturity, the converse would also be true, that if a *conacre* contract is not a contract for land, there would be no right in the *conacre* holder to an occupation of the land, and that occupation would remain as it was. In *Evans v. Roberts* the distinction is taken between a contract, as in *Crosby v. Wadsworth*, for the sale of growing grass not produced by the labour and expense of the occupier, and a contract for the sale of growing crops produced by that labour and expense. At page 836, Bayley, J., states, that "the purchaser of a growing crop, who, by his contract, acquires a right to have the crop continue in the land of the seller until it arrived at maturity, must, before the passing of the Statute of Frauds, have been considered to have had an interest, not in the land, but in a chattel independent of the land," and that being so, the learned judge says he "cannot suppose that by the fourth section of that statute, which enacts that unless certain provisions be complied with, no action shall be brought upon any contract or sale of any interest in or concerning lands, tenements, or hereditaments, the Legislature contemplated, as the subject matter of such contract or sale, that interest which passes from a vendor to a vendee by a sale of a growing crop of potatoes;" and Mr. Justice Holroyd, at p. 837, states a similar proposition. The terms of the contract in *Evans v. Roberts* were, that the potatoes were to be dug by the owner of the land, but Mr. Justice Holroyd states it as his opinion, that if the contract had been otherwise he

would still hold as he did. The distinction arising upon that point is disposed of by the case of *Jones v. Flint*, in which that element did exist. The distinction between a crop produced by labour, and one not so produced, may be a refined one, but it is too clearly settled by the authorities to be now questioned. In *Jones v. Flint*, the contract was for the sale of potatoes and other matters, and part of the terms were that the defendant should dig the potatoes; it was held that the contract was not one for an interest in land. That case shews that although a party purchasing a crop derives a benefit from the land, and has a right of entry upon it, yet he does not thereby acquire an interest or right of occupation. Now, it is true that the contract in *conacre* cases is not for a crop already in the land, but for liberty to put a crop into it. It appears that the land was prepared by the owners, and that the potatoes were to be sown by the *conacre* holder; therefore, for that purpose the latter must have a right of entry. But if in *Jones v. Flint* the right of entry had not the effect of rendering the contract one for an interest in land, can it be said consistently with that decision that the right of entry for sowing should have that effect, and that in either case he gets more than what is described by Lord Denman as an easement? It appears to me, therefore, that those portions of the argument which rested on the ground that the *conacre* holder had acquired a right of entry, are answered by the cases of *Evans v. Roberts* and *Jones v. Flint*. *Sheridan v. M'Cartney* was also referred to. It is enough to read it to see that the doctrine of *Barnard's Case* is disapproved of by the Chief Justice. In ordinary cases of *conacre* dealing there is no actual change of possession or occupation, and here there is no provision for it in the contract, and therefore, to use the words of Lord Denman in *Jones v. Flint*, "we should imply so much and so much only as is necessary to give full force to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way," the case of *Hare v. Celey* has been much relied upon, and has an important bearing on the present case. It appears to me to be an express authority for the proposition that a party entering into a contract like that before us, does not acquire any right to the possession of the land. The words of the contract there appear accurately to express what takes place in *conacre* dealings. I think that case is not distinguished by the fact that the owner of the land was himself to provide half the seed, and to get half the profit. In ordinary dealings in *conacre*, all the seed is provided by the *conacre* holder, and he gets all the profit, paying a rent. It is difficult to understand why the circumstance of the owner's giving half the seed, and getting half the crop, should make any difference. I do not understand how the decision in *Hare v. Celey* can stand with that in *Barnard's Case*. Such a reason as that suggested by my brother Hayes, that a person could not pass an estate to himself and others, is not even glanced at by any of the reports. It appears, therefore, to me, that this case of *Hare v. Celey* is not only an authority on the case before us, but that its weight is not impugned by *Crosby v. Wadsworth*. As to *Greenslade v. Tapscott*, that case is not followed in *Hogg v. Lord West-*

meant. which decision, it appears to me, it would be difficult to reconcile with *Greenlade v. Tapscott*. Nor was it not followed in *Dease v. O'Reilly*. Besides, it would appear from the report of *Greenlade v. Tapscott* that there had been in that case an actual change of possession; besides, too, that the question argued there appears to have been not so much whether the party got the occupation, as whether, admitting the purpose for which the occupation was got, it was an occupation within the meaning of the lease in that case. Coleridge opens his argument by saying, "The proper test for deciding this question, is not whether the persons who raised the crops of potatoes were occupiers, but whether they were such occupiers as are contemplated by the lease." I think, therefore, that that case is not an authority conclusive on the present question. As to the other cases, I concur with my brothers Fitzgerald and Denay. I do not much rely on the particular facts of this case as distinguishing it from *Comiskey's Case*. I assume that the facts are the same in both. I base my judgment on this, that *Comiskey's Case* and *Barnard's Case* were both erroneously decided, and that such a dealing as this, without an actual transfer of possession, does not disqualify the owner of the land from having his name retained on the register.

BALL, J.—The authority of a case of *Hare v. Coley* is altogether unquestioned to this day. It is an old case, but there are things in the world that are not the worse for being old. It comes to us from three different reporters; it has the sanction of Viner, by whom it is cited, and of Baron, by whom it is referred to no fewer than three times; and the principle of the case is corroborated by the text of Coke Littleton, as well as by the authorities referred to in Hargreave's note to Coke Littleton, 55 a. Now, the substance of that case is this: Hare, being the owner of land, put it forth to tillage to the other three co-plaintiffs, who were on the record with him in the action, upon an agreement entered into by them with him that the three should manure it and find half the seed, and that he should find the other half; that they should sow and reap the crop when ripe; and that he should have one moiety of it, and they the other. After the seed had been sown, but before the crop came to maturity the defendant entered upon the land; and for the breaking of the close, Hare and three others brought trespass *quare clausum fregit*. It was adjudged, first, that the agreement between Hare and the others did not amount to a lease of the land; and secondly, that the action of trespass *quare clausum fregit* could not be sustained; because although Hare, the owner, could have sustained the action against the defendant if he had brought it alone, the three others could not join in it, because no interest in the land passed to them under the agreement, and they were not in possession of the land. In 4th Bacon's Abridgment, 778, under the title "Leases," the case of *Hare v. Coley* is stated; and in 7th Bac. Abr. 658, the principle of the case is abstracted. Now, it has been repeated at the bar that in one of the books where the case is reported, viz., Cro. Eliz., the only matter appearing to be decided was, that the transaction did not amount to a lease of the land. But this is not so, for the Court, after deciding that matter, proceeded to decide further that

Hare alone could have brought trespass *quare clausum fregit*, which necessarily involved the decision that the three others had no possession of the land, for if they had, they could have joined in the action. It may be noticed also that the marginal note in Cro. Eliz. is as I have mentioned; and that the abstract in Bac. Abr. refers to the very report in Cro. Eliz. alone, showing that that report was so understood. Taking it, then, that the authenticity and authority of the case are unexceptionable, I come to consider whether the principle of it is applicable to the case before the Court. In the present case the appellants, in May last, gave permission to labourers and others to plant potatoes as conacre in certain ploughed ridges or drills on the appellant's holdings, pointed out to them for that purpose. These holders proceeded to manure with manure belonging to the appellants. The conacre holders were to pay for the crops in money or in labour on the crops being removed at maturity. Further, during the time the crops were to be in the ground the lands were to be protected by the owners, and the conacre holders were to weed the crops. Further, there were no fences separating the parts of the fields so set from those which were not set. The question then is, whether by giving permission to the conacre holders to plant potatoes under this agreement, the appellants had divested themselves of the occupation of the lands and transferred it to the conacre holders, or whether by reason of such arrangement the appellant had not ceased to occupy. In my judgment a permission given to grow a particular species of crop on the land of another, and that particular species of crop only, is not like giving the possession of the land generally, which possession would confer a dominion over the land and authorize any use of it consistent with the lease or title; but being confined to one species of crop, the conacre holder could not, without being a trespasser, grow any other; and I ask is this such a holding as will put the owner out of occupation? On the authority of *Hare v. Coley*, I hold that the conacre holders did not become the occupiers, and that the appellants did not cease to be so. Every circumstance in *Hare v. Coley* applies here. The occupation of the land there remained as it had been previously, and the three other plaintiffs acquired no possession. But further, the case now before us is more favourable to the conclusion that the conacre holders acquired no possession than the case of *Hare v. Coley*; for in the present case the conacre holders were to manure the ground, and put in seed, and take the crop, as in *Hare v. Coley*, with this difference, that in that case half the seed was to be found by Hare, and half the crop was to become his property; but all the labour to be done on the land was to be by the three who were made co-plaintiffs, and Hare was to have no concern in the tilling of the land; whereas, in the present case, the appellants were to be remunerated either in money or in labour, as money's worth. And in *Hare v. Coley* there was no provision that Hare was to have anything to do with the protection of the land from trespass; that, it should seem, was to be the business of the three other plaintiffs, whereas here it is expressly stated that the crops were to be protected by the appellants. Now, this appears to me, independently of other circumstances, to lead directly to the conclu-

sion that in the present case it was never contemplated that the appellants should cease to occupy; for, how otherwise could they protect the crops from trespass or exercise any care over the land, as they were bound to do by their agreement? It will be observed that this obligation required for its fulfilment continual presence on the lands, and not merely a casual presence as for the purpose of weeding the crops; and it may be said that this presence would, of itself, import that the conacre holders were not in occupation; for if they were, why should they throw the duty upon the owners of the land? It was said that the provision as to the conacre holders weeding the crop imported a possession for that purpose. It seems to me that that is no more than what from the nature of the transaction must have been implied if not expressed; for it seems to me that they must be understood to be at liberty to do such acts as were incident to the permission which had been given them. Now, upon these considerations I conclude that, the case now before the court is even more favourable to the application of the principle of *Hare v. Celey*, than even that case itself was, and that the present case is ruled by *Hare v. Celey*. I come now to consider some of the objections which have been made. *Crosby v. Wadsworth* is strongly relied on as an authority to show that a person purchasing a growing crop has the possession of the land, and therefore, that the appellants are out of possession. It appears to me that that case does not warrant such a proposition. The plaintiff in that case had become the purchaser by a parol agreement of a crop of grass growing on a close, and the owner having entered the close the plaintiff brought an action of trespass, *quare clausum fregit* against him. It was held there that the action was sustainable on the ground, not of the possession of the close, but simply from the doctrine of law that one who has the enjoyment of a crop of grass during the year, while it is coming to maturity, has that enjoyment exclusive, and may, in that right maintain trespass. The words of Lord Ellenborough are, "The plaintiff appears to have been entitled to the exclusive enjoyment of a crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might, in respect of such exclusive right maintain trespass against any person doing the acts complained of in violation thereof." There is not one word about possession in what follows or precedes what I have read. The marginal note of the case is to this effect. (His Lordship read the marginal note to *Crosby v. Wadsworth*; and further referred to *Wilson v. Mackreth* (3 Buz. 1826) and continued)—I take it that this case of *Crosby v. Wadsworth* is no authority for the proposition that the purchaser of a crop of grass has as such, the possession or occupation of the land on which the grass is growing. Then comes *Barnard's case*, which we are told is a decision to be held almost sacred and not to be reviewed on any ground. Perhaps, the single observation that *Hare v. Celey* was not cited at all in that case, would be sufficient to shake the authority of it. But still, notwithstanding that circumstance, we were told that the decision in that case was arrived at after such mature consideration, that it ought not to be called in question and

must be implicitly followed. Now, I must refer to the case of *Close v. Brady*, which has been already referred to. In that case, which was a motion to attach a land agent for receiving rents from conacre holders, there being an order that the rent of the land should be paid to the receiver, Baron Pennefather expressed himself thus:—"I am disposed to consider this as a mode of farming land in the possession of the inheritor." That was the opinion of Baron Pennefather in his deliberate judgment as to the character of this holding, of which there is hardly any instance to be found in England. That was his judgment in 1839, and *Barnard's case* came before the same Baron in 1857. Now, in *Barnard's case*, no reference was made to *Hare v. Celey*; or, to the principle on which it proceeded; nor, was any intimation given to Baron Pennefather as to his having given a judgment on the question some years before. Under the circumstances it appears to me that a much more unsatisfactory case could not be found. However, Baron Pennefather and the other judges being left in the dark as to the true principle on which the case ought to be decided, ruled that, conacre tenants were to be considered as having possession of the land set to them. But now, after sifting the doctrine and the authority of *Hare v. Celey*, and after having heard Baron Pennefather's decision as to this conacre holding being a mode of cultivation, I ask, if *Hare v. Celey* had been cited to that judge, can any one doubt that he would have looked the matter full in the face, and would have followed the decision in *Hare v. Celey*? It is almost useless to criticise *Barnard's Case* farther, for at every step one finds what makes it cease to be an authority. It has been noted that I was one of the judges before whom *Barnard's Case* was argued. When I heard so I was surprised, and as to the grounds on which I concurred in the decision I have no recollection; but having heard cases cited here which were not cited there, and, after consideration, I am of opinion that the case was wrongly decided, and ought not to be followed. As to judges changing their opinion, I would refer to *Bright v. Hutton* in the House of Lords, and to the observations there made in reference to *Upfill's Case*. With those observations I leave the matter which was pressed a good deal. There is a variety of other matters also in which I have been anticipated. There is one other matter upon which we were strongly pressed by Mr. Chatterton. He turned to the interpretation clause of the Poor Law Act (1 & 2 Vict., c. 56) and found there that the term "occupier" in that Act is to be understood as including any person in the immediate use or enjoyment of any hereditaments rateable under the Act, and he would have us conclude that the term as applied to the appellants here would not be correct, because they were not in the immediate use or enjoyment of their land after the conacre letting. The answer to that is very simple, namely, that they are in the immediate use and enjoyment, for the contract does not deprive them of it, and therefore no difficulty arises upon that interpretation clause. Baron Pennefather in some two or three words of his judgment in *Close v. Brady*, expresses an opinion that it is consistent with such an occupation for the specific pur-

pose of enabling the conacre holder to bring his crop to maturity, that the inheritor never ceased to be in the immediate enjoyment and use, for he got the crop from the land in the shape of rent. He says, "In my opinion the letting of lands to conacre tenants is but a mode of tilling it, and the rents paid by them are but a part of the produce of the land in the hands of the inheritor." In my judgment the conacre holder is not the person in occupation, and the appellant is, he not having parted with the occupation by reason of the nature of the agreement, and consequently for these reasons I concur with the majority of the court in holding that the appellants are entitled to succeed in their appeal.

ANDREW M'CAFFERTY, APPELLANT; THOMAS LECKEY, RESPONDENT—Dec. 4, 1861.

Borough franchise—Residence—Distance from Borough—St. 13 & 14 Vict., c. 69, s. 14.

Where a person's dwelling-house in which he actually lives is more than seven miles from a borough, but an angle of a field attached to the dwelling house is within the seven miles, the person is not entitled to have his name retained on the list of freemen for the borough, as entitled to vote for a Member of Parliament for the borough.

THE following case was submitted by William Armstrong, Esq., the Revising Barrister for the borough of Londonderry:—The respondent was duly returned by the Town-clerk of the borough of Londonderry on the list of freemen of that borough, as entitled to vote in the election of a member to serve in Parliament for that borough. The respondent was duly objected to by the appellant, on the ground that he did not reside and had not resided for and during six months immediately preceding July 20, 1861, within seven statute miles of the court-house of the city of Londonderry, that being the place where elections of persons to serve in Parliament for that borough are usually held. The respondent is, and has been for several years, a freeman of the said borough, and lives at a place called Longfield, which consists of a dwelling-house and offices, and land held therewith, and known as part of Longfield. The dwelling-house of Longfield in which the respondent has lived for years, and still lives, is more than seven statute miles from the court-house in the city of Londonderry, and so also are the out-offices; but measuring from an angle of the field nearest to the city of Londonderry, and in which the out-offices are partly built, and which field is part of the residence of Longfield, and known as such, that angle is within seven statute miles of the court-house of Londonderry, which is the usual place for holding the election of a Member of Parliament for the said borough. That angle is twenty-six perches nearer the city of Londonderry than the dwelling house of Longfield. It was objected by the appellant that the respondent was not entitled to have his name retained on the said list of freemen of the said borough, because he did not reside, and has not resided for and during six months immediately preceding the 20th July, 1861, within seven statute miles of the court-house in the city of Londonderry, that being the place where elections of

persons to serve in Parliament for the said borough are usually held; and, as the point of law to be decided, that the distance of the residence of the said respondent from the usual place of holding said election should be measured from the dwelling-house of Longfield and not from the angle above mentioned, or any other place than the dwelling-house. I held upon the entire case that the respondent's name ought to be retained on the said list of freemen entitled to vote for a member for said borough; and as to the said point of law, I held that it was not necessary that the distance of the said respondent's residence from the place of holding said election should be measured from the dwelling-house only, but that it might be measured from any part of the premises held with the dwelling-house and known as part of the residence of Longfield, and within the seven statute miles. If the Court of Exchequer Chamber shall be of opinion that I was wrong in so holding, then the name of the respondent is to be expunged from the said list of freemen; but if otherwise, then the name is to be retained. I appeal against the above decision.—GEORGE PROCTOR, Attorney for Andrew M'Cafferty, of Lurgan House Lane, in said borough, duly authorised by him.—WILLIAM ARMSTRONG.

S. M'C. Greer for the appellant.—The question turns upon the 14th and the 112th sections of the statute 13 & 14 Vict., c. 69. The fact of a portion of the land on which a person has his dwelling-house being within the proper distance, is not sufficient.—*Leigh v. Hind* (9 B. & Cr., 774); *Whithorn v. Thomas* (1 Lutw. El. Cases, 125); *The King v. The Duke of Richmond* (6 T. R., 560); *The King v. The Inhabitants of North Curry* (4 B. & Cr., 953).

M'Causland, Q.C., for the respondent.—The field was part of the residence.—*Co. Litt.*, 5 (b.); 1st Shep. Touchst., 94; *Hill v. Grays* (Plowd., 164); *Battenworth's Case* (1st Co. Rep., 31, b.); *Taylor v. Clemson* (2 Q. B., 978); *Dee v. Collins* (2 T. R., 419). Suppose that Mr. Leckey conveyed "his residue at Longfield" without more, would not a jury find that this field passed?—*Daly's Case* (Ale. Reg. Cases, 252).

Greer was not called upon to reply.

BALL, J.—The court is of opinion that there is no ground for the objection to this appeal. The barrister was mistaken in his finding, and in the law of the case. It is unnecessary to state more than the language of the Act itself—namely, that the party must reside within seven miles of the borough to be entitled to the franchise. That being the law, the question is where does the party reside. He resides in the place where he lives and sleeps, in the place which is his residence in point of fact, and not in point of the virtual construction, which, as I understand Mr. M'Causland, he seeks to put on the Act. The case does not allow of any doubt, and therefore we allow the appeal, and the officer of the Court will have, in the usual way, to see that the name of the claimant is expunged from the list.

O'BRIEN, J.—Mr. M'Causland's argument is, that because a man's residence may include his field, and that is within seven miles of the borough, therefore he resides within the seven miles. No such conclusion follows.

HAYES, J.—If the words of the statute were, that the place of residence, or some part thereof, should be within seven miles, I would go with Mr. McCausland; but the Act points only to the actual place of residence.

FITZGERALD, J.—We must draw some line, or we shall be perpetually involved in these discussions, and we must hold, that a man's residence is his dwelling-house, and that by the dwelling-house is meant his house, and not the fields about it.

DEASY, B.—The Assistant Barrister has found that this gentleman lives more than seven miles from the borough.

Appeal allowed. No costs.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

RE J. MCCOOTE.

Notice of assignment of policies of insurance—fraudulent preference.

Where policies of insurance are assigned by bill of sale as security for money advanced to a trader, and no notice of the assignment is given to the Insurance Company before the bankruptcy, the assignees are entitled to the proceeds.

Where a trader, as security for money borrowed, makes an assignment of teas to the creditor, who has no intimation that the trader is embarrassed when that assignment is made without any application on the part of the creditor, it will be deemed a fraudulent preference, and the assignees will be entitled to the property so assigned.

THE bankrupt was a tea dealer in Victoria-street, Belfast. The case came before the court on charge and discharge.

JUDGE LYNCH, in delivering judgment, said,—Now, this case is before me on the charge of Mr. Robert Buchanan, and the discharge of the assignee; and the questions raised before me are respecting the title to the property, contained in the bill of sale of the 19th June, of three policies of insurance; I have also to deal with regard to fifty-two chests of tea transferred to Buchanan on the 22nd June, and the twenty boxes of tea transferred to Buchanan on the 10th July. Now, as regards the bill of sale of the 19th June, by it three policies of insurance are dealt with as conveyed thereby; but the discharge makes the case that no notice of the assignment was given to the insurance company before the bankruptcy, and no evidence of such notice is given or attempted by Mr. Buchanan; and, holding, as I must do, that such notice was necessary to complete Buchanan's title, I hold, consequently, that the produce of these policies belongs to the assignees. The next matter I have to consider is the transfer made on the 10th July, as it is the most material fact in the case, inasmuch as that transfer is now impeached as a fraudulent preference given to Buchanan in contemplation of bankruptcy. I find a very curious answer of the bankrupt, 297, respecting this transaction. But taking the case now on the

evidence, chiefly of Mr. Buchanan himself, how stands the case? On the 27th May, 1861, Buchanan became surety for the bankrupt to the Northern Bank to the extent of 1000*l.*; by way of indemnity for him, the bankrupt lodging in his hands 500*l.* Afterwards, on the 8th June, the bankrupt applied for this sum as a loan, and offered to give as security there for the articles in the bill of sale; and then having got the 500*l.*, he executed on the 19th June the bill of sale now relied on. As a further security, on the 22nd June, he gave Buchanan a transfer of the fifty-two chests of tea. Immediately afterwards the bankrupt started on his expedition to London, when the gold was lost, certainly to his creditors, and whereby of necessity a state of insolvency arose in his affairs. This being so, he writes on the 4th of July the letter of that date to Buchanan. That letter I have placed on the minutes. At the time that letter was written Coote was manifestly insolvent. That letter was an invitation to Buchanan to come to Belfast to ascertain the amount to be paid by him—and to have it placed out of danger in his hands—and it is in my mind impossible, reading it, and seeing the act done consequently, to doubt for one instant that this was a preference shown to Buchanan in fraud of the bankrupt law. I, therefore, decide that it was a fraudulent preference, and I rule that the twenty boxes of tea belong to the assignees. But there remain still two classes of property—viz., the furniture and fixtures mentioned in the bill of sale, and the fifty-two chests of tea to which the case also refers. In my opinion, upon the evidence, and having heard Mr. Buchanan examined before me, his conduct respecting these transactions was perfectly *bona fide*. No shadow of suspicion rests on him respecting any matter raising suspicion in this case, and he stands before me fully with equality of equity and justice with the other creditors in respect of his liabilities. He gave the guarantees out of kindness to his relative, and he got, and had a right to hold, the 500*l.* lodged with him as an indemnity fund, and he afterwards advanced this fund to Coote as the consideration for the bill of sale. I rule that the proceeds of the furniture belong to Mr. Buchanan, and may be retained by him. There remains, then, only the fifty-two chests of tea to dispose of. The charge in paragraph 9 states an application for the transfer of those teas; but no evidence whatever that I see to sustain such statement, vaguely and loosely made, without date, and the manner of it not stated; but on the evidence I do not believe that any such demand was made, and I think the transaction of the bill of sale is inconsistent with the alleged demand. Five hundred pounds was the estimated risk on the guarantee, and the money lodged met it. The advance afterwards of that money was the consideration of the bill of sale on the 19th; and the further transfer of the fifty-two chests of tea seems to me manifestly to have been the act of Coote, voluntarily done to try and secure Buchanan more largely than he had done. The consideration seems not to have been the 500*l.* advance, if Coote's letter of the 6th July is accurate, for he treats then the bill of sale as the only security for the 500*l.*; and if the case is true, as made by Coote, I see no grounds to lead him on the 22d June to give out of his possession a share of the article in which he dealt,

viz., tea, to meet what he shows was no real liability, nor never would be, in fact, so, except by his bankruptcy, and also consequential derangement of his affairs. I think I cannot safely deal with the transactions otherwise than by holding that the transfer of the fifty-two chests of tea also fails, on the ground of its being a voluntary act of Cooté, fraudulent as against his general creditors. I have come to this conclusion reluctantly as regards Mr. Buchanan. I think his liability has arisen out of his desire to benefit his relation, and his too great confidence in his position and trade. I think his claim as meritorious as that of any other creditor; in fact, rather more so, as he had no profit in his dealing, and no personal interest in the matter. I regret, further, that I have not had the benefit of hearing his case argued; but upon the best consideration I have been able to give to the case, I feel bound, in order to uphold the vital principles of this code, to decide against the claim of Mr. Buchanan to these fifty-two chests of tea. Regarding the general circumstances of the case, and seeing that Mr. Buchanan succeeds here in a portion of his claim, I give no costs against either party, the assignees to have their costs against the assets.

Court of Appeal, in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD JUSTICE OF APPEAL AND THE LORD CHANCELLOR.]

IN RE OTWAY'S ESTATE, EX PARTE ARMSTRONG.

Nov. 24; Jan. 17; Feb. 3.

Incumbered Estates Court—Conveyance from, with map annexed at request of the purchaser—Incorporation—Misdescription—Compensation.

Upon the petition of S., an order for the sale of the estate of O., a tenant for life, was made by the Commissioners of the Incumbered Estates Court. A survey of the estate was ordered by the Commissioners, and the printed rental stated that "a book of maps, approved of by the Commissioners, may be inspected at the office of the solicitor having the carriage of the sale." The description and quantities of "Lot 14" in the rental and in the map were identical. Amongst other denominations therein comprised, was "Coolacarra, Mountain, held in common by tenants, 363a. 2r." In 1855 Lot 14 was conveyed to the wife of A., as representative of a deceased son, whose guardians had purchased it in 1853. Upon the application of Mr. A., it was ordered that a map of Lot 14, approved of by the Master of the Incumbered Estates Court, should be endorsed upon the conveyance. The conveyance contained no reference to the map, but the denominations and quantities in both were the same. Shortly after, possession had been given by the sheriff to A. and his wife under the conveyance, upon the application of S., an order was made by the Commissioners of the Incumbered Estates Court, dismissing the petition and order for sale as to the unsold portions of O.'s estate, the latter undertaking to pay the petitioner's

post costs, and the balance of interest due on foot of certain incumbrances discharged by the produce of the sale, mentioned in a schedule, and also to abide any further order of the Commissioners in the matter. The title of A. and his wife to portion of the lands of Coolacarra having been disputed, in 1859, A. and his wife brought an action for trespass against H., and gained a verdict. At a second trial, obtained upon the ground of the admission of illegal evidence on the preceding one, the conveyance of the Incumbered Estates Court was rejected, and the jury found that 270 out of the 363 acres described as Coolacarra in the rental, conveyance, and map, were never known by that name, and were the property of H. A and his wife applied to a judge of the Landed Estates Court, that the order dismissing the petition and order for sale of O.'s estate should be varied, and further portions of O.'s estate sold, to pay them compensation for the loss and severance of the 270 acres, as also the amount of the costs incurred by them in both trials. The judge of the Landed Estates Court ruled that A. and his wife were entitled to compensation for the value of the 270 acres, and that, pursuant to O.'s undertaking in 1855, he was bound to pay the same; but he refused to give any compensation for the costs incurred, or for severance. O having appealed from the whole of this order, and A. and his wife having appealed from the latter portion of it,

Held, that the map was not so incorporated with the conveyance as to pass the lands comprised within its ambit.

"That the doctrine of compensation, as applied to conveyances under the Court of Chancery, does not apply to conveyances from the Incumbered or Landed Estates Court, who alone are responsible for the vendor's title.

"That no order could be made against O. personally, as the undertaking by O., upon which the order for the sale of his estate had been dismissed, applied only to the matters mentioned in the schedule hereto.

"That O.'s creditors could not be compelled to bring back into court the sums paid to them.

"And that (reversing the order below) A. and his wife were not entitled to any compensation whatsoever.

A PETITION was presented to the Commissioners for the Sale of Incumbered Estates in Ireland, on the 20th of March, 1851, by William Stephens, for the sale of the estate of Robert Otway; and on the 23rd of December, 1851, the order for sale was made absolute. Mr. Otway was tenant for life of his estate, with remainder to his first and other sons, in tail male. A survey of the estate was made by order of the court. Lot 14 of the printed rental purported to comprise "That part of the town and lands of Curreeny, with the several denominations; that is to say, Knockavoga, Knockfeen, Coolacarra, Gortnaskeha, Turbanalee, and Rehasuohod, situate in the barony of Upper Ormond and county of Tipperary, containing 1206a. Or. 17p., statute measure, or thereabouts." Opposite to the denomination of Coolacarra there appeared, "Coolacarra, Mountain, in common to tenants, 363a. 2r." No value was set opposite Coolacarra. This lot never was posted for sale, as difficulties arose in deducing title to the lands of Curreeny.

On the 2nd November, 1853, G. J. Webber, the guardian of John Armstrong, a minor and ward of court, proposed to the Chief Commissioner to become the purchaser of Lot 14, for the minor, whose estates it adjoined, for the sum of £1,000. The Chief Commissioner directed the proposal to stand over until the rental of Lot 14 should be settled by the Master of the Court; and when it was settled, in pursuance of his direction (but no alteration made therein), the Chief Commissioner, on the 8th of December, 1853, accepted Mr. Webber's proposal. In the posting for sale of the Otway estates, dated the 1st day of December, 1853, Lot 14 was stated to be "withdrawn for the present," and was struck out of the printed rental. Mr. Webber, as guardian of the minor, John Armstrong, having applied to Master Henn to sanction the proposal to purchase Lot 14, Master Henn, by his report of the 19th of December, 1853, approved of the purchase. To the report was annexed the above rental of Lot 14. John Armstrong, the minor, died on the 3rd of January, 1854; whereupon the Commissioners of the Incumbered Estates' Court ordered that Lot 14 should be conveyed to his mother, Mathilde Rose Armstrong, administratrix of the minor, who had married Thomas Armstrong (the petitioner), in the year 1851. No maps were attached to the rental, but Thomas Armstrong applied to the Chief Commissioner for liberty to annex a map to the conveyance of Lot 14; and, by an order dated the 5th of May, 1855, it was ordered by the Chief Commissioner, that it should be referred to the Master of that court to approve of a map, to be endorsed on the conveyance of the lands; and that the order, and reference, and expense of preparing the map should be at the expense of the purchaser. By a deed-poll, dated the 16th of June, 1855, and signed by the Chief Commissioner and Mr. Commissioner Longfield, Lot 14, being the lands of Curreeeny and its sub-denominations, Coolacarra, &c., containing 1206a. Or. 17p., were, in consideration of £1,000, conveyed to Mathilde Rose Armstrong, her heirs, and assignees, upon the trusts declared by a certain order of the Court of Chancery therein referred to. The schedule to that deed was the same as that annexed to Master Henn's report. The conveyance did not contain any reference to the map, but it was stated on the face of the map attached to the conveyance, that it was the map referred to in the annexed conveyance, and it stated the quantity of land delineated therein to be 1206a. Or. 17p.; it bore the seal of the court and the Secretary's name, and the regular approvals of the various officers of the court. Shortly after the execution of the conveyance, Thomas Armstrong, and Mathilde Rose Armstrong, his wife, were put into possession, by the Sheriff of Tipperary, of the lands, comprised in the conveyance, which were not in the occupation of tenants; and, amongst others, of Coolacarra. On the application of William Stephens (the petitioner in the Incumbered Estates' Court matter), an order was made by one of the Commissioners of that court, directing the petition for sale to be dismissed as to the unsold portion of the Otway estate, mentioned in a schedule to the order; the owner, Mr. Otway, undertaking to pay the petitioner's post costs and the balance of interest money on the incum-

brances, after applying the purchase money realised by the sales then had; the owner also to be responsible for any sum which the Commissioners might consider properly payable for the petitioner's further costs, and also to abide any further order to be made by the Commissioners in this matter. It was further ordered, that the conditional and absolute orders for sale should be discharged, so far as the same related to the lands in the order mentioned. In the spring of 1859, a notice in writing was served upon Mr. and Mrs. Armstrong, by Mr. Nat. Hone, requiring them to join in settling the bounds of Curreeeny and certain lands called Gortnahumna, of which Mr. Hone was the owner. On the 20th of August, 1859, Mr. Thomas Armstrong met Mr. Walker, the land agent of Mr. Hone, shooting over part of the lands of Coolacarra; on Mr. Walker asserting Mr. Hone's title, each mutually warned the other off the lands. Mr. and Mrs. Armstrong brought an action of trespass against Walker, which was tried, in the Court of Exchequer, in the sittings after Hilary term, 1860. For the defendant it was contended, that of the 363 acres conveyed to Mr. and Mrs. Armstrong as Coolacarra, 270 acres formed part of Gortnahumna, and not of Coolacarra. A verdict was found for the plaintiffs. A second trial having been directed by the full court, upon the ground that illegal evidence was received upon the first trial, the case came on at the sittings after Michaelmas term, 1860. The Lord Chief Baron at the second trial rejected the map, which was attached to the conveyance of the Incumbered Estates' Court, as any evidence of what was contained therein; and the jury found that the premises upon which the alleged trespass took place were not ever called or known by the name of Coolacarra, and did not, therefore, pass by the conveyance; but were properly called Riehaun-donagh, a sub-denomination of Gortnahumna or Gortacoma, and were the estate of Nathaniel Hone, and not the estate of the owner, Mr. Otway, in the matter of whose estates the lands in question had been sold. Hone's title to about 270 acres in the centre of the lands purchased by Mr. and Mrs. Armstrong, was proved by a long series of deeds. Otway was no party to the proceedings at law, nor did the Armstrongs consult him at all with reference to Mr. Hone's claim. In December, 1860, Mr. and Mrs. Armstrong laid before Otway an opinion of counsel, that they were entitled to compensation; but as Otway did not come to any arrangement, Mr. and Mrs. Armstrong served notice upon Otway of their intention to apply for compensation for the loss of the lands, and injury by severance, and for the costs incurred in the case of *Armstrong v. Walker*, as between solicitor and client; that a sufficient portion of the residue of the estates in the matter of Otway, owner, Stephens, petitioner, might be ordered to be sold to realise these demands; that the boundaries of the mountain portion of Lot 14 might be ascertained; and that, if necessary, a supplemental conveyance should be executed, at Otway's expense. Shortly before the motion came on before Judge Dobbs, Armstrong, for the first time, became aware of the Order of May, 1855, dismissing the petition and order for sale of the Otway estates: he, therefore, served a further notice,

that an application would be made that the order of the 21st of May, 1855, should be varied so far as it purported to discharge the conditional and absolute orders for sale; and that, pursuant to his undertaking, Otway should pay the amount claimed by the first notice. By the order of Judge Dobbs, dated the 18th of May, 1861, he declared Thomas Armstrong and Mathilde Rose Armstrong entitled to compensation for the value of the 270 acres, and that Otway, pursuant to his undertaking in the order of the 21st of May, 1855, should pay the amount of such compensation, when ascertained, together with the cost of the application; but he refused any compensation for the costs in *Armstrong v. Walker*, or for severance. From this latter portion of this order Mr. and Mrs. Armstrong appealed; Mr. Otway appealed from the whole order. Both appeals were heard together by the Lord Chancellor (the Lord Justice of Appeal was absent from illness), on the 24th of November, 1861. On the 27th of November the Lord Chancellor stated, that in consequence of the novelty and importance of the case, he would wish the case to be re-argued in the presence of the Lord Justice of Appeal. Accordingly, upon the 17th of January, 1862, the appeals were re-argued.

Sergeant Sullivan (with him *A. Brewster, Q.C.*, and *J. H. Richards*) for Mr. and Mrs. Armstrong. The intention of the Legislature was, to empower the Commissioners of the former Incumbered Estates' Court, and the Judges of the present Landed Estates' Court, to give indefeasible titles to all purchasers in that court. The purchaser is not allowed to look into the title of the estate he wishes to purchase. The court investigates the title privately, and must be satisfied upon it, before the estate is advertised for sale. The seal of the court should cure all defects in the title. After the first trial of *Armstrong v. Walker*, the case of *Roe v. Lidwell* (9 Ir. Com. Law, 184, affirmed in the Exch. Oham. 11, Ir. Com. Law, 330), was decided. That case took the profession by surprise; and the Lord Chief Baron felt that by it he was bound to reject the map as evidence of what passed under the conveyance. In *Roe v. Lidwell*, *sup.* the plaintiff, in an action of ejectment for forty acres of the lands of Dromardmore, gave in evidence a conveyance to him by the Commissioners of the Incumbered Estates Court, of the town and lands of Dromardmore, in the barony of Ikerrin, and county of Tipperary, containing 1085a. Or. 23p., statute measure or thereabouts, and described in the annexed map with the appurtenances. The schedule to the conveyance stated the denomination of the lands comprised therein to be Dromardmore, the quantity of land to be 1085a. Or. 23p. It was proved that the map annexed to the deed comprised forty-five acres, a portion of the lands called Dromardbeg, and not Dromardmore. And it was held that the first description of the lands prevailed over the second, and that nothing passed under the map which was not part of Dromardmore. The clear meaning of Otway's undertaking to abide any further order of the Incumbered Estates Court, was to provide for such a contingency as had happened here. The order for sale of the Otway estate should be reinstated. As to the appellant's right to compensation, this case is identical with that of *Cooper v. Cooper*

(4 Ir. Chan. 75). As the costs of the two trials were incurred upon the faith of the validity of Mr. Otway's title and the conveyance of the Incumbered Estates Court, they should be added to the compensation, *Collen v. Wright* (7 El. & Bl. 301).

The Solicitor-General (with him *J. E. Walsh, Q.C.*, and *Robert Reeves*) for Mr. Otway.—Three questions are to be considered—first, in what does a sale under the Landed Estates Court differ from a sale under the Court of Chancery. Secondly, can compensation be given in this case under the Incumbered or Landed Estates Court Acts. Thirdly, can the costs of the two trials at law be included in the amount of compensation. No application for compensation could have been sustained had this been a sale under the Court of Chancery. There was no fraud. When once a purchaser under this Court accepts the title he can only look to his covenants, *Lord St. Leonards, Ven. & Pur. 441*; *Thomas v. Powell* (2 Cox. 394); *Cann v. Cann* (3 Sim. 447); *Taylor v. Gorman* (4 Ir. Eq. Rep. 550). The same rule applies to purchasers in the Incumbered Estates Court. If there is fraud or misrepresentation, they are entitled to compensation, but not when, as here, the errors arose from the negligence of the solicitor of the purchaser in not inserting such words with the conveyance prepared by him as would incorporate the map with it. *Roe v. Lidwell* had not the effect attributed to it by the counsel for Mr. and Mrs. Armstrong; if it had, it would have overruled *Errington v. Rorke*, decided by the House of Lords (reported in 9 Ir. Com. Law. 357). If the Commissioners of the Incumbered Estates Court had intended to sell lot 14 by this map, which Mr. Armstrong got attached to the conveyance, they would have said so in the conveyance, but they carefully avoided saying any such thing. If an owner, having discharged all the incumbrances upon his property by the sale of part of his estates, obtains an order dismissing the order for sale, and enters into an undertaking in the same words as those used in the order of May, 1855, is he to continue liable for such defects as this to the end of time? when will his liability cease? That undertaking applies only to the acts and proceedings annexed to the order. As to the costs of the two trials, Mr. Armstrong never told Mr. Otway that he had been disturbed by Hone. Had Armstrong done so, and had Otway encouraged him to litigate the title, then it would be possible to understand the application for compensation for costs. These 270 acres are mountain moor, useless save for shooting. The cases where costs have been added to compensation were cases either of covenant for quiet enjoyment or where there had been fraud, misrepresentation, or deceit; *Williams v. Burrell* (1 Com. B. 402, 433); *Smith v. Compton* (3 B. & Ad. 407); *Lewis v. Peake* (7 Taunt. 153); *Blyth v. Smith* (5 Man & Gr. 405). In *Collen v. Wright* (7 El. & Bl. 301), authority was given to bring the action, therefore that case is not analogous to the present; *Richardson v. Dunne* (8 Com. B., N.S. 655); *Walker v. Hatton* (10 M. & W. 249); *Madden v. Fyson* (11 Ad. & El. 292). Fraud must be clearly proved—*Early v. Garrett* (9 B. & C. 928).

A. Brewster, Q.C., in reply.—This Court should remember that this case is not to be governed by the practice of Courts of Equity, for it is now called upon

to administer an Act of Parliament which is above law. A purchaser in the Incumbered Estates Court is not allowed to look at any one of the title deeds of the estate which he wishes to purchase. If Otway stood by and saw another man's land sold to pay his debts, he was guilty of fraud. For the purpose of obtaining a survey of Mr. Otway's estate an affidavit was made in 1852, by the solicitor having the carriage of the sale, in which "Coolacarra" was mentioned as one of the denominations to be surveyed. The rental by which the Otway estate was sold contains these words, "A book of maps approved of by the Commissioners of the Incumbered Estates Court, may be inspected at the office of Mr. Dobbyn" (the solicitor who had the carriage of the sale). There is no analogy between purchasers under this Court and those under the Incumbered Estates Court, for the conveyances from the latter are in the form given by the statute in which alone the purchaser can prepare them, and this contains no covenants of any description. Armstrong's money went to pay off incumbrances affecting the Otway estate; he is therefore a creditor upon the estate for so much, and the petition and order for sale of those estates should be reinstated to recoup Armstrong. It must be admitted that the map was not part of the conveyance; if it had been, Mr. Armstrong would have bought part of the Hone's estate and could have held it against the latter. No notice was at that time given, as now, to adjoining proprietors. It cannot be denied but that, by those words in the rental, the Commissioners held out those maps to the world as containing what they intended to sell. In the cases of *Booth v. Daly* (6 Ir. Com. L. Rep. 460), and *Rochfort v. Ennis* (6 Ir. Jur. N. S. 169), the Commissioners of the Incumbered Estates Court failed to give indefeasible titles to the purchasers contrary to the intentions of the Legislature. Armstrong's right to costs stands upon the same grounds as his title to compensation; the Incumbered Estates Court are supposed to give an indefeasible title to every purchaser. The Commissioners would not have listened to Armstrong asking for compensation if he had come before them when warned off the lands by Hone's agent. They would have said to him, "We gave you an indefeasible title; how can you tell what right Hone has to any part of the land. You must assert your rights under our conveyance before we will listen to any application for compensation. When we are proved to have misled you, then will be the time for you to come to this Court." The amount of the costs shows how difficult it was to establish Hone's title to the lands, and how obscure the question was.

Feb. 3.—THE LORD CHANCELLOR.—In this case we are called on to consider an order made by Judge Dobbs, in which he decided that Mr. and Mrs. Armstrong are entitled to compensation for the loss of 278 acres of land; and that the compensation be paid by Mr. Otway, the owner of the estate of which the land formed part. Mr. Armstrong's application was not only for compensation for the loss of the above number of acres, but also for the amount of certain costs incurred in certain proceedings taken in the Court of Exchequer, founded on the title which Mr. Armstrong supposed he had obtained from the Incumbered Estates Court. Judge Dobbs granted

the application, save as to compensation for the amount of the costs, from which exclusion Mr. Armstrong has appealed. Mr. Otway also has appealed from the order, on the ground that no compensation should have been given to Mr. Armstrong. At first sight Mr. Armstrong seems entitled to compensation. But let us examine the facts of the case. The Otway estate was brought into the Incumbered Estates Court to be sold, upon the petition of Mr. Stephens, a creditor. The petition for sale was filed, not on foot of a debt due by Mr. Otway, but on foot of an anterior mortgage of the estates, of which Mr. Otway, the present appellant is tenant for life. A petition for sale, then having been filed by an incumbrancer upon the estate, the lands became subjected to the jurisdiction of the Incumbered Estates Court, and the Commissioners of that court proceeded to deal with them. For the purposes of a sale, a rental and map were prepared, descriptive of the estate, in which were mentioned the particular denominations of the lands, and the tenancies for which they were held. In that map a part was mentioned as "Coolacarra, mountain land, held in common by tenants, 363 acres." We find that 270 acres are described in the map, and there is no question, that of the 363 acres, 270 acres did form part of the lands mentioned in the rental and map. The lands were not all sold publicly. Lot No. 14 was withdrawn, in consequence of an objection which arose in connection with another lot. That being so, the guardians of John Armstrong, a minor, the son of Mrs. Matilde Rose Armstrong, before her marriage with the appellant, proposed to the Commissioners to become the purchasers of this lot, and their offer was accepted, and the guardians were declared the purchasers of lot No. 14. Up to this stage in the transaction, during the whole time, antecedent to the declaration of the guardians as purchasers, the conduct of all matters had been in the hands of Mr. Stephens and his solicitors, who had the carriage of the sale. Of course, Mr. Otway was a party, and had notice that an arrangement for the sale of the lot had been entered into, and so far was bound by it; but the duty of investigating the title devolved upon the judges of the Incumbered Estates Court, and the duty of preparing the conveyance upon the purchaser. The Incumbered Estates Court then proceeded to sell this lot, and conveyed it by an instrument which has proved inoperative in effecting what the Commissioners intended. The conveyance purports to convey the lands of Curreeny, &c. In the map the lands were described by certain metes and bounds, that map was annexed to the conveyance, but the latter was not so embodied with it, as to convey to a court of law that the lands, as described by those metes and bounds, were intended to be conveyed. Had the conveyance been so framed—had it clearly expressed an intention to convey the whole according to the map, the statute conferring jurisdiction upon the Incumbered Estates Court would have passed the lands to the purchaser absolutely. But cases have arisen in the courts of Common Law, wherein the language of conveyances in connexion with maps annexed to them, have been the subject of decision, and as those courts have decided that in such cases as this, the map is ineffectual as a conveyance, we are in a differ-

ent position from what we would occupy if there were no rules upon this subject. But it is now too late, and it would be highly improper for us, on the present occasion, to express an opinion upon those cases; but, I certainly am not prepared to treat the conveyances of a court possessed of ample jurisdiction and endowed with the power of making decrees *in rem*, as ordinary conveyances between A, B, and C. I am now speaking of the mode in which this conveyance would have been dealt with if it had been brought into a court of law. But there remains another question. If the words of the conveyance had embodied the map with the conveyance, no judge could hold but that the lands purported to be conveyed were those within the ambit of the map. But in the present case the conveyance has not been so worded. It has, unfortunately happened, that in the conveyances of the Incumbered Estates Court which have been brought under the notice of the courts of law the amount of land conveyed did not clearly appear. In my humble judgment that is a serious defect. It might be difficult to determine the bounds of the proper land. What is the policy of the Statute regulating the Landed Estates Court? To convey every inch of ground to the purchaser, which as described on the map and rental, he was entitled to suppose he had bought. It was not intended, that that court should be enabled to sell the estate of one man for that of another. But it was intended, that if by accident or mistake that court happened to sell a portion of an estate adjoining that before it, the sale should be irrevocable—that having done its utmost, having endeavoured, to the best of its judgment, to ascertain the actual boundaries of the lands to be sold, that court should convey an indefeasible title to the purchaser. These antecedent precautions were not taken, and Mr. Armstrong has failed to obtain an indefeasible title. What would have been the value of this conveyance, if an ejectment had been brought against Mr. Armstrong, I do not say. No action of ejectment was brought, and perhaps it never would have been worth Mr. Hone's time to dispute the title. But the Court of Exchequer has decided that the whole estate which Mr. Armstrong thought he was purchasing was not indefeasibly vested in him, and he, very naturally, looks to somebody for compensation. There can be no doubt but that the purchaser having thus lost a portion of his purchase money would be entitled to compensation if the means of giving him such compensation existed. Upon the question of compensation, it is clear that this case cannot be compared to those cases of sales under this court, in which compensation has been given to purchasers, and upon which Mr. Armstrong's counsel have dwelt so much. The cases cited all turn upon the covenants for title. In *Thomas v. Powell* (2 Cox. Chan. Cas., 394), and in other cases, it was held that the purchaser must look to the title which he was getting, and had no remedy save upon the covenant for titles as between any vendor and vendee. So in the case of *Edwards v. McLeay* (Coop. 308), where it was held that if there be a misrepresentation by the vendor as to the title of part of the premises sold, not only will compensation be given to the purchaser, but this court will declare the sale to be void.

Similarly in the cases of *Maynard v. Mosely* (3 Swan. 651); *Cann v. Cann* (3 Sim., 447), and *Cooper v. Cooper* (4 Ir. Chan. Rep. 75). In the last case there was a map attached to the conveyance, which was admitted to be part of the conveyance; in all these cases compensation was given because of misrepresentation; in which too there are distinctions; for to obtain compensation, the misrepresentation must have been wilful. Mere unintentional misrepresentations will not entitle the purchaser to relief, as was held by Lord Manners in *Legge v. Croker* (1 Bal. & Beat. 506), and so in *Gibson v. d'Este* (2 Y. & Coll. C. C. 542), which was affirmed in the House of Lords—as *Wilde v. Gibson* (1 Ho. of Lds. Cas. 605). It was there laid down that a representation, made *bona fide*, and without personal knowledge, will not entitle a purchaser to relief. If we try to bring this case within the above class, we must look to see where the misrepresentation lies, and how far it could rescind the contract. Now, Mr. Otway was no party to the sale in one sense. The map was prepared by the Commissioners of the Incumbered Estates Court themselves. They investigated the title, and held out to the world that a good title could be made to this estate. From the evidence there cannot be a doubt but that the Commissioners intended to convey these 270 acres as part of the lands purchased by Mr. Armstrong, and we have nothing to show wilful misrepresentation upon the part of any one. Therefore, if we were to try this case by the test of the principles which apply to sales under this court, we would have great difficulty in applying the doctrine regarding covenants for title. But then it may be said, "There is a warranty of title given by statute." Well, all we can say is, that whatever you have not got, we cannot help you. This is, no doubt, a very important question. But the mischief here lay in the conveyance which was prepared by the purchaser. The conveyance, if prepared according to the language of the Act of Parliament, would have been effectual. Therefore, we have here a party complaining of the Act of Parliament, which also raises a very important question. Again, we have no fund in court to act upon. The creditors are all paid: it is too late for the court below to attach them; and in this respect this case is very different from what it might be, if there was a fund in court, or if the Commissioners had a continuing jurisdiction to sell further portions of the estate: but the fund must now remain unchanged for ever as regards the creditors paid off out of it, and we have now no power over it. The parties themselves and the judge below manifestly felt this: that he could only give relief in one way, and that he had no jurisdiction over the lands, as there was no incumbrancer, and therefore, he made an order upon Mr. Otway personally. It was contended that under the terms of Mr. Otway's undertaking contained in the order of 1855, that the judge below might have sold the remaining portion of Mr. Otway's lands. All that remained to be done, as between the Commissioners and the creditors was set out in a column, in which were entries showing what amount Mr. Otway undertook to pay as balances due to different creditors. That being so, the judge below felt that he could not make any order against the

unsold lands, and fell back upon that undertaking. And I must say, that it appears to us, that it would be a very strong measure to make Mr. Otway now liable for what has happened. Here is a tenant for life, no party to any of the law proceedings, asked to pay an enormous amount of costs incurred in proceedings in reference to which his opinion never was asked. This undertaking is to be construed by what occurred at the time it was made; by it he undertook to pay certain balances or abide any other order in reference thereto. Those words can only refer to an order made in reference to the administration of the specified fund which was to come into the hands of the Commissioners. It may be said that there are words in that undertaking enabling the Commissioners to reinstate the original order for sale. We are sure it never was contemplated to involve Mr. Otway in such a manner. We are of opinion that the judge below put too wide an interpretation on that undertaking. That part of his order which refuses to allow the purchaser the costs of the actions is of course correct; they could not be allowed in any case. And we are of opinion that Judge Dobbs' order for compensation to Mr. Armstrong should be reversed, and that the appeal therefore should be dismissed.

THE LORD JUSTICE OF APPEAL stated that he agreed in every word uttered by the Lord Chancellor, as they had carefully considered the question together. It was never dreamt that an owner after twenty years or more should pay compensation to a purchaser for any deficiency which might be occasioned by the parties dealing with the estate: enormous mischief would be done by one promulgating such a doctrine. That never was the intention of the Incumbered Estates Act, and we cannot so interpret its provisions.

Court of Chancery.

[Reported by Charles H. Foot and William Woodlock, Esqrs.,
Barristers-at-Law.]

PIGOTT v. DUNNE.—Jan. 22.

Renewal, right to, where tenant has been in occupation of part only of the lands comprised in the lease—Disclaimer—Evidence—Conditional renewal—Costs.

THE petition in this case was filed by John Pigott against Col. Francis Plunket Dunne, and prayed the specific performance of a covenant for perpetual renewal. By an indenture of lease dated the 14th of May, 1795, and made between Edward Dunne (father of the respondent) of the one part, and John Pigott (father of the petitioner) of the other part, after reciting that the said Edward Dunne was seized in fee-simple of the lands of Coen, Glanbarrow, and Lacken, in the Queen's County, and that one George Pilsworth was possessed of the said lands, at the yearly rent of £42 15s., late Irish currency, under a lease which would expire on the 1st day of May, 1796. And that certain other tenants therein mentioned were seized and possessed of the lands of Lacken by virtue of different leases for lives, at the yearly rent of £48, late currency, the said Edward Dunne did demise unto the said John Pigott the lands of Coen, contain-

ing by common estimation 775a. 1r. Op. plantation measure; the lands of Glanbarrow, containing by common estimation 209a. like measure; and the lands of Lacken, containing 160a. like measure, to hold the same to the said John Pigott, his heirs and assigns, for the three lives therein mentioned (and of which the petitioner's was one), at the yearly rent of £118, late currency, equivalent to £108 18s. 5d., present currency. That indenture contained a covenant for perpetual renewal on payment of a peppercorn renewal fine on the fall of each life, in the usual form. The following memorandum of agreement of the same date was signed by the said lessor:—"Whereas, George Pilsworth now holds the lands of Coen and Glanbarrow under me by lease, which I suppose will expire on the 1st of May next, at the yearly rent of £42 15s.; and the lands of Lacken are held from me by different tenants at the yearly rent of £48. And whereas, I have by indenture of lease this day set all said lands to John Pigott, Esquire, at the yearly rent of £118, the first payment in the lease to be made on the 1st day of November next. It is, however, an agreement that the said John Pigott shall not pay me more rent for all said lands by the year than £90 15s., until after the expiration of the said George Pilsworth's said lease. I therefore acknowledge that the said John Pigott is not to pay me a greater yearly rent for all said lands than £90 15s. until after the expiration of the said Pilsworth's lease." Immediately after the execution of the lease, John Pigott entered into the possession of the lands of Coen. On the expiration of George Pilsworth's lease John Pigott proceeded to take possession of the lands of Glanbarrow, when he found that one William Mooney had obtained a lease in reversion of Glanbarrow from Edward Dunne, and refused to give up possession to John Pigott. And the petition stated that John Pigott was unable to obtain any information as to Mooney's lease. The lessee then applied to the lessor to put him in possession of all the lands demised by the lease; and in two letters to the land-agent of the said lessee, one in the year 1803, and the other in the year 1806, Mr. Dunne promised to do all in his power to give the lessee the benefit of the lease. The two letters were as follows:—

Dublin Barracks, July 16, 1803.

SIR,—On enquiry, I find Mr. Pigott is indebted to me £153 15s. 10d. This likewise includes Mrs. Dunne's dower. The rent of this part of the lands in Mr. Pigott's hands since May 1st, 1796, is to 1st May, 1803, being seven years, at £30 15s. 2d. per annum, amounts to £215 6s. 2d., out of which Mr. Pigott paid two years' rent, £61 10s. 4d., by a draft on Messrs. Latouche, leaving five years' rent due to May 1st last, amounting to, as I have above mentioned, the sum of 153 15s. 10d. I here state the particular tenants and the rent they pay to me, making up the entire rent of Coen and Glanbarrow. I would esteem it a particular favour if you would request, in my name, Mr. Pigott to send an order for to have that sum paid to me. In the meantime, I have written to have the tenant of Mooney's land purchased out, let what may be the price, in order that there may be no complaint against me for not doing my utmost.

I have the honour to be, Sir, your most obedient
servant
E. DUNNE.

— Dixon, Esq., No. 19, Clare-st.

Rent of Coen and Glanbarrow.

Coen, in Mr. Pigott's hands, ...	£30	15	2
Glanbarrow, Mr. Mooney tenant, ...	16	0	0
Do. James Dempsey, ...	13	11	4
Do. Wm. Brophy, ...	5	6	9
Do. J. Flanagan ...	4	6	9

Total of Mr. Pigott's rent, 70 0 0

The Glanbarrow tenants pay me regularly, as well
as Mrs. Dunne's dower.

7 years' rent of Cowen, from May,
1796, to May, 1803, 7 years, at
£30 15s. 2d., ... £215 6 2

Paid out of the above by Mr. Pigott,
by draft on Latouche & Co., 61 10 4

Due to General Dunne, £153 15 10

I conclude Mr. Pigott did not pay Mrs. Dunne any
rent, if he has it is to be deducted. I beg to hear from
you on this business.

Brittas, April 22, 1806.

SIR,—I yesterday had the honour of yours of the
20th, on the subject of the lands of Glanbarrow leased
by me to Mr. Pigott in the year 1795. The prior
lease of the small piece of ground in question I have
done all in my power to have the occupying tenant
removed by purchase or ground (*etc.*); and, agreeable to
your letter, I shall again make the attempt, although
I am confident it will not avail. I had a long con-
versation with Mr. Pigott on the subject when he was
last in Ireland, in which, after explanations of an ir-
regular and improper step taken against the lands of
Coen by my then agent, he was pleased to observe
that his man of business was at all times author-
ized to pay to me the rent of the Coens (which he had
in his own possession) until I should make an arrange-
ment respecting Glanbarrow, so as to give him the
benefit of his lease. I considered the agreement ex-
tremely kind, and what I should have expected from
Mr. Pigott as my neighbour and friend, to whom I
made the lease without any kind of advantage, except
ing that of complying with his proposal, not recollect-
ing at the moment I had made a lease of a small part
of Glanbarrow in reversion some years prior to 1795,
and which escaped my memory at the moment, being
pressed for time, as I was embarking with the regi-
ment I then commanded. These are the circumstances
of the transaction, assuring you that anything that
can be done by me, and which I shall again attempt,
by endeavouring to remove the tenant in question,
shall not be neglected but forthwith undertaken in the
manner you have pointed out. At the time I had the
honour of receiving yours, I proposed writing on the
subject of the rent of Coen, and forwarding the en-
closed account, requesting Mr. Dixon would be pleased
to send me the amount, and which I conclude, of course,
was authorized by Mr. Pigott. As from your letter I
perceive it is to you I am to apply, I shall thank you
for an answer, directed to me at Tullamore, commu-
nicating with Mr. Pigott if necessary. My reason for
not calling for the rent sooner proceeded from my not
being in the country for nearly three years.

I have the honour to be, Sir, your most obedient
servant,
E. L. DUNNE.

Stephen Dixon, Esq.

Part of Coen in Mr. Pigott's posses-
sion, 11 years' rent, from May,
1795, to May, 1806, at £30
15s. 2d. per annum, £386 6 10
By draft on Messrs. Latouche & Co. 61 10 4

Balance due to General Dunne, May
1st, 1806, ... 276 16 6

The arrangement contemplated in the two letters
was never effected; but the petition stated that an
agreement was come to between the parties (both of
whom at that time did not reside in Ireland, owing
to the disturbed state of the country), that John
Pigott should only pay an apportioned rent of
£30 15s. 2d., late currency, equal to £28 7s. 10d.
present currency, for the lands of Coen, of which
he had obtained actual possession; and that Ed-
ward Dunne should receive from the tenants of Lacken
and Glanbarrow their rents, which, added to the rent
of £28 7s. 10d., equalled exactly the rent reserved by
the said lease of 1795; and that such payment by the
tenants was to be considered payment by John
Pigott. In proof of this agreement in addition
to what is before mentioned, it was stated by the pe-
titioner, and admitted by the respondent in his answer-
ing affidavit, that in the year 1801, Mooney's rent
having fallen into arrear, Mr. Pigott's cattle on the
lands of Coen were distrained for payment thereof;
and that in the year 1832, Edward Dunne's
estates were in Chancery, under a receiver; and that
the petitioner, in whom the interest in the lease
was then vested, was served with notice by the
receiver to pay to him all the rent reserved by the
lease. No payment was, however, made in pursuance
of such order, but the apportioned rent only was paid
by the petitioner to the receiver. It also appeared,
from the receiver's accounts filed in the month of
July, 1836, that the apportioned rent paid by Mr.
Pigott, together with the rent payable by the tenants
of the lands of Glanbarrow and Lacken, only exceeded
by the sum of 2½d. the rent reserved by the lease of
1795. The lease under which Mooney held was, as
it appeared from the answering affidavit of the re-
spondent, for 41 years, or the life of Edward
Dunne. The last renewal of the original lease bore
date the 25th July, 1830, and was made between
Edward Dunne of the one part, and the petitioner
of the other part, and contained all the lands demised
by the said lease, and referred to the leases recited in
the original lease. Between the date of the origi-
nal lease and the renewal, Edward Dunne, by
settlement, became tenant for life of the lands, with
remainder to his sons as he should appoint. The
apportioned rent of £28 7s. 10d. only was paid up to
the filing of the petition, and possession had never been
obtained of Lacken or Glanbarrow by the peti-
tioner. Edward Dunne, the lessor, died in the month
of October, 1844, and thereupon his interest in the
lands became vested in the respondent. The pe-
titioner became entitled in the year 1831. One of the
lives in the last renewal having died, application was
made to the lessor for the execution of a fee-farm

grant of all the lands, but refused, on the ground that the lease in question was not a subsisting lease, and that neither John Pigott the elder or any one claiming under him had ever been in possession under the lease. The defence put forward by the respondent in his answering affidavit was, that no such agreement was ever entered into as that mentioned in the petition. That the lease having been surrendered by operation of law before the execution of the renewal, the renewal, being only executed by a tenant for life, was inoperative against the respondent, who took under a registered settlement of the year 1818. That in the old rental of the estate Mr. Pigott only appeared as tenant to the lands of Coen for three lives or 31 years, from the year 1801; and that the tenants of Lacken and Glanbarrow were returned as holding under distinct leases. That both the respondent and the original lessor dealt with the tenants of Lacken and Glanbarrow as absolute owners, by varying the lettings and bringing ejectments against the defaulting tenants. An affidavit was also made by Edward Meadows Dunne, the brother of the respondent, to the effect, that on the petitioner being served with notice by the receiver to pay all the rent reserved by the original lease, he denied his liability and repudiated the lease, and stated he would resist any demand for payment of the rent of Glanbarrow and Lacken. The petitioner, by a further affidavit, stated that he had not the slightest recollection of any such interview, and denied that he ever repudiated the original lease.

A. Brewster, Q. C., (with him *R. R. Warren* and *Robert Reeves*) for the petitioner.—The petitioner's right to a renewal is clear. All the facts of the case show that Edward Dunne only contemplated that John Pigott should pay rent for the land he had actual possession of. The petitioner is not barred by the Statute of Limitations, as it was only in October, 1844, when Edward Dunne died, and when Mooney's lease determined, that he could have obtained the full benefit of his lease. Besides, two lives in the last renewal are still in existence; and the right to sue on the covenant would only accrue on the fall of the lives. The rent of Lacken and Glanbarrow was suspended until October, 1844. The petitioner never repudiated his lease, but only insisted that the agreement should be carried out, and that he should not pay rent for Lacken and Glanbarrow until he got possession.

Serjeant Sullivan (with him *Jas. Rogers, Q. C.*, and *Charles Shaw*) *contra*.—It is proved that the petitioner repudiated the lease; and after such repudiation this Court should not entertain the present petition. After remaining passive during the bad times, when the respondent gained nothing by the lands of Glanbarrow and Lacken, the petitioner calls for a renewal of the lands when land is much more valuable. *The Ecclesiastical Commissioners of Ireland v. O'Connor* (9 Ir. C. L. R. 242), shows how the lease of 1795 operated, viz., as a lease in possession of Coen, and a lease of the reversion, with the rent incident thereto of Glanbarrow and Lacken; and the petitioner not having received the rents of Glanbarrow and Lacken, he is now barred. This Court will not decree a renewal when, looking at all the circumstances of the case, it appears that the tenant did not remain inactive from ignorance of his

rights, but from mere supineness—*M'Donnell v. Burnett* (4 Ir. Eq. Rep. 217). This Court will not grant relief to a lessee who comes forward after so great a lapse of time—*Drew v. Lord Norbury* (3 T. & L. 36).

THE LORD CHANCELLOR.—This case is a simple one upon its facts; it is the case of a lease, made in the year 1795, by the late General Dunne to Mr. Pigott, the petitioner, of four denominations of land, viz.: Coen, Glenbarrow, and Lackan, ar. i. Owen, for three lives with a covenant for perpetual renewal. Upon that covenant this case arises, as it is contended by the petitioner, that that covenant was confirmed by a renewal granted by General Dunne, in the year 1830. If that were the only fact in the case, Mr. Pigott, as a matter of course, would be entitled to renewal. Then comes the difficulty in the case. It appears in evidence, that in point of fact, that when the lease was made, Mr. Pigott went into possession of the Coen and Owen only, and that, as to Glenbarrow and Lackan, (regarding which it is contended by the respondents this petition should be dismissed) it was recited in the lease that they were subject to certain leases for lives then unexpired. So that in fact, Mr. Pigott did not get even into occupation of the lands of Glenbarrow and Lackan, by receipt of the rents; and we have General Dunne receiving the rents and dealing with those denominations, as is very plain from the leases which have been proved to have been made by him, irrespectively of Mr. Pigott or his son. It is said that there is great difficulty in the way of granting a renewal of all the lands included in the lease of 1795: and that it cannot be presumed that there was a private compact between General Dunne and Mr. Pigott, that only the denomination Coen was to pass under the lease; if that were so, there would be great difficulty in carrying out the renewal beyond Coen. But the rent fixed by the lease of 1725 is £118, if there had been any arrangement that Coen alone should pass, the rent would have fixed at £20 or thereabouts; but I find that there has been paid as rent under the lease only such a sum as is very nearly a fair rent for Coen alone. It appears then, that the apportioned rent paid by Mr. Pigott for Coen and Owen, together with the additional rent arising out of Glenbarrow and Lackan, make together the sum of £118, so that General Dunne received the full rent under the lease. I have then no mere presumption of an arrangement, but an express agreement relative to the contents of the lease; for at the date of the lease, I find General Dunne stating that Glenbarrow was subject to a lease to a man named Pilsworth; in reality, Pilsworth was paying about £90 for Glenbarrow and Lackan; £42 is for the one, and £48 for the other denomination; and £90 added to what Mr. Pigott paid, makes up the amount of the reserved rent. This serves to explain matters with regard to Pilsworth's lease, but it turned out that at the time of the making of the lease of 1795, Glenbarrow and Lackan were subject to a reversionary lease to a man named Mooney, the expiration of Pilsworth's lease. General Dunne seems to have forgotten the existence of that lease; but since the expiration of Pilsworth's lease, Mooney has paid the rent of Glenbarrow and Lackan to Colonel Dunne, son of General

Dunne. The reason of this seems to have been that, General Dunne entertained some notion that Mr. Pigott would be responsible only for such part of the lands as he got into occupation of. It is very true that the rents alluded to in General Dunne's letter are spoken of as accruing from Glenbarrow alone, and not from Lackan; but it is plain that the whole sum embraced both Glenbarrow and Lackan, and that as long as the early leases existed, General Dunne received the rents of those denominations. The conclusion then at which we must arrive from all those facts is that, upon the execution of his lease, Pigott went into possession of Coen and Owen, and quasi possession of all the denominations comprised in the lease, and only waited for the expiration of all the prior leases, when the lease of 1795 would become a fructifying lease; and if General Dunne were now alive, I am sure that he would confirm that view of the transactions. General Dunne seems to have considered that Mr. Pigott acted very kindly in not at once taking possession of all the lands, asserting all his rights under the lease. He confirms that view in the strongest manner, when he gave the renewal of the lands in 1830; but Mooney's lease was in existence then, and he never would have done so if he had not reposed perfect confidence in Mr. Pigott. What would he have done if Mr. Pigott had decided to go to the tenants? I cannot say. The present respondent, Colonel Dunne has opposed the granting of the renewal, which General Dunne, his father, insisted on granting, and I am sure, could have given very good reasons for doing so. This was the state of affairs down to the death of General Dunne, and there would be no difficulty in the case but for the statement made in the receiver matter. Now it seems to me that when then applied to, Mr. Pigott may, very naturally have said, "Why should I pay up the rents which you have been receiving since the commencement of the lease?" It has been said that that amounts to a disclaimer of the lease. I do not think it does. Mr. E. M. Dunne is speaking of a conversation which took place twenty years ago. He does not appear well informed about the circumstances connected with the lease. It is impossible to believe that, two years after General Dunne had granted the renewal, Mr. Pigott could make such a statement. I cannot believe he would. I cannot hold against the plain facts of the case, that Mr. Pigott ever disclaimed. It was urged by the respondents counsel, that if this renewal be granted, Mr. Pigott would not be bound by the dealings of Colonel Dunne with the tenants. There is no evidence, however, of any dealing of his with the tenants; and if, Mr. Pigott gets his renewal, he must take it, subject to all the *bona fide* leases made by Colonel Dunne. The landlord was receiving rent, *quacunqve via*. Although I concur in the observations made during the progress of the case, it appears that after the lapse of a considerable time after the death of one of the *certainque vies*, Mr. Pigott has come forward; that has been all explained, and the only thing Mr. Pigott can be charged with is his not sooner asserting his title, of which Colonel Dunne was not aware; therefore, although I now decree a renewal of the lease of 1795, I will not give the petitioner any costs. The renewal to be granted only

on the terms of the petitioner taking it, subject to all leases made *bona fide* by Colonel Dunne before the filing of the cause petition.

Rolls Court.

[Reported by William Woodlock, Esq., Barrister-at-law.]

UPINGTON v. TARRANT.—June 22, 27; November 11, 1861.

Statute of Limitations, s. 42—Charge payable by instalments—Periodical sum of money.

A testator devised to his daughter a sum of £250, chargeable on certain lands, and to be paid to her by yearly instalments of £20 from the day of her marriage, with a power of distress in case of non-payment of "such annuity or instalment of £20 per annum." Held that a rent was created within the meaning of the 42d section of the Statute of Limitations—3 & 4 Wm. 4, c. 27.

THIS was an appeal from an order of Master Brooke, dated the 25th April, 1861. The cause petition stated that John Tarrant the elder was, at the time of making his will and of his death, seised in quasi fee of the lands of Kilcranathan, in the county of Cork; and that being so seised he duly made his last will, dated the 13th September, 1831, whereby he devised the entire of the said lands to his two sons,—the respondent, William Tarrant and John Tarrant, since deceased, and their heirs, to be equally divided between them. And he thereby devised to his daughter, Mary Ellen Tarrant, now Upington, one of the petitioners, the sum of £250 sterling, to be chargeable on the said lands, and to be paid to her by yearly instalments of £20 from the day of her marriage, but not until then, provided it was with the consent of her aunts therein mentioned, and approbation of her brother; such portion of £250 to be paid and payable by yearly instalments of £20 from the day of her marriage, but not until then, with power to his said daughter, or her lawful husband, to distrain said lands and every part thereof; and such distress to dispose of according to law in case of nonpayment on the part of his said two sons of such annuity or instalment of £20 per annum. And the testator thereby desired that said annuity or instalment of £20 per annum should be paid to his daughter or her lawful husband, their heirs or assigns, by two half-yearly payments of £10 each, until the aforesaid sum of £250 should be paid to her or her assigns. And he further desired that his two sons, William and John, should contribute jointly and severally to support and clothe his said daughter, Mary Ellen, in a reasonable manner; and that upon doing so no interest should arise upon the said sum of £250; but if they neglected such support and clothing, he desired that said sum of £250 should be liable to interest at £6 per cent. per annum, until his said daughter's marriage, but by no means after. And the said testator desired that in case of the death of either of his two sons without lawful issue, the proportion or half which such son would be entitled to, as thereinbefore mentioned, should go to and become the property of his surviving son, subject to an an-

nity of £10 per annum to his said daughter, Mary Ellen, for and during her natural life, with a power of distress to the said Mary Ellen in case of nonpayment thereof; and in case of the death of his two sons, William and John, without lawful issue, then and in such case he desired that his said daughter, Mary Ellen, should be entitled to the entire of said lands; and he desired that if his said daughter, Mary Ellen, should die without marriage, her portion of £250 should go, share and share alike, between his two sons, William and John. The petition then stated that the testator died in 1837, without altering or revoking his said will, leaving his said two sons and his daughter him surviving; and on his death the said respondent, William Tarrant, and said John Tarrant entered into possession of the said lands, and continued in possession thereof until the month of April, 1860, when John Tarrant died without ever having had a child; and since his death William Tarrant, the respondent, had been in possession of the whole of the lands. That on the 20th February, 1841, the petitioner, Samuel Upington, intermarried with the petitioner, Mary Ellen, with the consent of the parties named in the will. That several payments were made from time to time by the respondent on account of the charge of £250; and that in the month of March, 1860, he paid the petitioner, Samuel, the sum of £25 17s. 5d., portion and on account thereof, leaving a balance of £125 due on foot thereof to petitioners after all just credits and allowances. That after the death of John the petitioners applied to the respondent for payment of the said sum of £125, but that he declined to pay same on the grounds, as he alleged, that the petitioners should have obtained payment of same from John Tarrant during his life. That in April, 1839, the respondent and John Tarrant had obtained to themselves a renewal of the lease of the said lands; and that the respondent had at the commencement of the suit the legal estate in the lands vested in himself, and that the petitioners were unable to take proceedings at law to recover the balance of the charge. The petition then prayed an account of what was due on foot of the charge, that the sum found might be decreed well charged on the lands, payment, and in default a sale. The petition was referred in the usual way, under the 15th section of the Chancery Regulation Act to Master Brooke; and on the 10th December, 1860, the respondent filed his discharge, in which he submitted that by virtue of the will the said John Tarrant, the younger, and the respondent were each liable to pay and contribute one equal moiety of the sum bequeathed by an annuity or yearly instalment to the petitioner, Mary Ellen, each such moiety being an annuity or yearly instalment of £10, payable yearly by each of them the said John Tarrant, the younger, and the respondent, from the time of the marriage of the said respondents until the total amount or sum of £125 sterling should be paid by each of them the said John Tarrant, the younger, and the said respondent. The discharge then stated a number of facts to the effect that the respondent was informed by John Tarrant, the younger, upon the occasion of his marriage with a sister of the petitioner, Samuel, that the said John Tarrant, the younger, had settled and arranged with the petitioners for the due discharge of

the moiety of the sum of £250, which he was liable to pay and contribute in respect of the half of the lands devised to him by the will; and that the respondent accordingly after the marriage of the petitioners commenced to pay to the petitioner, Samuel; and that he received and accepted from the respondent the moiety of the said charge or sum by yearly payments of £10 each; and that the respondent continued to pay, and the petitioner, Samuel, to accept and receive, the said sum of £10 yearly; and that in the year 1853 he settled a final account with the petitioner, Samuel Upington, on foot of the said moiety of the said charge, whereby the balance due on foot thereof by the respondent was ascertained to be a sum of £38, and no more; and that he, the said respondent, passed his bond to the petitioner, Samuel, dated the 6th April, 1853, with warrant of attorney, conditioned for the payment of £66 19s. 6d., being the amount of the said balance, and the residue for money lent, with interest at £5 per cent.; and that the respondent afterwards paid said bond and all interest thereon. The discharge further stated that John Tarrant in his lifetime had always ample means to pay, and either did pay or would have paid his moiety of the said yearly sums if same had been payable by or had been demanded of him; but that the said Samuel and Mary Ellen led the respondent to believe, and the respondent did in fact believe, that all their claims and demands by virtue of the said will, in respect of the said yearly sums payable by the said John Tarrant, the younger, had been duly settled and discharged with and to the said John Tarrant, the younger, on his marriage; and that no such claim as that put forward by the petitioners in the cause petition would ever be set up; and that all respondent's liability in respect of the said yearly sums had been fully ascertained and finally settled on the occasion of passing the said bond; and that respondent accordingly acted upon such belief, and did not compel the said John Tarrant, the younger, to pay the moiety of the yearly sums payable by him by virtue of the will, and could not now obtain any contribution in respect of the sum now sought to be recovered from respondent if respondent were now obliged to pay the same, as there were now no assets of the said John Tarrant, the younger, forthcoming. The respondent also by his discharge relied upon the Statute of Limitations. The Master by his decretal order declared that at the time of the filing of the petition the demand of the petitioners was barred by the 42nd sec. of the Statute of Limitations, and accordingly dismissed the petition with costs. From this order the petitioners now appealed.

Serjeant Sullivan, Chatterton, Q. C., and Exham, in support of the appeal.—From the terms of the Master's order it is plain that the only defence here is that of the Statute of Limitations; everything else is out of the case. The Master held that this was a rentcharge, and that the claim was therefore barred by the 42nd section of the statute. But it is impossible to hold that this is the case of a rentcharge. It is evident upon the whole will that what the testator intended to give was a gross sum, payable by instalments. If this is held to be a rentcharge, it will be impossible, with any safety, to give a sum payable by instalments—5 *Jarm. Convey.* p. 14, last edition.

Warren, Q. C., and *W. M. Johnson*, for the respondents, to sustain the Master's order.—The circumstances here raise a clear equity independently of the Statute of Limitations. *Mere laches per se* will not deprive a creditor of his rights against a remainderman; but where there are circumstances such as those in the present case, the creditor will be held to be barred—*Hungerford v. Whitney* (4 Ir. Ch. 211); *Loftus v. Swift* (2 Sch. & Lefr. 642); *Bentham v. Haincourt* (Finch, C. P. 30); *Pickard v. Lears* (6 Ad. & Ell. 475); *Piggot v. Stratton* (1 De G. F. & J. 33); *Aston v. Aston* (1 Ves. 264). The cases at law are collected in 2 Sm. L. C. 664; *Bell v. Richards* (3 Jur. N. S. 520); *Orms v. Bedall* (30th L. J. Ch. 1); *Pulsford v. Richards* (17 Beav. 94); *Freeman v. Cooke* (2 Exch. 654). Then as to the Statute of Limitations, this is clearly a "rent" within the 42nd s. of 3 & 4 Wm. 4. c. 27. The interpretation clause defines a "rent" as "any periodical sum of money charged upon or payable out of any land."—*Kenny v. Lynch* (9 Ir. Eq. 530); *Harcourt v. White* (28 Beav. 303). This is a stale demand—*Sibering v. Earl Balcarras* (3 De G. & Sm. 735).

Charlerton, Q. C., in reply.—Upon the construction of the will it is plain that this is not an annuity. The testator imposed on the lands a gross charge of £250, and then for the ease of the owners of the land directed that it should be paid in instalments of £20 a year. He cited *Sanders v. Coward* (15 M. & W. 48); *Aymott v. Holder* (17 Jur. 318); *Moss v. Hall* (5 Exch. 46); *Strong v. Foster* (17 C. B. 201).

Nov. 11.—THE MASTER OF THE ROLLS delivered a written judgment, in which he stated the facts of the case, and proceeded to say that, from the view which he took of the second ground of defence raised it was unnecessary for him to go into the first ground. He observed upon *Loftus v. Smith* (2 Sc. & Lefr. 642), and then said that the second ground of defence was, that the demand was barred by the 42nd section of the Statute of Limitations. He read the interpretation clause of the statute so far as it related to the word "rent," and said that the 42nd section was to be read as if the words in it were that "no arrears of any annuity or periodical sums of money," &c., were to be recovered, except as therein stated. The testator had bequeathed to his daughter the sum of £250, to be paid by yearly instalments, and then followed the words empowering the daughter to distrain in case of nonpayment. This was clearly a terminable annuity within the 42nd section. The testator called it an annuity. His Honor was of opinion that this was an annuity charged upon the lands, with a power of distress. He was therefore of opinion that the Master was right, and the motion must be refused with costs.

Court of Appeal in Chancery.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

UPINGTON AND WIFE, PETITIONERS AND APPELLANTS;
TARRANT, RESPONDENT.—April 24.

The Court of Appeal will be slow to reverse a decision below, arrived at after deliberation, unless clearly satisfied that that decision was erroneous. Lord

Wensleydale's judgment in Vernon v. Wright (7 House of Lords, 66) approved of.

THE above case came before this Court upon an appeal by Samuel Upington and his wife against the decisions of the Master of the Rolls and of Master Brooke.

The same counsel appeared as below. In addition to cases cited below *W. M. Johnson*, for the respondent, cited the following words of Lord Wensleydale, in *Vernon v. Wright* (7 House of Lords, 66), as to the functions of a Court of Appeal:—"However, I cannot say that my notions on that subject (alluding to the decision of the Court below) have amounted to much more than a doubt in the course of this inquiry; and I hold that you ought not to reverse a careful and elaborate decision of the Court below, unless you are satisfied that it is wrong. A mere doubt in your own mind as to the propriety of the construction ought not to entitle you to reverse the judgment. And when I consider that that judgment has been recognised as being perfectly sound by four judges out of the five who have given their opinion, I certainly cannot consider that my doubts ought to weigh; in fact, I may say they are removed."

THE LORD CHANCELLOR.—This is a very difficult case. It is very hard to say what is the exact meaning of the words of this will. Furthermore, we are called upon to reverse the solemn decision of two tribunals. To enable us to do so we must clearly see that there was a miscarriage in the courts below. Mr. Johnson very properly called our attention to the principles enunciated by Lord Wensleydale in *Vernon v. Wright* (*sup.*) If we could read this will as containing only one reference to this sum of £250, we could treat that sum as a legacy; but then the will goes on to say that that sum of £250 is to be paid to the testator's daughter by yearly instalments of £20 per annum; and that said annuity or instalment of £20 per annum should be paid to his daughter or her lawful husband, their heirs or assigns, by two half-yearly payments of £10 each until the sum of £250 was paid to her or her assigns. So that even if this sum were a legacy up to the period of Miss Tarrant's marriage, it is very doubtful whether it did not change its character and become an annuity from the marriage. If the Courts below had held that these payments did not constitute an annuity, I would feel great difficulty in holding there was an annuity; but as the Courts below had held that there was an annuity created, I do not see my way in the case save to affirm the decisions below.

THE LORD JUSTICE OF APPEAL.—I am of the same opinion as the Lord Chancellor, and think that under the circumstances we ought to affirm the decision below. There are, certainly, grounds to say that this sum of £250 was only to be recovered by periodic payments. This is my present opinion, but I feel very grave doubts upon the question.

No costs of the appeal.

IN THE MATTER OF THE RENEWABLE LEASEHOLD CONVERSION ACT, EX PARTE HANKS—Feb. 5.

Practice—Renewable Leasehold Conversion Act—Recover—Costs.

Where a tenant seeks a fee-farm grant, and there is a

receiver over the owner's interest, the tenant must call upon the receiver to take the proper proceedings to have a fee-farm grant given before he proceeds himself, and, semble, that where the receiver is appointed in a cause, the tenant, in case of a refusal to act by the receiver, ought to proceed by motion in the cause, and not by petition under the Renewable Leasehold Conversion Act.

THIS was a petition for a fee-farm grant under the Renewable Leasehold Conversion Act. The tenant had served a notice upon the landlord's solicitor, calling for the grant. To this an answer was returned, stating that there was a receiver over the landlord's interest in the lands in a cause of *Radcliff v. Lee*, and stating further that no grant could be given without the leave of the court. Thereupon the tenant called upon the solicitor for the receiver, who was also solicitor for the landlord, to take the necessary steps for an application to the court for an order to execute a fee-farm grant. This the receiver's solicitor declined to do, whereupon the tenant filed the present petition.

C. H. Woodroffe, for the petitioner, cited *In re Roberts* (8 Ir. Jur. 248).

Richard Reeves for the receiver in *Radcliff v. Lee*, submitted that the tenant ought not to have proceeded by petition but by motion in the cause.

THE MASTER OF THE ROLLS said that the proper course would have been for the receiver to have applied by motion in the cause. Lord St. Leonards had decided that where a party sought for a renewal, and there was a cause or matter in which there was a receiver or guardian or committee, the tenant ought to call on the receiver, guardian, or committee to take the proper proceedings, and that if the tenant himself applied he would get no costs. Under the circumstances of the present case, as the receiver had been called upon to act, he would give the petitioner his costs, but his impression was that the application should have been by motion in the cause. However, as the proceeding was a *bona fide* one, he should direct the receiver to pay the petitioner his costs of the petition and proceedings thereunder. No costs should be given to the receiver.

Court of Queen's Bench.

Reported by Walter M. Bourke, Esq., Barrister-at-Law.

OWENS v. VANHOMRIGH.—Jan. 24th.

Arbitration—Reference of cause before trial—Costs to abide result of award—Com. Law Pro. Act, (Ireland) 1853, sect. 243—Ditto, sect. 10.

Where an action for £109 11s. 4d. was, after service of summons and plaint and before defence filed, referred to arbitration, the submission providing that the costs should abide the result of award; and that the arbitrator should inquire into certain claims of set off on the part of the defendant which otherwise would have been barred by the Statute of Limitations, and the award adjudged that the defendant was indebted to the plaintiff in the sum of £18 10s. Held that the plaintiff was entitled to full costs.

THIS was an action for 109 11s. 4d. claimed to be due on foot of an account extending from 1852 to

1856. The subject matter of the summons and plaint was referred to arbitration before defence was filed. The submission provided for an extension of the time; "that the costs of said action, and incident to the said consent, and any order to be made thereon, and of said arbitration, should abide the result of said award;" and also that certain claims of the defendant by way of set-off, which were barred by the Statute of Limitations, should be taken into account by the arbitrator. The award adjudged that the defendant was indebted to the plaintiff in the sum of £18 10s. No defence had been filed. The award was, by order of the court, confirmed and made absolute. Plaintiff's costs were taxed to £42 11s.; and the taxing master certified them to half the amount only, £21 5s. 6d. The plaintiff had paid the fees of the arbitrator under the impression that the party who succeeded would be entitled to full costs.

J. A. Byrne moved for an order that the taxing master do review his taxation of the plaintiff's costs of this action, and of the submission and reference, award, and proceedings thereunder; and do amend the certificate of plaintiff's costs, by inserting therein £42 11s. instead of £21 5s. 6d. The submission gave no authority to the arbitrator to certify for costs, but provided that they should abide the result. Sec. 243 of the Com. Law Pro. Act of 1856 has no application to this case, because the action ceased after the issuing of the summons and plaint, and there was no recovery in the action as provided for by that section. Secondly, though the section would have been applicable in ordinary cases, the parties here have by their contract withdrawn from the ordinary rule of law, that contract is with reference to the costs that they should abide the event of the award; and it is an established rule that the words of a contract are to be considered in their primary sense, unless it appears from the context that they should be understood otherwise. The word "costs" in the submission means full costs—*Keene v. Deeble* (3 Barnwell and Cresswell, 491), which arose on the construction of 43 Geo. 3, sect. 3—*Holder v. Raitt* (2 Adolphus & Ellis, 445); *Gurney v. Buller* (1 Barnwell and Ald. 670). On the construction of the submission it was held that similar words (in *Griffiths v. Thomas*, 4 Down. & Lowndes), "that he in whose favour the decision was should be paid by the other party the costs of the suit;" and the award not being void on the face of it needed no amendment—*Cleary v. Cleary* (10 I. Com. Law, 329). The 6th, 9th, 10th, and other sections of the Com. Law Pro. Act of 1856, refer to compulsory references; this case must be tried as if there were no such statute, though the 243d section of the Act of 1853 applies to it—*Keene v. Deeble* (3 Barnwell & Cresswell, 491). The cause and the arbitration, and the costs of cause and arbitration, are distinct things. There was no recovery by virtue of the proceedings in the suit, the recovery was in a different tribunal—*Molloy v. Jones* (1 Ir. Jurist, N. S. 9); *Jones v. Jones* (29 L. Journal, N. S. O. P. 151); *Wiggins v. Cook* (28 L. Journal, N. S. O. P. 312).

W. J. O'Driscoll, contra.—The costs were properly certified by the master to half their amount—Com. Law Pro. Act, 1856, sect. 97; for by the consent the parties put themselves in the position in which the

court would have put them. The only difference was, that the court was not applied to to make an order, the reference having been had after action brought. The arbitrator stood in the position of the master had there been a reference to him—Com. Law Pro. Act, 1856, section 10. The arbitrator finds only £18 to be due to the plaintiff; and had the case been tried before a master, the plaintiff should have gotten only half costs. [*Amicus curia*—*Wiggins v. Cook* (28 L. Journal, N. S. Com. Pleas, 312); *Jones v. Jones* (29 Law Jour. N. S. O. Pleas, 151).]

Cur. adv. vult.

LEFROY, C. J.—We direct the taxing master to review his taxation, as the plaintiff is entitled to full costs. This was an action of assumpsit, in which, after summons and plaint and before defence filed, the matters in dispute were referred to arbitration. In the consent there is a provision that the costs should abide the event of the award; and it was therein further provided that the plaintiff should not object to any items brought forward in the way of set-off by the defendant, on the grounds of their being barred by the Statute of Limitations. The cases of *Jones v. Jones*, and *Wiggins v. Cook*, are authorities upon the construction of the provision in the consent that the costs were to abide the result of the arbitration. The meaning of that provision is, that whoever succeeded should get his costs, irrespective of the amount recovered. But I am of this opinion independent of authority. I have always considered that the provision in the Common Law Procedure Act, limiting the amount of plaintiffs costs in certain cases, was to be taken strictly. Any legislative provision, the object of which is to deprive anyone of a legal or common law right, is to be construed strictly and in favour of the party deprived of his right; and I think this principle applies in an especial manner to the present case. The words in the consent, referring the costs to abide the result of the arbitration, do not bring the case within the provisions of the 97th section of Common Law Procedure Act of '56, since the costs were to abide the result without any reference to the sum awarded to either party. The parties here have entered into an agreement to make a law for themselves by relinquishing the benefit of the Statute of Limitations, the costs to abide the result. The result has been in favour of the plaintiff, and therefore the plaintiff is to have his full costs.

O'BRIEN, J.—Whatever doubt I had upon this point has been removed by reference to the cases cited in the judgment just delivered. Independent of authority, however, it is only right to give the plaintiff the benefit of the provision in the consent. If the parties wished they might, in the consent, have provided that the arbitrator should settle the question of costs.

HAYES, J.—It is very satisfactory to have cases in point; and the more so, when we find them decided on principle. When two persons go to law, and are not satisfied with the existing tribunals, but repeal the statute made for the benefit of the defendant, and make a law for themselves, we must construe the agreement that the costs are to abide the result in this way: if the plaintiff succeeds he is to get his costs, and if the defendant succeeds he shall have them.

The plaintiff has succeeded here, and is entitled to full costs.

FITZGERALD, J.—I should wish that this case were decided on broader grounds. If the plaintiff recovered less than £20 he is within the provisions of the 97th section of the Common Law Procedure Act of '56. Whether that sum were recovered by the judgment of the court or by the award of an arbitrator, is immaterial, so as the sum was recovered by virtue of the proceedings. The plaintiff's application rests on the construction of the clause, "the costs to abide the event of the arbitration;" that means the legal result, as explained by my brother Hayes, the plaintiff to get his costs if he were successful, and the defendant if he were successful. The plaintiff here, in an action of account, claimed £109 11s. 4d., subject to set-off; and it was provided in the consent that the Statute of Limitations should be no bar to any claims of set-off on the part of the defendant, thus laying down a rule which would not prevail in an ordinary action. The plaintiff succeeded in establishing his claim to £18 10s., and he is entitled to his full costs.

Rule accordingly.

Agent for the plaintiff—B. Booth.

Agent for the defendant—J. Julian.

HIL. TERM, 1862.

THE QUEEN AT THE PETITION OF JAMES GORMAN v. MAYNE.—*Jan. 27th.*

Quo warranto—*Towns Improvement (Ireland) Act, 1854; 17 & 18 Vic. c. 103—Right of females to vote at election of Town Commissioners.*

Election for Town Commissioners under above-named Act. Thirty-one females voted; ten for the relator and twenty for the defendant. Other votes objected to. A rule nisi for an information in the nature of a quo warranto had been obtained, on the grounds that the election was irregular, illegal, and void; and that the relator had a greater number of legal votes than the defendant. As the poll stood, the latter had a majority of votes. On showing cause, held, that acquiescence in any illegality cannot confer a right not allowed by law.

An election for two town commissioners for the Glas-tule ward of the township of Kingstown, was held on the 15th of October, 1861, before George Perrin, under the provisions of the Towns Improvement (Ireland) Act, 1854. The poll was declared as follows:—J. Crosthwaite, 85; R. Mayne, 77; James Gorman, the relator, 75; and E. Murphy, 70. Thirty-one females had voted at the election—ten for the relator, and twenty-one for Mayne. The relator objected to these votes as illegal; and he also alleged that eleven persons had voted who had not been twelve months in possession; that two joint occupiers, not qualified, had voted; and also five other persons disqualified for various reasons, had voted; making in all thirty-nine illegal votes for the defendant; and that after striking off the ten female votes recorded for him he would have a majority of legal votes over both Crosthwaite and Mayne. A scrutiny was demanded on the day of the election, but it was refused.

A notice to hold a scrutiny was served on Mr. Perrin same day; and a letter repeating the demand was written to him next day, but without effect. On the 1st of November notice was served on Mayne to vacate the office of town commissioner. He had subscribed the declaration on the 21st of October. A rule nisi, as mentioned above, had been obtained in Michaelmas term by the relator.

Whiteside, Q. C., and McDonough, Q. C., now showed cause.—Ladies were entitled to vote at the elections under the 17 & 18 Vic. 103. They are comprised in the qualification for electors, section 22. They are not excluded by the Act. The relator had availed himself of similar votes; and he was stopped, by his acquiescence at the time of the election, from afterwards questioning their legality—*Rex v. Parkyn* (1 Barnwell and Adolphus, 690). Two questions are to be put to electors at the poll—Are you the person named in the rate-book, and have you already voted; and if answered in the affirmative, the party rated to the necessary amount is entitled to vote. The court will not disturb votes that have been acquiesced in—*Rex v. Parry* (6 Adolphus & Ellis, 810); *The Queen v. John Campbell* (2 Irish Com. Law, 391, note); *The Queen v. Greene* (2 Gale and Davison, 24); *Queen v. Preece* (5 Queen's Bench, 94). The word person, in section 22 of the Act, includes females; for no word, except the word male only, shall be construed to exclude them. Section 1 (glossary) and the language of the statute is peculiar where a right is conferred on a male only—3rd & 4th Vict., cap. 108. [*Chief Justice*—It is objectionable to refer to another statute when the construction is to be had from the statute itself.] Females are included in the parties liable to rate; if they be not expressly excluded, and that a question arises as to their being included, reference must be had to the glossary. The word occupier is applied alike to those liable to rate—section 60, and to those entitled to vote—section 22.

Armstrong, Serjeant (with him *Kernan, Q. C., and Coffey, contra*)—Women cannot vote, for occupier in the statute means male occupier, as householder means male householder. Ladies are not ecclesiastics nor magistrates; but if they be entitled to vote under this Act for the election of commissioners, there is nothing to prevent a lady sitting as a magistrate. 17 & 18 Vic., sections 1, 6, 7, 22, &c.—*Rex v. Stubbs* (2 Term Reports, 395). A woman can vote for a poor-law guardian though she cannot be herself a guardian—*Queen v. Campbell* (2 Irish Common Law, 391, note). The *quo warranto* should go in this case on the authority of *Rex v. Carter* (Cowper's Reports, 58).

LEFROY, C. J.—In this case the question is on the construction of the Towns Improvement Act, and it affects the constituency of every town in Ireland where the Act applies. It has been said that there should be no enquiry in this case, because the party at whose instance this case has been brought forward has availed himself on a former occasion of votes similar to these he here objects to. It would be a very questionable ground for our deciding in the matter of a legal right that there had been acquiescence on the part of some other party. But how acquiescence can give a legal right it is difficult to conceive. In the

cases referred to in which that rule was acted on the nature of the facts involved no legal difficulty. This is a case of too much importance to be decided by a reference to other cases. We do not go beyond the Act itself in deciding on its construction; and all the constituencies that are affected by it will have an opportunity of obtaining a decision which will settle this case and all other similar ones.

O'BRIEN, J.—It is absurd to say that the circumstances of acquiescence at a previous election at which both the candidates availed themselves of illegal votes, should prevent one of them now questioning the legality of an election where there are questions affecting the legality of the votes. The *quo warranto* is to go.

HAYES, J.—This is not a case in which we should refuse the *quo warranto*.

FITZGERALD, J.—Some of the cases cited in argument establish that a party may by acquiescence or by his own conduct disentitle himself to raise questions as to form or practice; but no authority has been given to show that when a party is disqualified by law any acquiescence can give the right by law not allowed. On the other question I shall give no opinion. I am not prepared to say that ladies cannot vote at such an election. If we were pressed to decide that question we should only be sending a case to be tried, prejudicing it beforehand.

Rule for quo warranto accordingly.

Agents for the relator—Kernan and Tracy.

Agent for the defendant—P. J. Mayne.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

DAVIDSON v. WOODS AND WIFE.—April 23.

Practice—Peremptory exception—Petition.

Objections to the interest of caveators should now be raised by petition, and not, as in the Prerogative Court, by peremptory exception.

Dr. Ball, Q. C., moved for the directions of the court as to the mode of trying the matters put in issue by the peremptory exception and plea. There had been lately a suit in this court respecting the validity of the will of Dr. Colvan, late of Armagh, deceased, in which Davidson, the plaintiff here, was the plaintiff, and the deceased's widow, Mrs. Colvan, was defendant, and in which persons named Ker were cited as next of kin, and also a person as heir-at-law. That case, when at trial, was compromised, and by consent a verdict was found for the plaintiff, in favour of the will. Shortly after the verdict, and before final judgment, the present defendants caused a caveat to be lodged, which was duly warned, and an appearance was then entered for the defendants, stating that Mrs. Woods was cousin-german and one of the next of kin of the deceased. To that appearance the plaintiff filed a peremptory exception, alleging that Mrs. Woods was not next of kin, but that the Kers, as nephews and nieces of the deceased, were his next of kin, and had been duly cited, and stating the verdict which was had; and it also relied on the fact that the defendants, though not cited, were aware of the suit, and that the Kers had been cited, and that the defendants were therefore

bound by the verdict in that suit. To this the defendants pleaded that the Kers were not of kin to the deceased, as their father was illegitimate, and therefore not a brother (as alleged) of the deceased, and that they were not cited in the former suit, and were not parties or privy to the compromise, which was fraudulent as to them; and then relied on the circumstances which, it was alleged, made it fraudulent and void. Counsel cited several authorities to show that the defendants were bound by the verdict, amongst them *Radcliff v. Barnes* (8 Jur. N.S. 330), where the objection was raised by *petition*, and affidavits were filed in answer.

Dr. Miller, for the defendants, objected to the case being discussed before affidavits were filed.

KEATINGE, J.—Nothing is said in the rules about a peremptory exception, except so far as they provide that the former practice in the Prerogative Court is to be followed where not otherwise provided for; but as it appears from the case which has been mentioned that in England the matter was raised by a petition and not an exception, I think it is desirable to have a uniformity of practice, and I therefore suggest that the case should stand over for the purpose of allowing the plaintiff to file a petition to be verified by affidavit, and the defendants then to answer by affidavits.

This having been consented to, the case accordingly stood over, the costs already incurred to be costs in the cause.

THOMAS BELL, PLAINTIFF; THE ATTORNEY-GENERAL
AND OTHERS, DEFENDANTS.—26th April.

Incorporation of revoked will by reference in a subsequent codicil.

A testator made a will of the 10th Sept. 1819, and by another of the 5th Nov. 1819, expressly revoked it; and by a codicil to it of the same day, after giving his property (subject to annuities) to his nephew, added, "trusting to his performance of my wishes contained in a will signed at, &c., on the 10th Sept. 1819, and which, if I live and perfect by legal advice, I intend to be my last will." Held, that the earlier will was thereby incorporated, and should form part of the probate, as together with the other will and codicils forming the last will of the testator.

THIS was a demurrer filed by the plaintiff to the plea filed by the Attorney-General. The declaration of the plaintiff propounded a will of the late Daniel Lyons, a lieutenant-col. in the East India Company's service, bearing date the 5th Nov. 1819, with two codicils; the first codicil, the 5th Nov. 1819, and the second, the 12th Nov. 1819, as together forming his last will. The plaintiff was one of the executors named in the said will, which contained a clause of revocation of all former wills. The plea of the Attorney-General alleged that the said will and two codicils did not together form the last will of the testator, as he had previously made another will, dated the 10th September, 1819, containing (*inter alia*) bequests for charitable purposes, copies of which, and of the will of 5th Nov. 1819, and the said two codicils of the 5th Nov. 1819, and 12th Nov. 1819, were respectively lodged in the

Registry.* And that although the will of the 5th Nov. 1819, did contain a clause of revocation of all former wills, yet, that the said testator had, by his codicil of the 5th Nov. 1819, incorporated the said will of the 10th September, 1819, with the said codicil of the 5th Nov. 1819; and that thereby the said will of the 10th September, 1819, became, and now is, a part of the said testator's last will, and ought to be admitted to probate together with the several other testamentary instruments mentioned in the said declaration; and that by reason of the said charitable bequests contained in the said will of the 10th Sept., 1819, the Attorney-General, on behalf of her Majesty, was interested and entitled to propound the same for probate. To this plea the plaintiff filed a general demurrer. The will of the 10th September, 1819, made at Almorah, in India, gave and devised to Lieutenant M. Mulkern, John Mulkern, Robert and Thomas Bell, all testator's money, securities for money, goods, chattels, estates, and effects of what nature or kind soever in trust, that when a certain sum deposited in his agent's hands at Calcutta, should amount to 12,000*l.*, it should be remitted to his executors to be by them lodged in the National Bank, Dublin, to be disposed of as he directed. Then followed directions to pay numerous legacies and annuities to a variety of charitable institutions in and about Dublin, and elsewhere in Ireland, and then he expressed his intention of purchasing with his personal property, exclusive of the said charitable gifts, a small landed estate, which should be entailed and inherited by his nephew, Thomas Bell and his lawful heirs, on condition of assuming the testator's surname and professing the Protestant religion, and conforming to the terms of his will. In default of which it was to go over; and he then gave minute directions for the cultivation and management of the said estate, and for the support of industrial schools, &c., thereon, and in the event of his not surviving to purchase the said estate, he then gave several annuities to various relatives, and then he appointed his said trustees also executors. The will of the 5th Nov. 1819, made at Roderpore, in India, gave the estates and all testator's property to the four trustees named in the former will, and another, a brother-in-law, Thomas Bell; and the trusts were to pay annuities and legacies to various relatives and other persons, and appoint the said five persons executors, and revoked all former wills. No charitable gifts were mentioned in this will. By a codicil of the same date, and on the same paper, he gave a legacy to a Hindoo in his service, and directed some of the annuities to some of his relatives to accrue to the survivors, and then went on, "I give, bequeath, and devise all and every part of my fortune, real and personal, to my nephew, Thomas Bell, or his heirs, trusting to his performance of my wishes contained in a will signed at Almorah, in the province of Kamoun, on the 10th September, 1819, and which, if I live and perfect by legal advice, I intend to be my last will and testament." The codicil of the 12th Nov. 1819, merely directed that such goods and chattels as were unprovided for in his will should be sold, and the amount thereof he gave to his elder brother, Martin Lyons. The testator died on the 15th Nov. 1819.

* Vide ante p. 127, as to the motion made respecting the form of the plea, which was amended as there ordered.

F. Johnson and Dr. Ball, Q.C. (Dr. Lloyd with them) in support of the demurrer—The will of 10th Sept. 1819, cannot be admitted to probate. It did exist, but was expressly revoked. The revocation is complete—the will of 5th Nov. 1819, not only revoking, but declaring that it is his last will; and if the prior will should be admitted to probate, the inconsistency arises, that in the probate will appear a will both revoked and also revived. The cases as to incorporation are divisible into two classes. First, documents not testamentary, as deeds, &c. Secondly, documents which, though testamentary, are imperfectly executed. An instrument revoked cannot be revived except by a codicil executed, as is mentioned in the 22nd section of 1 Vict. c. 26. Besides, the words used in the codicil are conditional, and indicate a deliberate intent to do some other act. “If I live and perfect by legal advice,” &c., show that the testator intended to do some other act—*Roberts v. Roberts* (31 L. J., Prob., 46); *Jarm. on Wills*, 83. In the goods of *James Gordon Duff* (4 Notes of Cases 474), the revocatory clause was qualified; and in the clause the reference was to the other document, so excepting it and preserving its vitality. The two wills are here quite inconsistent and cannot be in the same probate. The trustees are not the same. In the first, the trust is to pay immediate annuities to charities; in the second, to pay annuities to brothers and sisters, which probably would absorb all the funds. The words of reference might only refer to a particular passage in the will—*Blackwood v. Damer* (3 Phill. 458.)

George Watters and the Solicitor-General (Dr. Townsend with them) for the Attorney-General.—The will of 10th September, 1819, is entitled to probate. In all the cases as to incorporation the only requisites are, that the document must have been in existence at the time of the execution of the will or codicil incorporating it, and that it be clearly identified as the only one answering the description—*Sheldon v. Sheldon* (1 Rob. 81); *Allen v. Maddocks* (11 Moo. P. C. 427); *Goods of Countess of Durham* (3 Curt. 57), in which the will of the late Earl was incorporated with that of his Countess; *Goods of Gordon Duff* (4 Notes of Cases, 474); *Goods of Pewtner* (ib. 479); *Goods of Darby* (ib. 427); *Carty v. Evans* (not reported), in the Rolls Court in Ireland; *Newton v. Newton* (6 Ir. Jur. N. S. 261); *Forbes v. Johnson* (3 Phill. 614); *Barwick v. Mullings* (2 Hag. 225). This is not a case within the Wills Act, but if it were the codicil shows a clear intention to revive the will.

Dr. Walsh (Orpen and Walker with him) for the other parties, were not called on.

Cur. adv. vult.

May 3.—*KRATINGE, J.*—His lordship having referred to the several wills and codicils, and to their respective provisions, said that the will of the 10th September, 1819, was expressly revoked by the will of 5th Nov. 1819; and, if there were nothing more, the first would clearly not be entitled to probate. The question, however, arises on the first codicil to the second will. The second will is very short, and deals with only a certain portion of the bequests contained in the first will. By the first will the testator also gave to several members of his family, annuities for life. The second will omitting the charitable bequests and the matters respecting the purchase of the estate,

goes over the same annuities for his relations, and has a clause of revocation; and there is enough on the face of it to lead to the presumption that the deceased did not mean that it should be considered as final. He begins by giving to his trustees all his property “for the following purposes,” and then they are to give certain annuities to several members of his family. But there is no disposition of the corpus of his property; and we have on the same day, and on the same paper, the first codicil added to it. It is short, and commences, “In addition to the bequests,” &c. (viz., which he had made in the will) he provides for the case of survivorship amongst his relatives; and after all should die he devises all to his nephew, Thomas Bell, “trusting to his performance of my wishes contained in a will signed at Almorah, on the 10th September, 1819, and which, if I live and perfect by legal advice, I intend to be my last will and testament.” He died a few days after the execution of that codicil, and did nothing to perfect the first will; and now the question is, whether the clause of revocation in the will of the 5th Nov. 1819, is not so qualified and restricted by the words of the codicil of the same day as to set up the first will, save so far as there may be an express revocation of any bequests in it, by special and inconsistent bequests in the will and codicil of Nov. At the close of the argument I intimated that I had no doubt about the point, but the parties having desired to hear my judgment I allowed the case to stand over; but of the law I entertained no doubt. This court is not a court of construction, except in some exceptional cases. Now if the first codicil had said, “I expressly declare that my nephew is to establish the several charitable bequests mentioned in the first will,” no one could argue that I could refuse to introduce the first will into the probate. But though the codicil does not give legacies expressly, still it uses language which in a Court of Equity is held equivalent thereto. I give no opinion here whether the language used creates a trust, but I have to see that the court of construction shall have on the probate everything necessary to enable it to form a correct judgment. The law is, that if a document is so described in a will—even untruly, or erroneously, or inaccurately—as that the court can arrive at what it was, if it was in existence at the time of making the will and is capable of identification, it is entitled to probate. There is no controversy here that this will of the 10th September, 1819, is the document referred to. The plea alleges it is, and the demurrer admits it. The authority cited of *Sheldon v. Sheldon* (1 Rob. 81) is very much in point. There, at p. 85, the eminent ecclesiastical judge, Dr. Lushington, says, “Let us, then, look back to original principles. There is a well-known and established distinction between wills of real and personal estate, which throws some light on the subject. If the courts of law or equity wished to know what real property a testator had devised, and in what manner, they looked to the original instruments themselves. If they wished to be informed as to the bequests of personal estate, they looked to the probate of those instruments, and never, I believe, to any other.” If that be true, and if I now refuse to allow the first will to form part of the probate, the courts, in a suit where personal property only was involved, could not look at the first

will; and now, perhaps, if real estate were involved, courts of law or equity could not look at anything except what was here decreed. But that is not necessary for me to consider now. Dr. Lushington, in that case, refers to the case of *Dillon v. Harris* (4 Bligh, N.S., 342), and at page 89 says, "If a party refers to a valid deed, and directs that his property should be settled on similar trusts, then there is a title to probate, and if there be litigation there is also necessity, for I have yet to learn how a court of law could give effect to such a will, unless the instrument formed part of the probate." Now the case in *The Goods of James Gordon Duff* (4 Notes of Ca. 474) is *quatuor pedibus* with the case before the court. There the words of revocation ceased to be operative as to the earlier document, and it was held to form part of the probate, to enable the executors to act on the provisions contained in it, if necessary. The meaning of the codicil here is clear, viz., I have a former will, and I intend, if I live, to send it to my counsel to be put into legal form, that all my property is to be governed by it, but if I die before that is done, then my will is to be the will of the 5th November, 1819, and the codicil, but my nephew is to take the property on the express condition of carrying into execution my intention as expressed in that earlier document. I am, in effect, asked to strike out the paragraph I have referred to in the codicil, for it would be quite inoperative unless I grant probate of the first will. I give no opinion on the construction of the words of recommendation, and perhaps there may be great difficulty in carrying them out. The court may think that the testator intended all his charities to be carried out, including his directions as to his agricultural estate, or may perhaps think that some of them are too uncertain, and that as to some no decree could be made; but I have nothing to do with those things. One executor here has instituted the suit as plaintiff, and he alleges the will of 5th November, 1819, and the two codicils mentioned in the declaration. The other executors put in pleas adopting the plaintiff's case. The Attorney-General pleads the facts to establish that this is the identical paper referred to, and should be incorporated. That binds the plaintiff who has demurred, and the Attorney-General must, in this suit, have judgment and his costs, to be paid (being a public officer) by the plaintiff directly, he to have them over out of the estate; but the averments in the plea do not bind the other defendants, and if my judgment is not acquiesced in, the Attorney-General would have to institute a suit against those parties to have the earlier will established, but by a consent now the matter could be finally arranged if all parties are satisfied with the judgment. The demurrer, however, must be overruled.

The parties then consented, and the further proceedings were stayed, all parties to have their costs out of the estate, the plaintiff and the other executors, if they please, to apply for probate in common form.

MASSEY v. PENNEFATHER—May 1.

Practice—Heir-at-law of deceased testator a lunatic—Not found so by inquisition.

Where the heir-at-law of a testator is a lunatic, but not found so by inquisition, and is an inmate of an

asylum, and the executor or other party desires to prove the will in solemn form, and service of a citation on the heir-at-law, had by order of the court been had on himself, and also his mother and the keeper of the asylum, the court will permit the case to go to trial, serving the order for trial, and all further orders, and all notices in the case in the same way as already directed as to the citation.

Dr. Lindsay moved that the mode of trial of this case should be directed. The case was for the purpose of proving in solemn form the will of the deceased, who had been both deaf and dumb. By an order of the 19th February, 1862, service of a citation on the heir-at-law was directed to be served on the defendant himself and his mother, and also on Dr. Forbes Winslow, the proprietor of the lunatic asylum in which the heir-at-law was living. He was alleged to be a lunatic, but no inquisition had been had, and no committee of his person or estate had been appointed. In the Court of Chancery a guardian *ad litem* is appointed to defend for an alleged lunatic, and the general rule in England is to appoint the solicitor to the suitor's fund the guardian *ad litem*—*Charlton v. West* (4 L. T., N.S. 455); *Mauleverer v. Warren* (2 Jones Eq. Ex. 47); *Moore v. Platel* (7 Beav. 583). In the Landed Estates Court the Act 21 & 22 Vict. c. 72, s. 73, provides expressly for such a case. In the law courts the practice is laid down as to the service on alleged lunatics of writs of ejectment, and service on themselves is held sufficient—2 Archb. Pr. 963; *Doe v. Roe* (9 Dowl. P. C. 844). As to cases of contracts, service was substituted on the physician of the asylum in which the alleged lunatic was—*Wilmot v. Marmion* (8 Ir. L. R. 224). The 65th section of the Probate Act, and 56th rule, provide as to the proper service of heirs-at-law, but no provision is made as to lunatics.

KEATINGE, J.—Either I have the jurisdiction or I have it not, and I am disposed to say that I have, and my order will not give me jurisdiction if I have it not. There is no saving in the Probate Court of such cases as this, and it leaves the court to act as it may deem right. I will, therefore, order the cause to be tried before the court itself, serving a copy of this order and of all further orders in the case, and of all notices of all further proceedings to be from time to time made on the defendant Richard Pennefather, and also on the persons mentioned in the order of the 19th February, 1862.

IN THE GOODS OF AMADEE DE MORIN, DECEASED,
INTESTATE.—May 3.

Practice—Administration Bond—Assignment of—Conditional order.

The court will only give a conditional order for the assignment of an administration bond to be put in suit against sureties, unless notice of motion has been given.

Dr. Townsend moved on behalf of Charles Baury, a plaintiff in Chancery, who was directed by Master Murphy to do so, for an assignment of the administration bond, to be put in suit against the sureties. The affidavits fully stated the necessity for the assignment,

but no notice of this motion had been given to the sureties.

KEATINGE, J.—In these cases I will only give a conditional order, unless notice of motion has been given, as I can well understand that the sureties may have some grounds to resist the motion, and ought to be heard. Cause to be shown in six days.

IN THE GOODS, UNADMINISTERED, OF JOHN HALLIDAY,
DECEASED, INTESTATE.—May 3.

*Limited administration de bonis non during lunacy of
the original administrator.*

*Where an administrator becomes of unsound mind,
(though not found a lunatic by inquisition), the court
will grant administration de bonis non, limited
during the lunacy of the administrator, directing the
original letters of administration to be impounded,
and their effect suspended till further order.*

A. Ormsby moved that letters of administration *de bonis non* of the goods of John Halliday, deceased, should be granted to Thomas Greene, the son-in-law of the intestate during the lunacy of Mr. Adam Halliday, a son, who had already obtained general letters of administration to his father's goods.—The affidavit stated the facts of the lunacy and of no inquisition having been had, and of the necessity of a personal representative of a suit in Chancery, and of the Master's directions to make the application. *Ex parte Evelyn* (1 M. & K. 4); *Re Bincks*, (1 Curt. 286); *Re Marshall* (ib. 297); *Re Philips* (2 Ad. 335.)

KEATINGE, J.—You are entitled to the order you ask. Accordingly, let administration *de bonis non* be granted to the applicant of the goods of the deceased, limited during the lunacy of the administrator, and let the original letters of administration be brought in and impounded in the registry, and their effect be suspended until further order.

Consolidated Chamber.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

[BEFORE HUGHES, B.—22nd March.]

GIBSON v. ———

Practice—Arrest—Barrister—Privilege.

A Barrister attending the Taxing Master to explain charges in costs, being fees paid to him in a suit in which he was counsel, but not being professionally instructed to make such explanation, is not privileged from arrest.

Shekleton moved that the defendant, a barrister, be discharged from custody on the ground of his privilege from arrest on the occasion when arrested. The affidavits to sustain the motion stated that the defendant resided at Merrion, and had been engaged as counsel in a case in Chancery of *Anderson v. Fry*, in which case a bill of costs was under taxation in Master Reilly's office, and some of the fees therein charged as paid to the defendant had been disallowed. The defendant had on several occasions attended at the master's office, in reference to such charges in these costs,

but the defendant did not allege that he had attended professionally, and on the day of the arrest, the 11th March, he had attended also in consequence of a letter which he stated he had received from the agent of the attorney, requiring him to attend, and was arrested on his returning home; but the letter did not itself more fully refer to the matter. The affidavit, in answer to the motion, relied on a deviation, but the case did not turn upon that.

Shekleton, for the motion, relied on the privilege of counsel, and that though the defendant was not holding a brief on the occasion, yet he was as counsel explaining the matter in the cause in which he was retained as counsel, and of which he was as such consulant—*Rubenstein v. —* (10 Ir. C. L. R. 386).

Palles, contra.—The defendant had no privilege. The Law Courts were not at the time sitting, and he could not be said, as in the case cited, to be attending the courts in quest of business.

HUGHES, B.—In this case the defendant has applied for his discharge from arrest on the ground of his privilege as a barrister. To do so, he must make out a case that he was professionally engaged as such at the time of the attendance, in returning from which he was arrested. It appears that certain fees alleged to be paid to the defendant were charged in the costs, which were disallowed. He goes to sustain those charges; that was not the business of a barrister, unless he was instructed by his solicitor to do so. And the letter produced does not amount to such instructions, but is merely a request to meet some one on some business, which might refer to something else.

No rule, the defendant to pay the costs of the motion.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-Law]

[BEFORE BERWICK, J.]

RE R. J. PARSONS.

*Attorney adjudicated bankrupt as a bill broker—
Gambling.*

Where an attorney is adjudicated a bankrupt as a bill broker, and on coming up for his final examination, it appears that he lost large sums by betting on horse racing, his examination will be adjourned sine die with a view to prevent him obtaining his certificate.

THE bankrupt, who was an attorney, was adjudicated upon trading as a bill broker. It appeared that he was in prison, having been arrested for a small debt, and it was stated that a friendly creditor filed a petition in Bankruptcy with a view to obtain his release from prison, and prevent him being discharged as an insolvent. He now came up for final examination as a bankrupt, and was opposed by *Heron, Q. C.*, on the ground of having attempted to account for a deficiency of £600 by stating that he lost it by betting upon horse racing. He took credit for other losses which he did not satisfactorily vouch, not having kept regular books. There was besides a special ground of complaint on the part of Mr. Lazarus, a creditor who

gave him cash for a bill. It was insisted that the examination ought to be adjourned *sine die*.

Kernan, Q.C. for the bankrupt, said the schedule had been vouched to a reasonable extent, and there was no ground whatever for supposing that a full and true disclosure and discovery had not been made by the bankrupt. As to the question of conduct, he admitted that it was not justifiable, still the examination ought to pass, and let the certificate be suspended for a reasonable time; that, he thought, would meet the justice of the case.

Berwick, J. said the case was a painful one, and, as regarded the profession to which the bankrupt belonged, a very important one. There was no profession where rigid integrity and moral conduct were so absolutely necessary as that of an attorney and solicitor. In the courses of their business the money of their clients came into their hands; but what safety could there be for it if the person who received it was a gambler, betting large sums upon horse racing? It was a course of conduct that, by way of warning, ought to be signally punished. When the case came before him for adjudication he had great doubt that Mr. Parsons was a trader, and he thought that the bills he discounted were incident to his profession as an attorney; but it was proved to him that when he got bills for discount he got them discounted by other parties, deducting a brokerage or commission for himself, so that he was adjudicated as a bill broker, and now his conduct as a trader was for the consideration of the court, considering the vicious practices in which he was engaged, he thought it would be violation of his duty in protecting the interests of trade if he passed the examination, and thus left him at liberty to get his certificate at some future time. He would, therefore, adjourn the examination *sine die*.

BEFORE LYNCH, J.

RE WM. ANSELL DAY*

Trading in or to Ireland—Act of bankruptcy in Ireland—arrest of trader—petition for adjudication, by himself.

The 31st section of the Irish bankruptcy and insolvency Act, does not make it necessary that there should be a trading in or to Ireland, although, the trader may be exclusively resident in Ireland, to give the court jurisdiction to make him bankrupt. Where an English trader comes to Ireland, for the purpose of getting an adjudication to rid him of his liabilities, and that adjudication is annulled, the trader is then arrested at the suit of a creditor, and presents his own petition for adjudication, the court will refuse to adjudicate on the same ground that the first adjudication was annulled.

Kernan, Q.C. appeared for trader.

Purcell, for creditors opposing the adjudication.

* See Jurist, vol. 7, p. 163.—In that case a petition was presented by a creditor, to make Mr. Day, who was an English attorney, bankrupt, but the bankruptcy was annulled; in the present case he comes before the court on his own petition, in the former case a very able judgment was delivered by Judge Berwick.

JUDGE LYNCH said.—In this case, although I had no doubt as to the order I should make, I have held the matter over for consideration, as a very important question is raised in it—namely, as to the jurisdiction of the court in a case where an English trader, becoming resident, and exclusively resident in Ireland, commits an act of bankruptcy here—is he liable to be made a bankrupt here, or, because his trade was in England exclusively, has this court no jurisdiction to deal with such a case? Judge Berwick, in his very able judgment, states it as his opinion (though not necessary to his judgment, which, with great clearness, states other substantial and plain grounds), that, to give this court jurisdiction, there must be a trading in or to Ireland, although he may be exclusively resident in Ireland. Now I am not at present able to give my consent to this part of Judge Berwick's judgment; and, if it becomes necessary for this court to rule this matter, I shall take occasion to confer with him before it becomes the law of this court. Section 31 makes the ground of exclusive jurisdiction to be a trader residing or carrying on business exclusively in Ireland. This cannot be held—both residing and carrying on business in Ireland—for plainly it need not be exclusively in Ireland—and we must, to find the limit asked to be affixed, seek it in the title trader; and I do not at present see that I would be warranted in declaring that trader in this statute meant a trader in or to Ireland. Perhaps it is a very exceptional case where a party exclusively resides in Ireland, and who can be a trader exclusively in England or elsewhere. Perhaps the only case in which that is at all likely to arise is, where a party has given up trade, and has come to reside in Ireland. But, suppose that such a person has large property here, and debts here, and commits an act of bankruptcy here—and many acts of bankruptcy arise out of the fact of his residence here—he is liable to be sued here, to have execution against him here, and yet he would not be liable here to the beneficial execution, according to the rights of his creditors, which bankruptcy affords. It may be a matter of great importance to have this point decided in some case, making it an essential point in the decision; and at present I only intend to go to the extent of saying that I am not convinced yet that the law is so. The cases cited do not appear to me necessarily to decide this point. The cases do not turn on the definition of the sort of trading which is within the statute, in addition to a residence and domicile in England, but in respect of trading simply in itself making him liable to the English bankrupt acts on his being found there as a casual visitor. Indeed, none of the cases say that a trading in or to England is, in all cases, necessary to bring the trader within the bankrupt laws, but only negatively such a rule is declared; and, indeed, perhaps the very conflict on these matters may have led to the very distinction made as to residence giving jurisdiction. I throw out these observations now, suggesting grounds for further consideration on this particular point; and the limitation of sec. 31 in the manner thus mentioned is, in my mind, too important to be dealt with extra-judicially, as I would do in now giving any decided opinion. Judge Berwick himself stated what showed that he did not consider he was finally ruling this point. In his judgment he very

carefully went through the case on the evidence before him, arriving at the conclusion that the petitioner was not, within the statute, exclusively resident in Ireland, or, indeed, at all *bona fide* a resident; and further, that he came over to Ireland with a fraudulent intent to pass an adjudication for similar purposes. I can hear no appeal from these findings, in fact, on the matter before him; and it only requires the reading of the evidence referred to by Judge Berwick to make me state my willingness to abide by his rule. I have only to consider if the fact of his arrest alters the case. If he was not by residence within the Bankrupt Act before his arrest, I do not think he is so by reason of his arrest; and I cannot, by reason of his arrest, now reinstate an adjudication which was properly annulled by reason of the fraud intended to be worked out of it, so as now to enable the parties to effectuate that fraud. I therefore refuse to adjudicate this party a bankrupt.

Attorney for Mr. Day.—Mr. Perry.
Attorney for creditors.—Mr. Meldon.

[BEFORE BERWICK, J.]

RE A. AND B. ARRANGING TRADERS.—Feb. 1862.

Jurisdiction.—petition for arrangement.—dissenting creditor filing affidavit of debt under the 104th section.—irregularity in taking proofs.—application for injunction to restrain creditor.

Where a creditor proves his debt for the purpose of voting against an arrangement which he alleges is not legally carried, and the arranging traders apply for an order to quash the affidavit of debt, and an injunction to restrain the creditor from proceedings; the court has jurisdiction to grant the application, although the course of proceeding pointed out by the 104th section, is to apply for an extension of time to pay or compound the debt, and if such application had been made, an extension would have been granted, beyond the time, for carrying out the arrangement. Where mere irregularities, not affecting the merits of the case, take place in the reception of proofs, the court will allow them to correct it in a subsequent ex parte application on the part of the arranging traders.

A. AND B. presented their petition to the court under the arrangement clauses, and after several meetings, the court confirmed the resolution of creditors, which was a proposal to pay ten shillings in the pound, upon their partnership debts, same to be paid by instalments within twelve months from the date of the confirmation of the resolution of creditors. There were several dissenting creditors, but there was a majority sufficient to carry the resolution. One of the dissenting creditors who believed that the resolution entered into was not valid, filed an affidavit of debt under the 104th section, with a view to make the traders bankrupt, or to raise the question, as to the validity of the arrangement. Upon the fourteen days (at the end of which an act of bankruptcy would be complete) being about to expire, Heron, Q.C. obtained a conditional order, that the proceedings taken in the court under the 104th section of "the Bankrupt and Insolvent

Act, 1857," by J. B. Kennedy (one of the dissenting creditors) against the said A. and B., by filing an affidavit in this court on foot of the debt of the said J. B. Kennedy, proved in the matter of the said petition, be stayed and quashed, and that the said James Birch Kennedy be, and he is hereby restrained from filing any petition of bankruptcy against the said A. and B., or either of them unless cause be shewn to the contrary, within fourteen days from service of this order upon the said James B. Kennedy." As cause against this order affidavits were filed which raised the points on which the creditor relied as to the invalidity of the arrangement. The creditor in his affidavit stated, that in point of fact, three fifths in number and value of the creditors, did not agree to accept the composition according to the form prescribed by the statute, and that the confirmation of the resolution, signed by the court was not valid, and did not bind the creditors dissenting. That he was further advised and believed that Messrs. Motta, creditors, No. 12 in the schedule, who by their agent proved their debt in the said matter, did not by themselves, or any person duly authorised in writing, vote on the question of assent or dissent, to said proposal, and that with regard to the debt of creditor, No. 52, on the schedule, the attorney, who stated and signed the resolution, was not duly authorised in writing to do so, and that a subsequent authority given, could not make a proof or vote valid on the day the resolution was signed—that in point of law and of fact, if the vote were not valid on the day it was given, it could not be made valid afterwards, except at an adjourned meeting of which the creditors got notice. He further stated that Mr. Samuel Norman, creditor No. 30, on the schedule, had not exhibited or produced the bill of exchange on which he made his proof, on the day that same was filed, and that, consequently, his proof should not have been received, and that these proofs, thus improperly given, left the arranging traders without the statuteable majority that entitled them to carry their composition. It further appeared that the arranging traders being aware of the defect in their case, came into court, by their counsel in a week after, and *ex parte* without any notice to any creditor, obtained an order in the following terms, "At a sitting held this day on this matter, before the Hon Judge Berwick, one of the judges of the said court, Mr. Clay, solicitor for the said A. and B., Mr. Heron, Q.C. counsel, Mr. Batt, for Mr. Henry Oldham, solicitor for creditors. On the application of Mr. Heron, the court allowed the bills referred to, in Mr. Norman's and Mr. Curtis's proof of debt to be exhibited, and the power to vote for Thomas Curtis to be filed. It further appeared that the attorney for the dissenting creditor, apprised the attorney for the arranging traders of those irregularities; but not being his business to cure defects that would prevent his client taking proceedings outside the arrangement, he filed his affidavit of debt under the 104th section. Affidavits were made on the opposite side, but the main facts, as above stated, were not controverted, except that the irregularity had been waived by consent.

Sergeant Armstrong (with whom was Levy) shewed cause against the conditional order. He contended that it was wholly irregular; the application made, was to

quash the proceedings, taken under the 104th section of the Act which provided that "if any creditor of any trader to an amount requisite to support a petition for adjudication, shall file in the court an affidavit that such debt is justly due, and shall cause him to be served, personally, with such affidavit, and with a notice in writing, stating that such affidavit has been filed pursuant to this Act, and requiring immediate payment of such debt, and if such trader shall not within fourteen days after personal service of such affidavit and notice, or within such *further time* as the court shall order—pay such debt, or compound, for the same to the satisfaction of such creditor, or enter into a bond, &c., he shall, on the 15th day after such service, have committed an act of bankruptcy," &c. In the present case nothing had been done, but merely filing the affidavit of debt—that was a legal right which the creditor had, and such an application was never heard of before, as one made to quash an affidavit which the creditor had a right to make. Had the application been to extend the time for paying, securing, or compounding for the debt—he would not say what the court might have done, but that application not having been made, and the fifteen days having been expired, no course could be taken, but to allow the creditor to file his petition for adjudication, and then the arranging traders could come in, and shew cause against the adjudication. It was admitted that the creditor had a legal right to file his affidavit of debt, and yet in the original notice of motion, a part of the application was for an attachment against the creditor, for doing that which, it was admitted, he had a legal right to do. He (Serjeant Armstrong) contended that the court had not jurisdiction to stop the creditor at that stage of the proceedings, from filing his petition under the 104th section, and that the only course to be taken, was to come and shew cause against the adjudication, when all the points, as to the validity of the arrangement, could be raised.

His Lordship, said—He had no doubt that he had jurisdiction, and although the notice, upon which the conditional order was founded, was not strictly regular, inasmuch, as he believed the proper course would have been to apply to extend the time, which he might have extended until the arrangement was all at an end, or he might permit the creditor to go on, and file his petition for adjudication, and upon shewing cause, try the validity of the arrangement; but that might be done as well on the present motion, as in shewing cause against the bankruptcy. He would hear counsel for the creditor upon the validity of the order, confirming the resolution of creditors which he had made.

Serjeant Armstrong relied upon the fact, that the *ex parte* order, which counsel for the traders obtained, was conclusive evidence that the original order for protection was invalid, or there would not be an abortive attempt made to set it right. The *ex parte* order contained two palpable mis-statements on the face of it, first, that there was a sitting in the matter of the arrangement, secondly, that Mr. Batt, the apprentice of Mr. Oldham, attorney for the dissenting creditor, was in attendance, he merely happened to go into court upon other business, and they put him down as attending in the matter, although, he told them he

was there upon other business, and then before the order or memorandum was made up, he cautioned them against putting his name down as attending in the matter at all. The attempt to set right, by a subsequent *ex parte* proceeding, proofs, and power to vote which were not valid, when the resolution of creditors was signed, should totally fail. The error could only be set right upon an adjourned sitting for proof of debts; then if Norman's, Curtis's, and Mottu's proofs, or two of them were struck off, the petitioners would not have the amount necessary to carry the arrangement. There was an affidavit made on the other side, that those matters which they called irregularities, (but which he, Mr. Armstrong, called fatal defects) had been waived, by the attorney, for the dissenting creditor, but that was totally denied, and the correspondence between the parties proved that fact, for Mr. Oldham apprised Mr. Clay, agent to the petitioners, on the very next day of how the matter stood—that he would proceed, for recovery of his debt, as he might be advised. It would be said, why did not Mr. Oldham come in, and get the matter set right, simply because it was neither his business nor his duty; he wished to make the traders bankrupts, because he was quite sure, much more would be got speedily in bankruptcy, than would be got under the arrangement at the end of twelve months. It was the business of those affected, by an irregularity, to get it set right. Under these circumstances, he asked the court to allow the cause shewn against the conditional order with costs, and permit the creditor to proceed as he had a right to do, under the 104th section. In the whole Act, from beginning to end, there was no power to stay proceedings, under the 104th section, in any other way, except by extending the time, and that not having been applied for, the court should allow the bankruptcy to proceed.

Heron, Q. C. and Kernan, Q. C.—For the arranging traders, the cause shewn should be disallowed with costs. It was a most unjust attempt, on the part of a dissenting creditor, to undo all that had been done, and, in fact, to injure the majority of the creditors who were fully satisfied with the arrangement. Mr. Clay in his affidavit states distinctly, that Mr. Oldham and Mr. Walker, who appeared for the dissenting creditors, scrutinized the proofs, and that their counsel also examined them, and stated openly in court, that the petitioners had three-fifths in number and value of the creditors, and had, consequently, carried the arrangement. It was further stated that the irregularity, even, if it could be denominated such, was waived, at least so far as regarded the objection to Mottu's proof. But in point of law, the creditor was wholly estopped from taking any proceedings against the arranging traders, inasmuch, as he allowed the time for appeal to pass by, and there was a valid order standing against him, until set aside by the proper tribunal, and all that they had to do was to stand on that order, but they were not sorry that his Lordship had gone into the facts of the case, so that he might know the miserable technacality upon which an arrangement, clearly for the benefit of the general creditors, was sought to be set aside. They cited *Re Arnold v. Arnold*, (Jones' Reports, 343.)

Levy, in reply.

JUDGE BERWICK delivered judgment, he said, the question brought before him was a novel one, and the case altogether was important. The question appeared simply to be, whether a creditor who proved his debt under the arrangement clauses, for the purpose of voting against the arrangement, was still at liberty to proceed, under the 104th section, to make his debtors bankrupt, although the necessary creditors in number and value, voted for the arrangement; and it was strongly contended, that the court had no jurisdiction to stop the bankruptcy in any way, but to extend the time for paying or compounding the debt. Had that application been made to him, he would have at once granted it; but he thought it answered the same purpose to stay, or restrain the creditor from proceeding with bankruptcy—extending the time would have had the same effect, and whether he did it the one way or the other, the result was the same. If he had not permitted the merits of the case, and the validity of the order for protection, to be gone into, the creditor might complain that he was prevented from proceeding with the bankruptcy, and deprived of an opportunity of shewing the invalidity of an order, which he might have done when the debtors came in to shew cause against the adjudication. If he (Judge Berwick) were right in the decision he was about to make, the creditor had all the advantage he could have had, even if he were permitted to go on with the bankruptcy, for he could make no better case in seeking to uphold the adjudication than he was permitted to make on the hearing of the present motion. The question before him, as already observed, was, had the court power and control over its own proceedings?—had it power to stop a creditor from proceeding to make his debtors bankrupt, who had obtained the protection of the court under the arrangement sections? If it had not, the arrangement clauses, which were capable of conferring benefits on creditors, would be a nullity, and the court would be turned into an engine of oppression. Suppose there was an error or irregularity in the order he had made, he was quite ready at any time, on the matter having been brought before him, to set it right if he could; but, instead of doing so, the creditor proceeded by an indirect course to do what he could have done directly, his object being to bring the case into a bankruptcy regardless of the interests or rights of other creditors. It was said, no doubt, with truth, that the party affected by the irregularity ought to have applied to set the matter right; but, after all, was the irregularity or mistake of such a character as to invalidate all that had been done, even if the question of acquiescence was wholly out of the case? He thought it was not. Now, how did the matter stand with regard to the disputed proofs. Although there was some controversy on the point, it was, after all, pretty clear, that on the day the arrangement was carried, the attorneys acting for the dissenting creditors expressed themselves satisfied of the fact, that the petitioners had votes sufficient to carry the arrangement; but they say they were not aware at the time of the real circumstances as they existed. They say, with regard to Norman's proof, that the bills which were the foundations of it were not produced for a week after it was made, and that consequently it ought not to have

been received at all. Well, he believed it was no uncommon thing, to receive a proof subject to the production of the securities referred to in it, and it appeared at all events that the bills in question were in court, or produced the next day to the registrar. He did not think there was anything occurred with regard to that proof that ought to invalidate it. It was further complained by the dissenting creditors, that Mr. Clay, who signed the resolution of creditors, had not authority to vote for Motta, Brothers, or for Curtis, and that their proofs should be struck out. With regard to Mottus' proof, it was made by their agent, Mr. Keys. Mottus are the celebrated watchmakers of Geneva, and Mr. Keys their agent in this country. Keys gave authority to Mr. Clay to vote, and the objection was, that Mottu did not give the authority. Well, Mottu did not complain of what was done (he took the composition bills), and why should the court listen to the complaint of a third party. As to Curtis's proof, the evidence with regard to it was, that the power to vote was signed and perfected long previous to the second meeting; but the power was mislaid, and was not to be had on the 2nd day of meeting, and it was mentioned to the court, as appeared by Mr. Olay's affidavit, and that voting paper was afterwards allowed to be filed *non pro tunc*. He did not think that there was any ground, as regarded that proof, to attempt to disturb what was done. Those were the merits of the case as regarded the objected proofs, and he did not think they were sufficient to warrant him in disturbing everything that was done, and defeating what he believed to be a beneficial arrangement for the creditors generally. He might say he was instrumental in having the original proposition modified. It was proposed at first to get two years for the payment of the composition; but the court, as well as the creditors, thought the time too long, and it was reduced to twelve months. On the whole, he would disallow the cause shewn, and make the conditional order absolute, although the mode of proceeding, strictly speaking, ought to have been to extend the time, which he would have done at once, and thus defeat the bankruptcy; but making the order absolute, restraining the creditor from proceeding with the adjudication, would have the same effect. He felt some difficulty about the costs, as the case was a novel one, both as regarded the mode of proceeding and the point raised about jurisdiction; but as he was bound upon the merits of the case to disallow the cause shewn, he should do so with costs.

Attorneys for the arranging traders—Mr. Clay and Mr. Rosenthal.

Attorney for dissenting creditor—Mr. Oldham.

Court of Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

RUTHERFORD v. MAZIERE.—Feb. 12.

Feme Covert—Trust for the separate use of, without power of anticipation—Application of trust monies by trustee for the benefit of her husband—Acquiescence of when discovered.

The trustee of property settled to the separate use of

a married woman without power of anticipation, at her urgent request and with her knowledge applied portion of the trust funds to the benefit of her husband. When discovered, she received for many years, without demur, the reduced income arising from the residue of the trust funds. Held, that by such subsequent acquiescence she had condoned the breach of trust.

THIS was a petition filed by Henry Rutherford, Henry Battersby, and Cathcart Lees, trustees of the settlement executed upon the marriage of Isaac M. Dolier and Sarah Rosanna (late widow of Robert Maziere), his wife, and Edmund Dolier, against William Maziere, under the following circumstances:—By articles of agreement made in the year 1842, prior to the marriage of Robert Maziere with Sarah Rosanna Rutherford, they, amongst other things, covenanted that as soon as she, or her intended husband in her right, should, upon her father's death, become entitled to any real or personal estate, they would convey and transfer the same to John Rutherford and William Maziere, and the survivors of them, and the heirs, executors, and administrators of such survivors, to hold the same in trust, "after the celebration of the marriage to invest so much of the same as should consist of personal estate, as thereafter mentioned; and to pay and apply the yearly and other rents, interest, dividends, and produce thereof, unto such person or persons as Sarah R. Rutherford should from time to time, notwithstanding her coverture, by any writing or writings under her hand direct or appoint, but so as not to dispose of or affect the same by anticipation; and in default of and until any direction or appointment, and subject to any partial direction or appointment, in trust to pay the same to Sarah Rosanna Rutherford for her own sole and separate use and benefit, totally freed from and independent of her husband, and of any control on his part and of his debts and engagements, but without power of anticipation, the same to be paid to her upon her own receipts alone, and applied by her as she might think proper." The articles gave the trustees power to vary the securities, and provided, that in case Sarah R. Rutherford should survive her husband, and should not have at his decease or in due time afterwards any child who might become entitled under the limitations to children contained in the articles, then the trust funds and every part thereof should, upon the failure of such issue, be paid, transferred, and applied unto Sarah R. Rutherford, her executors, administrators, and assigns, or as she should direct or appoint for her and their own benefit, freed and discharged from every trust imposed upon them by the articles. The intended marriage was celebrated shortly after the making of the articles of agreement; and there was issue three children, who all died in the lifetime of their father, Robert Maziere, who died in 1856, leaving his widow, Sarah R. Maziere, surviving. John Rutherford died in 1845, leaving his co-trustee, William Maziere (the respondent) surviving. Upon the death of Mrs. Robert Maziere's father, subsequent to the marriage, the sum of 2756*l.* Bank of Ireland stock, and the sum of 1219*l.* old £3 per cent. stock, became vested in John Rutherford and Robert Maziere upon the trusts before declared thereof. Upon the

4th of July, 1860, Isaac M. Dolier intermarried with Mrs. Robert Maziere, who by the settlement executed upon that marriage, assigned and transferred to the petitioners all the property to which she was entitled above. The settlement contained a clause giving a wide discretion to the trustees, with the assent of Mrs. Dolier, to give credit to Mr. William Maziere, the respondent, for all sums applied by him, under the directions of Mrs. Dolier, in the lifetime of her late husband. The petition charged that William Maziere, in the year 1845, after the death of his co-trustee, sold the Government stock, which produced the sum of £1300*l.* and lent it upon mortgage. It also charged that the respondent had sold out 1119*l.* of the bank stock; and that of the amount realised thereby, viz., 2171*l.*, was represented by a mortgage to him, by the late Robert Maziere, of the lands called Ungola; but that the mortgage was totally unproductive in consequence of the claims of prior creditors. The petition alleged that the respondent had dealt thus with the trust funds, and had made advances to his brother, without the knowledge or consent of Mrs. Maziere (now Mrs. Isaac Dolier), and in derogation of the trust for her separate use, which had been intended to protect her fortune. The petition prayed that the respondent might be directed to transfer the unsold bank stock, and the mortgage debts and securities to the trustees of Mr. and Mrs. Dolier; and that he might be held liable for any deficiency which might appear upon his accounts being taken. The respondent's case was, that the late Robert Maziere had been a person of extravagant habits, and had been constantly involved in pecuniary embarrassments. That at the urgent entreaty of Mrs. Robert Maziere, he had sold out portions of the bank stock settled upon her, and had either applied the produce in paying off her late husband's creditors, or had handed it over to Robert Maziere. The mortgage of the lands of Ungola was taken to prevent the late Robert Maziere sacrificing them for a trifle, as he threatened to do; and that steps were taken only after the respondent had been subjected to the most heart-rending entreaties of Mrs. Robert Maziere to apply her fortune (she having no children alive) in aid of her late husband. That on some occasions Mrs. R. Maziere would not allow her husband to know from what source the money handed to him came. The respondent submitted an account of how he had disbursed the produce of the bank stock sold out by him; and stated that his sister-in-law had ever continued on terms of the greatest intimacy with him, and had always expressed, even up to a short time prior to her second marriage, her deep obligations to him for his kindness to her; and he contended that he was not liable for the bank stock which he had sold out, as he had done so at the instigation, and entreaty, and with the full knowledge and concurrence of Mrs. Robert Maziere, who had received the interest upon the residue of bank stock, from the death of Mr. R. Maziere, without any objection or comment. The respondent also objected that the petition was not verified by Mrs. Dolier (late Mrs. Robert Maziere); and a notice having been served that he would cross-examine Mrs. Dolier *viva voce* at the hearing, the solicitor for the petitioners made an affidavit, to which a medical certificate was annexed, to the effect that Mrs. Dolier

was in too precarious a state of health to allow of her appearing in court, and that her verification was unnecessary.

The Solicitor-General (with him *Geo. Battersby, Q. C., and Dames*), for the petitioners.—There was not such acquiescence by Mrs. Dolier when discovered as will protect the respondent from the consequences of a breach of trust. The acts of acquiescence must be positive and distinct. Unless they be such the respondent must replace the trust funds, no matter how great may have been the pressure put upon him by Mrs. Dolier—*Hanchett v. Briscoe* (22 Bea. 496); *Mara v. Manning* (2 Jon. & Lat. 311). The greater the distress of Mr. Robert Maziere, the greater was his influence over his wife; and in proportion to the urgency of her entreaties it became the duty of the respondent to prevent her sacrificing the property intended as a provision for her—*Scott v. Davis* (4 Myl. & Cr. 93). As there is a restraint on anticipation in this settlement, the respondent cannot recoup himself for a breach of trust out of funds over which Mrs. Dolier had a power of appointment—*Kellaway v. Johnston* (5 Beav. 319). The following cases were also cited,—*Jackson v. Hobhouse* (2 Merr. 483); *Bateman v. Davis* (3 Madd. 98); *Clive v. Carew* (1 John. & Hem. 199).

Serjeant Sullivan (with him *A. Brewster, Q. C., R. R. Warren, Q. C., and Exham*), for the respondent,—Mrs. Dolier has not verified this petition, although the truth of its statements depends upon her knowledge. She urged, and consented to, the sales of the bank stock by the respondent; and her acquiescence for five years, when discovered, is well established. The clause against anticipation in the first settlement did not prevent Mrs. Dolier parting with the principal of the trust fund, provided the interest thereof was preserved to her. This case is very similar to that of *Brewer v. Swirles* (2 Sm. & Giff. 219). There a married woman, with an absolute power of appointment over property settled to her separate use, induced the trustees to lend the fund on unauthorised security, and the fund was lost. She executed a deed of appointment of the fund so lost in favour of her infant children; and a bill filed on their behalf against the trustees was dismissed. The petitioners here are in the same position as the children in the last case. When Mrs. Dolier became discoverer she could do what she liked with the trust fund. Even if Mr. Robert Maziere was still her husband she could not be listened to; for if a married woman draw in a trustee to do anything against her benefit, she being so concerned, shall not afterwards be admitted to take advantage of it against the trustees"—3 Swan. 82, note; *Derbishire v. Home* (3 De G. M. & G. 80, 113.)

Mr. J. E. Walshe, Q. C., and Mr. A. Vance were examined *viva voce*, and stated that they had been intimately acquainted with Mrs. Dolier during the lifetime of her first husband; and that she was well aware that the bank stock was sold out by the respondent in breach of the trusts of the marriage settlement; and that she not only concurred in such acts, but instigated them.

A. Brewster, Q. C., in reply, cited *Wilton v. Hill* (5 Law J. Chan. 156).

THE LORD CHANCELLOR,—In this case I am of opi-

nion that I ought not to make a personal decree against Mr. Maziere to replace these trust funds. It would be a case of extraordinary hardship upon him if I were to be compelled to make that decree in the present suit, which in ordinary cases this court has felt bound to make for the protection of the public—in cases where a breach of trust has been committed at the entreaty of the person who has been entitled to the fund for the time being. Mrs. Dolier appears to have been possessed of considerable fortune in reversion, subject to certain provisions, which the marriage articles were conversant; and under those articles she certainly was under great restraint. She could not anticipate her life estate, although she could do so in the event of her dying in the lifetime of her husband; but she could not anticipate the principal in the event which happened. The settlement does not contain any power enabling her to do so, as it would be empowering her to deprive herself of her means of support. Consequently I am of opinion that it is impossible to sustain the proposition that she had such a power as to bring the case within the doctrine laid down in 3 Swanston. No doubt if it were so, this would be a strong case to oppose the ordinary doctrine; but this case must be decided upon a consideration of all the transactions which led to this breach of trust, and the conduct and acts of all the parties interested in this matter. No doubt, no acquiescence by a wife during coverture will condone a breach of trust. It would be open to her to come into this court after her husband's death, and say, "Whatever I did, I did it under constraint;" and she might call upon this court to declare, that she should not have been deprived of protection of the trustee against her husband's influence during his lifetime. It was contended that a fraud was practised by Mr. William Maziere; I do not think that is the case. He was perfectly cognisant of the trusts of the will and settlement, and it cannot be said that he was in any way deceived. His mind was perfectly free; he was at liberty to act as he chose in opposition to all this lady's entreaties. She thought she was dealing with her own money. It was manifestly her intention to deal with the trust fund as if her own absolutely. Her whole conduct shows that; so does the evidence of the two respectable gentlemen who have given evidence. Everything in the case tends to show that she considered these monies her own upon her husband's death, and that they were completely within her own disposal; that she knew well what she was doing; and that she in an independent and determined spirit disposed of the money. It has been said that she was under the influence of her husband; well, the same may be said of every woman who is married, in a great degree; but the facts of this case show clearly that she wished her husband to suppose that the money was his own; and she sought to obtain the money from Mr. William Maziere unknown to her husband, and secretly. This case is clear of everything which usually appears in suits of this description, except that everything was done at her instance: knowing what she was entitled to, knowing what Mr. William Maziere had done, she sanctioned it during her husband's life, and after his death she also sanctioned it. She remained a widow for upwards of five years; and while she was *sui ju-*

ris, and in constant communication with Mr. William Maziere, she made no demand upon him for these trust monies. She charged him with no breach of trust. Her object seems to have been to bury all the past transactions in oblivion, and to treat him as the joint repository with herself of all that had been formerly done for the purpose of freeing her husband from his embarrassments. She gave receipts without demur for the interest upon the balance of the stock and upon the available mortgage. It turns out that one mortgage was not a real mortgage, but that it was a transaction carried out to protect her husband from his creditors, to prevent him from dealing with the lands. I find too that the late Mr. Richard Meade made inquiries from Mr. William Maziere relative to these transactions; and there is a letter from the former, written just before her second marriage, on the subject; and Mr. Maziere swears that Mr. Meade was satisfied. I also find the second marriage settlement referring to these transactions, and giving to the trustees of that settlement power to relinquish all claim to the money advanced if they believed that Mr. William Maziere's account of the transactions was true. The words of the settlement give the widest possible discretion to the trustees to examine into the amount expended *bona fide* by Mr. William Maziere at Mrs. Robert Maziere's request, for her husband, and to give Mr. William Maziere credit thereof. What is the meaning of that? Clearly, that if they considered Mr. William Maziere's statement to be true, they should make no further demand. Mr. William Maziere swears it is true; Messrs. Walsh and Vance confirm the truth of it. Therefore, having regard to the facts which have been proved, it is clear that at the time of the second marriage all parties were cognisant of Mr. William Maziere's acts, and adopted and sanctioned them. The petition also contains an averment which goes far to sanction Mr. William Maziere's acts, and to show that Mrs. Dolier was cognizant of everything and perfectly willing to sanction. I think it is clear, on all the facts, that Mrs. Dolier, knowing in what manner Mr. William Maziere had dealt with the trust fund, fully authorised and acquiesced; and that the trustees, if they believed Mr. William Maziere's account of the disbursements, should have given him credit for them. This is the interpretation which I put on the words of the settlement. That being so, here is a cause petition filed, not by Mrs. Dolier, but by Mr. and Mrs. Dolier—by Mr. Dolier in Mrs. Dolier's name. The petition is not verified by Mrs. Dolier; she is not pledged to the truth of one word in that petition derogatory to Mr. William Maziere. That distinguishes this case from that of *Hanchett v. Briscoe* (22 Beav. 496). This case goes much further than that one. There a married woman who was absolutely entitled to stock in court, being separately examined, desired it to be transferred into the names of trustees "upon trust for her absolutely; and that the dividends should be held and applied for her separate use for her life." This was done. There the party who filed the bill was not the husband of the lady but her assignee of the fund which had been swept away. Mrs. Dolier does not say a word in this matter; she is no party to these proceedings, save in form. On the whole of this case, therefore, I am of opinion that

whatever breach of trust was committed by Mr. William Maziere was done with the knowledge and full concurrence of Mrs. Dolier; that she sanctioned there that breach of trust by her acts; and that the words of the cause petition admit as much; that it was Mrs. Dolier's anxious desire to give Mr. William Maziere full credit for all the monies advanced by him for her first husband. I will dismiss this petition as against Mr. William Maziere, and declare the mortgage and stock vested in the new trustees. I will retain the petition until the petitioners decide whether they will go into the office and take the accounts of the rents, and interest, &c.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

ROONEY v. KELLY.—Nov. 21, 22, 23; Dec. 2.

Copyright—Pleading—St. 5 & 6 Vict. c. 45.

The summons and plaint in its several paragraphs complained that the defendant in two books of his printed, &c., for sale, divers parts of the plaintiff's book, and thereby pirated the said parts of the plaintiff's book contrary to the statute 5 & 6 Vict. c. 45. To this the defendant pleaded that J. R. M. was the author as well of the defendant's books as of the plaintiff's book; that he composed the plaintiff's book in 1855, and the defendant's books in 1860; that the books were of a different character; and that the entire of each of them was composed partly from certain knowledge, learning, and ideas which said J. R. M. then had in respect of the subject matter of the said work, and partly from common sources of information, and every part of defendant's books was the result of fair mental operations of J. R. M. upon said common sources of information; and that no part of defendant's books or either of them was copied or colourably altered from the plaintiff's book.

Held, first, that the summons and plaint disclosed a sufficient cause of action; and secondly, that the defence was bad.

DEMURRER. The first paragraph of the summons and plaint stated that the plaintiff at and previously to the committing of the grievances after mentioned was, and theretofore hitherto had continued, and still was, the proprietor of a copyright then and during all that period, and still subsisting in a certain book and volume intituled "The Æneid of Virgil, first six books, as read in the entrance course, T. C. D., military examination at Sandhurst, and the various endowed schools in Ireland, literally translated, with a brief memoir, by J. R. Mongan, ex-scholar T. C. D.," which said book and volume was thereafter described as "The said book of the plaintiff;" and the defendant, in that part of the British dominions called Ireland, during the time aforesaid, and after the passing of the Act of Parliament passed in the sixth year of the reign of Queen Victoria, intituled "An Act to amend the law of copyright," did print and cause to be printed for sale divers parts of the said book of the plaintiff without the consent in writing of the plaintiff, then being such proprietor as aforesaid, the said

parts of the said book of the plaintiff being so printed, and caused to be printed as aforesaid in each of a large number of copies of a certain book and volume intituled "Mongan's Aldine Virgil; Virgil, the *Æneid*, Books I. to XII. complete, with English notes, explanatory and critical, and a metrical analysis of the *Æneid*, by Roscoe Mongan, A.B., Ex-Scholar Trinity College, Dublin;" and also in each of a large number of copies of a certain other book and volume intituled "Virgil, the *Bucolics*, *Georgics*, and *Æneid* complete, with English notes explanatory and critical; also a Metrical Analysis of the *Æneid*, by Roscoe Mongan;" and the defendant thereby pirated the said parts of the said book of the plaintiff contrary to the said statute, whereby the plaintiff had been prevented from selling divers copies of the said book of the plaintiff; and his profits in the said copyright had been diminished. The second paragraph stated that the plaintiff at and previously, &c., was and thenceforth hitherto had continued, and still was the proprietor of a copyright then and during all that period, and still subsisting in a certain other book and volume thereafter for conciseness described as "the said book of the plaintiff," and having the like title as in the first paragraph set forth, and during the period aforesaid, and after the passing of the Act of Parliament in the first paragraph described, and in that part of the British dominions called Ireland, numerous copies of two certain books and volumes respectively thereafter described as "the said books of the defendant," and having the like titles respectively as in the first paragraph in that behalf set forth; and each of such copies containing printed therein divers parts of the said book of the plaintiff, were printed for sale without the consent in writing of the plaintiff, then being such proprietor as aforesaid, and contrary to the said statute; and the defendant afterwards in that part of the British dominions called Ireland, well knowing the premises, and without such consent as aforesaid, and contrary to the said statute, did publish and cause to be published divers copies of the said books of the defendant respectively, each copy containing printed therein the matters aforesaid, whereby the plaintiff had been prevented from selling divers copies of the said book of the plaintiff; and his profits in his said copyright had been diminished. Third paragraph: For that the plaintiff at and previously to the time, &c., was and thenceforth hitherto had continued, and still was the proprietor of a copyright then and during all that period, and still subsisting in a certain other book and volume thereafter for conciseness described as "the said book of the plaintiff," and having the like title as in the first paragraph in that behalf set forth, and during the period aforesaid, and after the passing of the Act of Parliament in the first paragraph described, and in that part of the British dominions called Ireland, numerous copies of two certain books and volumes thereafter respectively described as "the said books of the defendant," and bearing the like titles respectively as in the first paragraph in that behalf set forth; and each of such copies containing printed therein divers parts of the said book of the plaintiff, were printed for sale without the consent in writing of the plaintiff, then being such proprietor as aforesaid, and con-

trary to the said statute; and the defendant afterwards, in that part of the British dominions called Ireland, well knowing the premises, and without such consent as aforesaid, and contrary to the said statute, did sell and expose to sale, and did cause to be sold and exposed to sale divers copies of the said books of the defendant respectively, each copy containing printed therein the matter aforesaid, whereby the plaintiff had been prevented, &c. Fourth paragraph: For that the plaintiff at and previous, &c., was and thenceforth hitherto had continued and still was the proprietor of a copyright then and during all that period and still subsisting in a certain other book and volume thereafter described as "the said book of the plaintiff," and having the like title as in the first paragraph in that behalf set forth; and during the period aforesaid, and after the passing of the Act of Parliament in the first paragraph described, and in that part of the British dominions called Ireland, a large number of copies of certain books and volumes respectively thereafter described as "the said books of the defendant," and having the like titles respectively as in the first paragraph in that behalf set forth, and each of such copies containing printed therein divers parts of the said book of the plaintiff, were printed for sale without the consent in writing of the plaintiff, then being such proprietor as aforesaid, and contrary to the said statute; and the defendant afterwards, in that part of the British dominions called Ireland, well knowing the premises, and without such consent as aforesaid, and contrary to the said statute, and at divers times, and from time to time, had in his possession for sale divers copies of the said books of the defendant respectively, each copy containing printed therein the matters aforesaid, whereby, &c., to the damage of the plaintiff of one hundred pounds. The defendant as part of each of his defences, and to be incorporated with each of said defences, said that the book which was described in the first paragraph of the plaint as "the said book of the plaintiff" was the same book as was described in the other paragraphs of the plaint as "the said book of the plaintiff;" and that the said book did not contain any part of the Latin text of any of Virgil's works; and that the books described in the said first paragraph as "the book and volume entitled Mongan's Aldine Virgil, the *Æneid*, books one to twelve complete, with English notes, explanatory and critical, and a metrical analysis of the *Æneid*, by Roscoe Mongan, A.B., Ex-Scholar, Trinity College, Dublin;" and the book described in said first paragraph as "Virgil, the *Bucolics*, *Georgics*, and *Æneid* complete, with English notes, explanatory and critical; and also a Metrical Analysis of the *Æneid*, by Roscoe Mongan," were the same books as were in the other paragraphs of plaint, and after in the defence referred to as the said books of the defendant; and that the first of the said books of the defendant consisted partly of the Latin text of the *Æneid* of Virgil, and partly of English notes and of a metrical analysis of the *Æneid*; and that the second of the said books of the defendant consisted of the Latin text of the *Bucolics*, *Georgics*, and *Æneid* of Virgil, and partly of English notes and of a metrical analysis of the *Æneid*. He then pleaded, first, that the plaintiff was not the proprietor of the copyright of "the book of

the plaintiff," as in the summons and plaint alleged; secondly, that the entire of each of the books of the defendant (except the Latin text of Virgil's works therein contained) was a new and original work, the result of fair and *bona fide* mental labour and operation exercised upon common sources of information in respect of the subject matter thereof, which said common sources of information were used by the author of said defendant's aforesaid works in the composition thereof fairly, legitimately, and not colourably; and so he said that the books of the defendant were not, nor was either of them an infringement of the copyright of the said book of the plaintiff; and thirdly, that one James Roscoe Mongan was the author as well of "the said books of the defendant" as of "the said book of the plaintiff;" and that said James Roscoe Mongan composed "the said book of the plaintiff" in the year 1855; and that "the said books of the defendant" (each of which was a work of a different character from the said books of the plaintiff) were composed by the said James Roscoe Mongan in the year 1860; and that the entire of each of the said books (save the Latin text therein contained) was so composed partly from certain knowledge, learning, and ideas which said James Roscoe Mongan then had in respect of the subject matter of said work, and partly from common sources of information which were for that purpose fairly and legitimately, and not colourably used by the said James Roscoe Mongan; and every part of the said defendant's books (except the said Latin text) was the result of fair and *bona fide* mental operations of the said James Roscoe Mongan upon said common sources of information; and that no part of defendant's said books, or either of them, were copied or colourably altered from the said book of the plaintiff; and so the defendant said that the said books of the defendant were not, nor was either of them, a piracy of the said book of the plaintiff, nor an infringement of his copyright therein, and therefore he defended the action. To this third defence the plaintiff demurred, because the same did not disclose any answer good in substance to the several causes of action in the writ of summons and plaint alleged, or any of them; and because notwithstanding, anything in the said defence alleged, certain parts of defendant's two books might be, in substance and fact, reproductions of certain parts of the plaintiff's books; and also because there might be infringement of copyright actionable at law, although intent to commit piracy on the part of the author were absent; and also because there might be infringement of copyright actionable at law, although the author of the book complained of did not in fact copy from the book of the plaintiff; and also because, notwithstanding anything in the said defence alleged, the author therein named might have had certain parts of the plaintiff's book, of which also he was the author, durably impressed upon his mind and memory, and might have afterwards, by means of such impressions, and without copying from the plaintiff's book, reproduced the same matter, and caused it to be transferred to the defendant's book; and also because a publisher was not justified in point of law in availing himself of the mental operations of an author upon a certain subject, in case another party had previously acquired copy-

right in the result of the mental operations of the same author similarly exercised on the same subject; and also because, notwithstanding anything in the said third defence alleged, the defendant himself might have published his several books, well knowing that certain passages therein were reproductions of certain parts of the plaintiff's book; and also because the existence of perfect good faith on the part of the author did not afford justification in law for the publication by the defendant of books containing certain passages not original, but reproductions in substance and fact of certain parts of the plaintiff's book; and also because in cases of the nature disclosed by the pleadings originality in fact of the book complained of was the true test on the question of piracy, but the said defence did not aver that the defendant's books were entirely original.

Phillips (with him *Serjeant Armstrong*) in support of the demurrer.—First, with respect to the sufficiency of the summons and plaint, it will be said that all the counts are bad because they complain of a piracy of parts of the plaintiff's book while under the 15th section of the Copyright Act, 5 & 6 Vict. c. 45, the complaint ought to be for a piracy of the entire book. But the declaration is sufficient. It cannot be argued that there is no copyright in parts of a work; if there is such a copyright then the infringement of it must be actionable. The interpretation clause, section 2 of the statute, defines the word "book" as "any part or division of a volume;" and though the words "separately published" occur in the section, they are to be confined to the words "map, chart, or plan," which immediately precede. The question of piracy of part of a book arose in a case cited in *Mawman v. Tegg* (2 Russ. at p. 398), as having been tried before Lord Kenyon. In *Sweet v. Benning* (16 C. B., 459), the declaration complained of the defendant's having printed portions of the reports contained in the plaintiff's periodical; and it was held that there might be an infringement of the copyright in the portions. Then with respect to the demurrer to the third defence, the defendant might have pleaded originality, as he has in fact done in the second defence, or he might have pleaded that his use of the plaintiff's book was legitimate. The third defence does neither one nor the other, while it leaves all the allegations in the several paragraphs of the summons and plaint undenied. The statement that no part of his books was copied or colourably altered from the plaintiff's book is no denial of our charge, but merely applies to the *modus operandi* of the author, not to the result in fact. The defence may mean that Mongan composed *de novo*; but the result being admitted on the pleadings to be a reproduction, does not the defendant publish for himself the result of the labour of which the plaintiff had become the proprietor? That reproduction was unlawful—*Wyatt v. Barnard* (3 Ves. & B. 77); *Longman v. Winchester* (16 Ves. 269). The defendant does not show that the reproduction was for the purpose of extract, comment, quotation, or illustration—*Jarrold v. Houston* (8 K. & Johns. 715). Then the *bona fides* of the author cannot justify the publisher where all the facts stand admitted against him which are admitted upon this record—*Read v. Lacy* (1 Johns. & Hem. 524, S. C., 7 Jur. N. S. 463)

shews that copying or not is not the test, but originality in fact; that the *bona fides* of the author is immaterial; and that the *bona fides* or mistake of a publisher is no justification—*Barfield v. Nicholson* (2 Sim. & St. 1); *Wilkins v. Aikin* (17 Ves. 424). Then the defendant cannot by indirect means compass what the law forbids to be done directly—*Turner v. Robinson* (10 Ir. Ch. 521.); *Jeffereys v. Boosey* (4 H. of L. 815); *Kyle v. Jeffereys* (3 Macq. H. of L. 611.)

Palles (with him *Sergeant Sullivan*) for the defendant.—The third defence is good. In order to constitute an offence under the Copyright Acts, there must be either a copying or a colourable alteration. Both are denied here. It is no offence to publish a book containing parts printed before. Story's Equity Jurisprudence, s. 940, shows the difficulty which must arise in cases of this description in deciding what is originality and what is not. *Sayer v. Moore* (1 East. 361); *Carey v. Longman* (1 East. 358); *Trusler v. Murray* (1 East. 363). *Carey v. Pearsly* (4 Esp. 168) shows that it is not sufficient to show that part of one book is transcribed into another. *Mathewson v. Stockdale* (12 Ves. 270); *Martin v. Wright* (6 Sim. 297); *Murray v. Bogue* (1 Drewr. 353). Then the summons and plaint is itself bad. The plaintiff ought to have declared for pirating his book, not part of it. If issue is taken on part of a book, piracy cannot come into question; if issue is taken on the entire, this necessarily involves the question of piracy—whether the whole book has been pirated. If he had declared for the piracy of his whole book, then it would have been a question whether copying portions of the book amounted to evidence of piracy of the whole. Part of a volume does not come under the definition of "book," given in the second section of the Act, unless it is separately published. The 23rd section of the Act shows that that is the true construction; that section vests the property, in copies of books which have been printed or imported without consent, in the proprietor of the copyright, and empowers him to sue for and recover the same, or damages in an action of detinue, or sue for and recover damages in trover. Supposing a part is copied, how can that part be recovered in detinue? If I publish a book, and in one part of it I print a part of another's book, and then I turn over and print a portion of matter of my own, the allegation on the other side is, that the part belonging to the other is a book within the meaning of the Act of Parliament; and if they recover their book under the 23rd section, they will recover also that which is my property. To print part of a book is not an offence, unless the part is such as to make the printing of it a piracy of the whole book. You cannot go outside of the statute for the cause of action. *Roade v. Conquest* (30 L. J., C. P. 209). Parts of a book may be fairly printed for purposes of criticism or quotation. If the plaintiff complains of the printing of parts, he ought to show that it was not a justifiable printing. The court will not assume that the person printing the part of the other's book is guilty of an offence, and the party complaining ought either to bring himself clearly within the statute, or show that the printing of the parts was not for a legitimate purpose.

Sergeant Armstrong, in reply.—The question re-

solves itself into one of pleading. The court is not called upon to decide any abstract proposition whatever, but whether, having regard to the statutable right, the common law does not, *ex necessitate*, give a remedy for the infringement of that right, and then whether the summons and plaint does not, in that view, state a good cause of action.—Co. Lit., 184, b. The printing of part is *prima facie* actionable. Then it lies upon the party who makes himself thus *prima facie* liable, to make an exception, and bring himself within it.

Dec. 2.—O'BRYEN, J.—This case of *Rooney v. Kelly* is an action brought by the plaintiff for the infringement of his copyright in the book mentioned in the summons and plaint. The summons and plaint contains four counts. [His Lordship here read the summons and plaint.] The defence applicable to all the counts is, that the plaintiff's book contains no part of the Latin text of Virgil, and that the defendant's books consist partly of the Latin text and partly of English notes; and then the first defence denies the plaintiff's copyright; the second defence is as follows:—[Here his Lordship read the second defence.] I refer to it for the purpose of showing the question which it raises, and because it appears to us that, under that defence, the defendant would be entitled to rely on the various points of law pressed by counsel in his argument. But the third defence, which is the one to which the demurrer has been taken, is of a different character. [His Lordship here read the third defence.] To that defence a demurrer has been taken, and, upon the argument of the demurrer, the defendant's counsel not merely contended that the defence was good, but that, even supposing it to be bad, still he was entitled to fall back on the defects which, as he alleged, appeared in the summons and plaint, and he said that all the counts were bad, as not disclosing a sufficient cause of action. In giving judgment in the case, I shall follow the order of the pleadings, and consider, first, the objection taken by the defendant to the summons and plaint. The objection is this, that the acts charged are not the printing of the entire of the plaintiff's book, or selling books containing the plaintiff's book, but printing parts only of the plaintiff's book; and the defendant contends that such summons and plaint is not in accordance with the statute; and that it was, at all events, incumbent on the plaintiff to show in his summons and plaint that, from the nature of the parts transferred to the defendant's book, his book was an infringement of the copyright in that of the plaintiff. Now, in order to maintain this, the defendant's counsel have argued that the plaintiff's sole right of action is under the 15th section of the St. 5 & 6 Vic., c. 45. That section provides, "that if any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent, in writing, of the proprietor thereof, or shall import for sale or hire any such book, so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or

exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed." The defendant's counsel contend that, to maintain an action under this section, it is not sufficient to state, as has been done in this case, that the defendant printed part of the plaintiff's book, or published books containing parts of the plaintiff's book; but that the summons and plaint should state those acts to have been done with respect to the plaintiff's book. The defendant admits, what, indeed, it is impossible to deny, that copyright may be infringed by printing part of a book. But he says, that though it is necessary to frame the summons and plaint in this manner for printing an entire book, still that the plaintiff might sustain an action by showing, as matter of evidence, that certain parts of the book, though not the entire, were printed, regard being had not only to quantity, but to quality, and the circumstances under which the book was published, being such that the printing of those parts might fairly be considered an infringement of the copyright. Against this argument, the plaintiff has relied upon the interpretation clause of the statute. That clause, which is in the second section of the Act, is to this effect: "That, in the construction of this Act, the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published." The plaintiff contends that the words "separately published" are only to be taken to refer to the immediately antecedent words, "map, chart, or plan," and not to the preceding words, "part or division of a volume," and, therefore, that part of a book, though not separately published, comes within the definition. This question has been much discussed during the argument, and without expressing, on my own part, any opinion, I may observe that there might be some difficulty arising from the statute itself in coming to the conclusion that the word "book," wherever it is used in the statute, comprises part of a book. The 23rd section alone would show that there would be great difficulty in so holding, because that section enacts "that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry-book, and which shall have been unlawfully printed or imported, without the consent of the registered proprietor of such copyright, in writing under his hand, first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such." Now, it is very hard to hold that the plaintiff would acquire that property in a book published by the defendant, because it contained a couple of pages of the plaintiff's book. But the view taken by the court renders it unnecessary to decide this question. It is unnecessary to pronounce any opinion upon this point, because we are of opinion that, independently of the 15th section, the proprietor of the copyright of a book may sustain an action for the infringement of copyright by sale, &c., of part of a book.

The second section of the Act defines the copyright of a book to be "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied;" and by the third section the copyright is secured to the author for his life and seven years after, or for forty-two years after the first publication. Now, the copyright of a book includes the copyright of every part. It would be difficult to maintain that, by leaving out one twentieth of a book, the remaining nineteen-twentieths might lawfully be published. The copyright, then, is vested by the statute in the proprietor, and the copyright includes not merely the entire, but every part. His rights are derived from the statute, and if they are invaded by printing parts of the book, then it appears to us that, independently of the 15th section, the common law right of action would attach. Upon this point I would refer to the case of *Beckford v. Hood* (7 T. R., 620), and to the observations of Williams, J., in *Reads v. Conquest* (30 L. J., 209). "The question, therefore," he says, stating not merely the case of *Beckford v. Hood*, but the result to be deduced from the authorities, "seems narrowed to this, viz., whether the statute of Anne, having confessedly put an end to such a right (if it ever existed) after the period it prescribes, has yet preserved it during the currency of such period. That it has done so, is a proposition which we think it difficult for the plaintiff to maintain. That a common law right of action attaches upon an invasion of the copyright, created by statute, was decided in the case of *Beckford v. Hood*, and followed in several other cases; but we are not aware of any case, since *Millar v. Taylor* was overruled by the House of Lords, which decides or recognizes that an author of a published work has any other than the statutable copyright therein." That is, we are of opinion that the copyright of the proprietor is derived solely under the statute, but also, that upon the invasion of the copyright, and independently of the statute, the common law right of action arises. Now, I observe in this case that the four counts of the summons and plaint state the acts to have been done contrary to the statute, and, so far, appear to be brought under the statute. But no difficulty arises in the plaintiff's way from that circumstance, because I find that, in a case of *Boozey v. Tolkien*, in 8th Common Bench, also reported in the Law Journal, it was held that, under a count containing these words "contrary to the form of the statute," the party might rely on and fall back on his common law right, and if the action could not be maintained under the statute it might be maintained at common law. The case arose there in this way: there were three counts in the declaration; the two first alleging the grievances complained of to have been done contrary to the form of the statute; the third similarly framed, with the exception that it omitted the words "contrary to the form of the statute." The application was to compel the plaintiff to strike out this third count, or the first and second counts, and the court granted it, on the ground that the count was unnecessary, and that there was nothing that could be proved under the third count which might not be given in evidence under the first or second. This was a strong view of the court, that

the party might fall back on the common law right. Then if the plaintiff has the property in the copyright of the book, and if we are of opinion that he might maintain his action at common law, though not within the terms of the 15th section, then we have next to consider how far the copyright is invaded according to the statement in the summons and plaint. Now, we were told that very alarming consequences would ensue if we were to hold that such a summons and plaint was good; if we held, that by printing a portion of a book, there was an infringement of the copyright. I do not think our decision involves any such consequences. We think it an offence *prima facie*, and a violation of the copyright to print parts of a book; but it is open to the defendant to say "in my book, it is true, there are parts of the plaintiff's book, but still the work on the whole is to be considered as original." It is open to him to say that those parts were only introduced for the very legitimate purpose of quotation. It is open to him to state any other grounds that would justify his printing any parts of the plaintiff's book. But we think it is sufficient for the plaintiff to state, in his summons and plaint, what, *prima facie*, constitutes an infringement of the copyright; leaving it to the defendant, if he can, to justify his conduct. We have been referred to a number of authorities on this point. They all agree in this, that piracy may be committed by printing parts of a book. But what parts of a book it would be necessary to take in order to constitute an act of piracy, as stated by Lord Cottenham in *Bramwell v. Halcomb* (3rd M. & Cr., 737), depends not merely upon their quantity, but also upon the nature of those parts, so that it is difficult, nay, almost impossible, to lay down any general rule on the subject, or to state how much exactly must be copied in order to constitute an act of piracy. He says:—"When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity. In my view of the law, Lord Eldon, in *Wilkins v. Aikin*, puts the question on a most proper footing. He says: 'The question upon the whole is, whether this is a legitimate use of the plaintiff's publication, in fair exercise of a mental operation, deserving the character of an original work.'" Well, it is perfectly open to the defendant, as in this case he has done in his second defence, to raise the question that this book of his is a new and original work, the result of fair mental labour on his part. He has put that ground fairly in that second defence by saying, "I admit that I printed part of the plaintiff's book, still the whole of my book is to be considered as a new and original work, and the cases show that the printing of parts will not constitute an act of piracy, if the parts are so insignificant in value and number that my book is to be considered as new and original, and, therefore, the plaintiff has no right of action." So that, by deciding that the summons and plaint is good, we do not prevent the defendant from resorting to these grounds of defence. He might say that the parts were taken

for the purpose of quotation, or of review or criticism, or he might rely on other grounds. Well, now, I find in the case of *Sweet v. Benning* (16th C. B., 459), that the declaration there stated, as here, that the defendants printed for sale and sold in a particular work "divers portions of the said reports contained in the plaintiff's said periodical, and thereby pirated the said reports." Now, these last words do not occur in any of the counts here, but it was admitted in the argument that the summons and plaint, if bad in other respects, could derive no support from these words, and, therefore, we are to consider the validity of the declaration in *Sweet v. Benning* independently of those words. But we are told that in that case the point was not raised. It is sufficient to look to the judgment to see that important questions were raised. The case went to trial, and the parties agreed to a special case, and it is not to be imagined that the counsel or the judges were insensible to, or could have failed to observe the circumstance, that the declaration charged only that parts of the book had been printed and published. It is difficult to imagine that they would have given judgment for the plaintiff if there was that defect in the declaration. But upon looking at the judgments of the court in that case, we find that they all agree in this, that acts of piracy might be committed by publishing part of a work, if that part was considerable or important. Mr. Justice Maule had some difficulty as to the case before him, but all the judges concur in the general principles which I have mentioned, that piracy might be committed by publishing part of a book; and judgment was thereupon given for the plaintiff, upon a declaration framed in the manner which I have mentioned. Of course, if we were shown clearly that the declaration was bad, we should be at liberty to reverse that decision; but that is not shown clearly to us. It is said that a party is bound to state in his declaration that the whole of the book was printed, but that in evidence he is only bound to shew part of it to have been printed; but that if he does not state in his declaration that the whole was printed, his declaration is bad. It is sufficient, in answer to this, to say, that printing parts is *prima facie* a piracy, but that it is open to the defendant to show that the parts printed are insignificant, and that for that or other reasons, the printing does not amount to an infringement of the copyright. Now, having stated what occur to me as reasons for my being of opinion that the summons and plaint is good, let us now consider what the defence is. The second defence I have already referred to. The third is framed with considerable care; framed I think with a view to obscure as much as possible the precise ground on which the defendant says he justifies what he has done. It is to be assumed that the defendant has printed parts of the plaintiff's book. Now, let us recollect that Morgan was the author of the plaintiff's book, and of the parts of the defendant's books, which it is alleged are objectionable as being copies of parts of the plaintiff's book. He says, first, that the defendant's books were of a different character from the plaintiff's book;—that is not very material, for they may be of a different character and yet an infringement. But he says

further, that the entire of them was so composed partly from certain knowledge, and partly from common sources of information, fairly and legitimately used. Is there anything inconsistent in that with the plaintiff's copyright being infringed? I presume the defendant's books were composed from Mongan's ideas on the subject; so was the book which was published in 1855. He does not say how much was composed from general knowledge and ideas, the result of which, in 1855, he had shewn in the work which he had sold to the plaintiff. He says he used the common sources of information fairly and legitimately. Well, the pleader being under the impression that that is not enough, goes on to say that every part of the book is the result of fair operation of Mongan on the common sources; and that no part was copied from the plaintiff's book. He admits that parts of the defendant's books were in the plaintiff's book; that parts of the plaintiff's books were reprinted; but he says that no part is copied; and that the whole is the result of fair and *bona fide* mental operations upon common sources. Here we are asked do we lay down the proposition, that because the author of a work sells a copyright in it, he is for ever precluded from considering or writing upon the same subject again? I do not intend to advance such a proposition; but the question would be, whether the second publication is fairly a new and original book, or merely a reproduction of the former one. Of course the knowledge he had in 1860 I am willing to assume had been in his mind for years before. The result, in a particular form, he sold to the plaintiff in 1855. If as the result of that knowledge which he then had, or of subsequently acquired knowledge and by mental operations, he reproduced a different, a new and original book, though somewhat the same, there is nothing to prevent his doing so. We do not mean to lay down that his doing so is illegal. But the whole of the statement in the defence may be true, and still the plaintiff's copyright may have been infringed; because, no matter what his intentions were, even supposing he had forgotten everything, and yet arrived at the same result,—and we are not to speculate on that, nor to decide how it was, whether by the same knowledge as in 1855, or by memory and subsequently acquired knowledge—yet the book is not his book; he has reprinted parts of the plaintiff's book; and we say it is no answer to that to say that he did so from common sources of information without putting forward that it was a new and original book. Upon these grounds we are of opinion that the summons and plaint is good, and that the third defence is open to the objections I have stated; and therefore that our judgment should be for the plaintiff.

HAYES, J.—Two points were raised upon the argument of this demurrer. The first, that the summons and plaint was bad; the second, that the third defence was also bad. The defendant insists on the first, and the plaintiff on the second of these points. My opinion is in favour of the plaintiff upon both. In each count of the plaint the plaintiff has averred a copyright under the statute and an invasion of it. After the repeated decisions on the matter, it would be vain to contend that copyright is anything but the

creature of statute, or that it had any existence at common law. The statute 5 & 6 Vict. c. 45, in the second section, defines a copyright to be "the sole and exclusive liberty of printing, or otherwise multiplying copies of any subject to which the said word is herein applied." Those subjects are ascertained in the third section; and the term "book" it is enacted shall mean "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published." It has been argued for the defendant, that in the construction of this clause the words "separately published" override all the antecedent words; so that the words "part of a volume," must be taken to mean "part of a volume separately published." With that construction I am disposed to agree; but I do not think we are therefore led to decide for the defendant upon the general question. All the counts of the summons and plaint seem to have been framed on the 15th section of the Act, under the impression that the remedy, as well as the right, is solely under the statute; but that is not so; for it is a well established principle, that when a statute gives a right, the common law steps in and gives a remedy for the invasion of the statutable right. On this part of the case I would refer to *Beckford v. Hood* (7 T. R. 620). Now, what is the right for the invasion of which the remedy is given? It is the sole and exclusive liberty of printing or otherwise multiplying copies; and I apprehend an author cannot be said to be left in the exclusive enjoyment of this liberty if any other person is to be at liberty to print any portion of his book; and if one person takes one portion, and another another, or the same person different portions at different times, the author might have hard work to discover the *disjecta membra* of his production. It is for the protection of right given by statute that the common law supplies a remedy; but that common law remedy is not to be taken advantage of without due regard to the rights of the public, for whose advantage the copyright is conferred upon authors. Therefore it is established that any person may, for purposes of comment, criticism, or quotation, print parts of another's book; and as these are only exceptions, it is sufficient in pleading that the plaintiff, in suing for the invasion of his right, shall aver his right, the kind of invasion of which he complains, and the damage. All this, I think, is sufficiently done in every count of the plaint, and I also think that it discloses a good cause of action. Then as to the third defence, the objection taken to it is that it may be true, and yet no defence to the action. I concur in that view, being of opinion that, after Mongan had sold his translation, neither he nor any person deriving under him had any right to infringe the copyright so sold by publishing either the whole or any part of that translation without some excuse; and that it is no excuse that the ideas to which he gave expression were the same ideas expressed in the same language in which he had previously expressed them. On these grounds I am of opinion that the defence is not good, and that the demurrer taken to it ought to be allowed.

FITZGERALD, J.—I also concur upon both points. As I understood the argument, the objection to the sum-

mons and plaintiff war, that it stated no actionable infringement of the copyright; and that the printing of parts of a book may be no more than the use of the book which the law allows. It is argued that the plaintiff should have alleged in his plaint, though contrary to the fact, that the defendant printed the plaintiff's book, and that he might sustain that allegation by proof of the printing of part. Well, as it has been stated already, it being quite settled that copyright has been created and defined and limited by statute, a great deal of the argument turned on the statute, and a great many cases were referred to; but I do not think it necessary to go through them all. They appeared to me during the argument to be very much beside the question. I may, however, refer to the Copyright Act, which is not the first Act, but only one of a series of Acts. The preamble recites that it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world. Then follows the interpretation clause; and then the sections which I will refer to in addition to the preamble, are the second, the eleventh, which provides for a registry to be kept at Stationers' Hall; the fifteenth, which gives a remedy in cases of piracy; and the twenty-fourth and twenty-fifth. The twenty-fourth enacts that no proprietor of copyright in any book to be published after the passing of the Act, shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book. The twenty-fifth section makes copyright personal property transmissible by bequest, and distributable as personalty in cases of intestacy. The result of all is, that a party who is the original publisher of a work, or the person deriving title from him, may have in it that special property which is called copyright, which is the exclusive right to print that work; and not merely to print the whole of it, but it and every part of it. That being the position of the plaintiff here, he shewing himself to be the owner of the copyright, and having *prima facie* the exclusive right of printing and publishing it and every part of it, he complains that he being in that position, the defendant, without his consent, printed parts of that work so as to injure his property. The question is, has he not stated a *prima facie* injury which, when put in the form of pleading which he has adopted in his plaint, requires an answer. My opinion was and is, that, being the proprietor of this work and having the exclusive right of printing it, when he stated that the defendant had infringed that right by printing a portion of it, he stated sufficient to shew a cause of action which ought to be answered. And though he thus shews a *prima facie* cause of action it is still open to the defendant to shew in answer that though the statement in the plaint is true, yet that he did the acts complained of, *bona fide*, for the purpose of fair quotation, extract, or criticism, for which purposes parts of a work may be taken by any person without infringing the copyright. That that is so is shewn by the case of *Sweet*

v. Benning, and especially by the judgment of Mr. Justice Crowder in that case (16 C. B., p. 490), which indeed seems to touch the very point, for he says,—“Looking, however, at the language of the statute, I feel very reluctantly bound to express my opinion that it (the defendant's use of the plaintiff's work) may and does amount to piracy. It falls exactly within the 15th section, taken in connection with the interpretation clause, s. 2. The result of those two sections is this,—that a person is guilty of piracy who prints or causes to be printed for sale any book or part of a book in which there is subsisting copyright without the consent in writing of the author or proprietor. That which the defendants have printed and published without the sanction of the plaintiff's is undoubtedly a part, and a very considerable and important part of the work of the plaintiffs.” That interpretation of the Act given by Mr. Justice Crowder is one which I am inclined to adopt, and it is one given in a case in which the declaration is nearly in the same form as that in the present one. *Carey v. Longman* (1st East. 358) also shews that the frame of the summons and plaint is right. The second count of the declaration in that case is substantially the same as that here; and I find that that case is very likely the one referred to by Lord Eldon in *Mawman v. Tegg* (2 Russ. at p. 398), where he says,—“There is a case of an action tried before Lord Kenyon, in which a motion was afterwards made for a new trial; and there Lord Kenyon states that the question, whether you could grant an injunction against the whole of a book on account of the piratical quality of a part came before Lord Bathurst; and Lord Bathurst seems to have held that you could not do so unless the part pirated was such, that granting an injunction against that part necessarily destroyed the whole. Lord Kenyon, who possessed great information on the subject, states himself to have been perfectly satisfied with the opinion of Lord Bathurst as bearing upon the judgment of Lord Hardwicke and the other cases. In the case before Lord Kenyon, the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord Kenyon's direction to the jury seems to have been to find damages for publishing the part only.” So far then the count seems to be correct as a matter of pleading; but I am willing to adopt the view which has been put forward by my brothers of there being a common law remedy for the infringement of a statutable right, and to say that the plaintiff has here stated what is *prima facie* a cause of action and requires an answer. But I am also prepared to go further, and to say that adopting Mr. Justice Crowder's interpretation of the statute, and treating this as a declaration not at common law, but under the statute, still the plaint is good. So much, therefore, as to the objection to the plaint. As to the demurrer to the third defence, I have to say a word or two. The second defence has already been stated. No doubt, the case here involves difficult questions; but I am happy to say that every question upon the merits of the case arises upon the second defence. In the course of the argument I asked Serjeant Sullivan if this third defence was a traverse or a plea in confession and avoidance. He stated that it

was a plea in confession and avoidance. I should rather have considered it a special traverse, so framed that no special issue could be taken upon it, but I will treat it as a plea in confession and avoidance. The first proposition, then is that we must take it as admitting the statements in the summons and plaint. Then, when we look to the defence, one of the first questions which we must consider is whether the concluding averment in it "That no part of defendant's said books, or either of them, were copied or colourably altered from the said book of the plaintiff" is alone a sufficient answer to the cause of action. It would not by itself be a defence, because it would admit the injury done—the printing of parts of the plaintiff's book to the plaintiff's damage. Well, then, what is the remainder of the defence? That a gentleman named James Roscoe Mongan, in 1855, composed the plaintiff's book, which was transferred to the plaintiff, who registered the copyright; that that book was partly the result of certain knowledge, learning, and ideas of Mongan's upon its subject, and partly taken from common sources of information; that in 1860 the same gentleman composed the defendant's books, which were also composed from his knowledge, learning, and ideas, and from common sources of information. That is really the whole of this defence. Put it in what shape, reproduce it in what form you will, it all amounts to this,—that James Roscoe Mongan composed two works, using for both his knowledge, learning, and ideas, and common sources of information. The admission on the face of the defence is, that the defendant printed parts of the plaintiff's book. Well, on the face of it, and assuming it all to be true, it affords no answer, but is a confession and an admission of the cause of action. On that ground I concur with my brethren that our judgment ought to be given for the plaintiff. And I wish to repeat that we are relieved from all responsibility as to the consequences of this decision by the fact, that every real defence is open to the defendant on the second defence.

Reported by Walter M. Bourke, Esq., Barrister-at-Law.

BYRNE v. BYRNE.—*Hil. Term, 1862.*

Demurrer—Meaning of the word "settle"—Who should sue on a contract for the benefit of a third party.

Action to enforce compliance with the terms of an agreement. The summons and plaint recited a letter from the defendant to the plaintiff (his mother), in which he agreed to settle £500 upon his sister as soon as he would be in a position to do so, in consideration of the plaintiff's yielding priority as to a portion of her jointure; that the plaintiff yielded priority as required, that the defendant was in a position to settle the £500 as agreed on; and that he had been applied to do so, but refused. Averment of conditions precedent. To this there was demurrer, on two grounds. First,—Because if an action can be sustained upon the agreement stated in the plaint, same should be brought by plaintiff's daughter, and not by the present plaintiff. Se-

condly,—Because the agreement stated in the plaint is too vague, indefinite, and uncertain to be the subject of an action.

Held, that there was no uncertainty in the word "settle," though the defendant might select the manner in which he would settle the money.

Held, also, that the plaintiff was the proper person to bring the action.

Christopher Palles (with him J. E. Walsh, Q. C.) in support of the demurrer.—The grounds of the demurrer are two-fold. 1st,—The words of the letter of the 25th June are too vague; the terms are uncertain; and the act to be done is uncertain. The word *settle* can be complied with by doing a great number of things. By a payment of money, by a charge on land and settlement in trust for the use of his sister, or by paying her the amount in cash. The defendant may be in a position to do one of these things and not another; and if the contract fails in its inception, there is no ground of action. A contract to do an ambiguous act is an ambiguous contract, and nothing at all can be made of it; nothing can render it certain. Several cases may be ranged under the head of a particular act. An agreement to enter into a partnership may be intended in many ways—*Figgis v. Cutler* (3 Stark. 139); *Coles v. Hulme* (8 Bar. and Cresswell, 568). But if there be an existing partnership, an agreement to become a partner in it is a good contract, because *id certum est quod certum reddi potest*. The court cannot gather from this contract what the defendant was to do, or the time or manner of doing it—*Guthing v. Lyn* (2 Barnwell and Ad. 232); *Dutton v. Poole* (2 Levins, 210); *Levet v. Hawes* (Croke, Eliz. 652). On the second point of the demurrer, that the daughter is the person who should sue; a stranger to the consideration cannot sue, except when the consideration moved from a parent who made the contract in favor of a child, when the parent may be considered as the agent of the child, and the child may sue on the contract—*Addison on Contracts*, 942. When the principal is disclosed by the agent who makes a contract, the principal may sue on it—*Rolle's Abridg.* 31, s. 8); *Levet v. Hawes* (Croke, Eliz. 619); *Dutton v. Poole* (2 Levins, 210); *Rippon v. Norton* (Croke, Eliz. 849). The person to bring an action on contract is the person in privity; but when a parent gives a consideration for a child, the consideration moves from the child; the legal right to sue cannot exist in two persons or two classes of persons. The real consideration here is the relationship, and the daughter is the person to bring the action.

M. Morris (with him Serjeant Sullivan), contra.—No one but the party contracting can bring an action for breach of covenant. The daughter was a stranger to the transaction, and the consideration did not move from her. All actions on contract must be founded on priority of contract, and must be brought by the party from whom the consideration moved—*Colyear v. Musgrave* (2 Keen's Reports, 81); *Viner's Abridgment*, title Contract. In alleging uncertainty in this contract, the defendant must go to prove that by meaning one of several things it meant no-

thing at all. Johnson and Webster define the word settle to be "to fix by legal sanction, to establish by gift or grant." The promise can be carried out for *it certum est, &c.*—*Figgis v. Cutler* (3 Starkie, 139); *Coles v. Hulme* (8 Barn. & Cresswell, 568); *Alder v. Boyle* (4 C. B. 635); *McNeill v. Reid* (9 Bing. 68); *Ashcroft v. Morrin* (4 Man & Granger, 450); *South Wales Railway Co. v. Wythes* (5 De Gex M'Nachten & Gordon, 880); *Great Northern Railway Co. v. Manchester and Sheffield Railway Co.* (5 De Gex & Smale, 138.)

Cur. adv. vult.

Jan. 25.—LEFROY, C. J.—This is an action for the non-performance of an agreement. The defendant applied to the plaintiff, his mother, to join him in a mortgage, she having a charge affecting the estate; and the mortgage requiring her to do so, she agreed to join in the mortgage on the terms of her son settling £500 on his sister. By the agreement he promised to settle that sum as soon as he should be in a position to do so. It is averred by the plaintiff that he is in a position to do so, and that he had been applied to to settle the money, but had refused, whereupon the action was brought. The mother brought the action; and it is contended that if any action lay, it should be brought in the name of the daughter. We have considered the objections on this point, and they seem to us to be unfounded. So far as any question appears to arise from the qualification as to the circumstances under which he promised to make the settlement, it has been alleged that he is in a position to do so, and by his demurrer he admits that he is. With reference to the uncertainty alleged to exist in the terms of the agreement, there is a vast variety of ways in which it might be carried out; by payment in cash, by making a charge on land, or by giving a judgment on warrant. With respect to this uncertainty, *id certum est, &c.*; and when he entered into a contract to make a settlement, and bound himself to do it, and now admits that he is in a condition to perform it, he must have had some definite understanding that he was capable of performing it. There is no uncertainty which may not be got rid of in any one of the ways suggested. The term *settle* is so ascertained by the meaning of the word in the English language, according to the definitions in the best authority, and by legal implication, that it alone would be sufficient to bind the party to the performance of the contract. It is a more serious question by whom the action should have been brought, and whether there was a sufficient consideration to sustain the action between the parties now at issue. I should have thought the difficulty would have been just the reverse; and that if the action had been brought by the daughter, between whom and the mother no direct consideration passed, the difficulty would have been to sustain the action. A case has been cited as authority that the action should have been brought by the daughter: but in *Tweddle v. Atkinson* (30 L. J. N. S. Q. B. 265) it was decided by the Q. B. in England "that the plaintiff could not recover, as he was not a party to the agreement, and no consideration ran from him." Another case occurs to me peculiarly

like the present one in its circumstances. The mother had an annuity of £50 charged on the property of her son, to which she was entitled absolutely. Her son was about to get married, and the marriage portion would not be paid unless the mother would release the property generally from her annuity, and charge it on a portion in lieu of its affecting the whole. The mother made a settlement so as to discharge generally, but stipulated, that in consideration of her doing so, the estate should be limited to the eldest son, who was about to be married, for life, with limitations in remainder to the younger sons in default of male issue of the eldest. The settlement was made accordingly, and the eldest brother died without issue, male. The estate was, subsequently to the settlement, purchased in the lifetime of the eldest son; and on his death, an ejectment was brought against the purchaser by the heir of one of the brothers along with the widow. The court held that it was a voluntary settlement, no consideration having passed between the younger sons and the elder brother. In giving judgment the Chief Justice said,—“We must take the mother to be a party to the settlement, by which the limitations were made to her younger sons. It appears she had the annuity, she joined in the settlement and gave up her annuity. We must suppose that at the time of the marriage objections would have been made to it unless the mother had joined in the settlement, and that the portion would not otherwise have been given; her joining in the settlement was therefore a good consideration, and she had a right to enforce the settlement. Her joining in the settlement was, on the face of it, sufficient to take it out of the statute of Elizabeth. Valuable consideration passed from her to her eldest son, and she had a right to stipulate for the benefit of her younger sons.” In this case now before us the plaintiff joined in the mortgage, stipulating for the benefit of her daughter. She had a right to do so; and valuable consideration passed from her to her son, the defendant, and she is the person to bring the action.

O'BRIEN, J.—*Dutton v. Poole* (2 Leving, 210) left this question in doubt, for it was not there decided that the father should not sue; but *Tweddle v. Atkinson* has decided it, though in *Levett v. Hawes* (Croke, El. 652), a different principle was laid down than that relied on by the plaintiff here. If there be any doubt as to the interpretation of the word *settle*, it is all the better for the defendant, who can choose any one of the different ways of carrying out the agreement.

HAYES, J.—The defendant makes two objections to the fulfilment of this contract. First, he says it is too vague. He does not say that it is unreasonable, or impossible, or unintelligible; but that there are so many ways of doing what is required by it that he is at a loss which to adopt. We tell him that when he contracts to settle £500 on his sister, it is both intelligible and reasonable. As to the second objection, that the action should not have been brought by the present plaintiff, but by some one else, I always thought that the action should be brought by the person from whom the consideration moved—*Dutton v. Poole*, and *Baseild v. Collard* (Allen 1), laid down

no exact rule as to who should bring the action, but this was done by the Q. B. in England, in *Tweddle v. Atkinson*, with which this case is very similar. The plaintiff here is the proper person to bring the action. What was good law in the reign of Charles I., is good law now.

FITZGERALD, J.—*Dutton v. Poole* (2 Levins, 210) is an authority for the position, that in this case the daughter might have brought the action. At the time when it was decided, authorities were both in accordance with and against it; and it continued to be considered good law until 1776, when it received the unqualified approval of Lord Mansfield in the case of *Martin v. Hind* (2 Cooper's Reports, 437); and by allowing the demurrer in this case, we should overrule the decisions in the Queen's Bench and Exchequer Chamber. In 1861, *Martin v. Hind* was overruled by *Tweddle v. Atkinson* (30 Law Journal, N. S. Q. B. 265) as it had previously been in *Barford v. Stuckey* (8 Moon. 88, 1 Bing. 225) in which case Parke, J., said,—"I find it difficult to understand the reasoning in *Dutton v. Poole*, or to see exactly how the parties in that case stood." The rule that applies in this case was correctly laid down in *Tweddle v. Atkinson*; a stranger to the contract, or one from whom no consideration moved, cannot sue on it. In the case now before us, if the mother received the £500, she would be treated in equity as a trustee for the daughter, whose interests would thus be sufficiently protected.

Demurrer disallowed.

Agent for plaintiff—P. J. Reilly.

Agent for defendant—R. McNamara.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

HOGAN v. BYRNE.

Validity of a devise of lands "to monks named Christian Brothers."

A devise of lands "to monks named Christian Brothers" is void.

AN action of ejectment had been brought by the heir-at-law of the Rev. Martin Cody against the defendant, a member of the Roman Catholic order of monks known as Christian Brothers. The latter claimed the lands, the subject-matter of the action under a clause in the will of the said Martin Cody, who died in June, 1860, which ran as follows:—"I leave my house, garden, out-offices, and lawn to monks named Christian Brothers, and one hundred pounds to enable them to pay their rent." The house in question was held on lease for lives renewable for ever. A verdict was had for the plaintiff, leave being reserved to have it turned into a verdict for the defendant. The defendant obtained a conditional order, against which

Ball, Q. C., showed cause.—By the terms of the will the defendants must fill two characters. They must be monks, and they must be Christian Brothers. By the evidence given at the trial, it was shown that they are popularly known as monks, but that their real name is Christian Brothers; that they are not in

holy orders; that they have a head who resides in Dublin; that they elect their own members upon every vacancy; that they have thirty-five establishments in Ireland, and in England seven; that any property left to them, as in this instance, is for the benefit of the body; that they are under the three vows of poverty, chastity, and obedience to their superiors; that these vows are perpetual; that none of the members can celebrate Mass; and that the order was founded in Ireland in 1801. We have first to inquire what the testator meant; and next, how his intention can be carried out. This devise is void for illegality, and void for uncertainty. The 28th section of the Emancipation Act, the 10 Geo. IV., c. 7., intending to reach Jesuits under any new name which they might invent for themselves, has included bodies not political, but of a character wholly religious. That Act declares its object to be the suppression or extinction of all such orders. Here we have the three vows characteristic of every monastic body—those of poverty, chastity, and obedience to superiors. The exception in favor of females in another section, shows how comprehensive the words were intended to be. And these enactments were never repealed. The Donations and Charitable Bequests Act, the 7 & 8 Vic. c. 97, has nothing in it favorable to that particular part of the Roman Catholic system, which is monastic. Prior to the Reformation, a bequest to monks was undoubtedly void. With this is mixed up the doctrine of *civilitur mortuus* by religious profession; but that doctrine is not law at the present day, nor has it been since the Reformation—*Evans v. Cassidy* (11 Ir. Equity Reports, 243); *Blake v. Blake* (4 Ir. Chancery Reports, 349). Hence, it can be no longer contended that the devisees in this instance compose a body capable of taking and holding in succession. That they should do so seems *prima facie* to have been the testator's intention. It is as if a man bequeathed property to his servants as a class. If a devise were made to the Kildare-street Club, nobody would take; because it would appear the testator imagined the club to be a corporation made up of fleeting members. [*Christian, J.*—Suppose a devise to the National Bank, would nobody take?] In *Carbery v. Cox* (3 Ir. Chancery Reports, 231), the bequest was given for a particular purpose. Besides there was a general charitable intent exhibited, which would have been carried out though there had been a misnomer. The monks were fiduciaries, and the charitable intent supported the bequest. In the case before us there is none such. To benefit the monks was what the testator meant, and he meant and contemplated a community, and there is no such community known to the law; and therefore on this ground the devise is void—see O'Leary on Charities, p. 136. It is also void for uncertainty. *Christian, J.*—I have not heard argued at the bar what occurs to me, that this devise may be void for uncertainty by reason of its verbiage, irrespective of other grounds. The testator does not say "to the monks," in which case it might be urged the whole body of monks would take, but "to monks named Christian Brothers." Suppose it were a devise to servants.]

Palles (with him *McDonough, Q. C.*) in support of

the rule. This bequest is neither illegal nor uncertain. To the objection that this body cannot be recognised since the Emancipation Act, the answer will be found in the note to *Read v. Hodgins* (7 Ir. Eq. Rep. 74). The Emancipation Act did not destroy the legal existence of such communities as the present, as see sec. 28, 29, 30, it only forbade the admission of new members. And the rule regarding the presumption of innocence must be remembered here. That rule is stated in *Best on Evidence*, p. 447 of the last edition, 1860. [Christian, J.—It is argued on the other side that the policy of the Emancipation Act contemplated the extinction of these bodies, and so made illegal a bequest of property intended to be enjoyed in succession by the members of a body so intended to be extinguished.] See *O'Leary on Charitable bequests*, p. 89, and the two cases of *Henrion v. Bonham* and *Murray v. Darcy*, which are given there; also the case in 2 *Hudson & Brooke*, 301. *Carbery v. Cox* is an authority for the defendant. In the judgment in *Blake v. Blake*, the Chancellor says, at p. 360 of 4 Ir. Chancery Reports:—"I see nothing against public policy in allowing these communities to acquire property." It is agreed on both sides that the doctrine of civil death for profession in religion is not law, and the reasons for this are given in *Blake v. Blake*, and in *R. v. Lady Portington* (1 Salkeld, 162). Monks, therefore, not being dead in law, are capable of taking as monks. Neither is this bequest uncertain; it is to monks designated Christian Brothers. [Ball, J.—In Ireland, or elsewhere?] That is matter of evidence. [Christian, J.—Do I understand you to argue that all the Christian Brothers everywhere would take as joint tenants?] That is one view which I should submit. The genus is monks, the species Christian Brothers. A bequest to that order of judicial persons called judges in Ireland, would be certain enough. [Christian, J.—A better illustration would be "lawyers called judges."] The court will avail itself of every possible alternative rather than make this will void for uncertainty—*Thellusson v. Rendlesham* (7 Ho. of Lords, 429). [Keogh, J.—I do not attach much importance to the absence of the definite article. "Monks called Christian Brothers," is as definite as "the monks," &c. The clause might have been in Latin. Christian, J.—The difficulty is this, that to avoid intestacy you are forcing on the testator a thing he never intended,—viz., to give this land to five hundred different monks, with power to leave it to their representatives.] This devise is good as to a class of *personæ designatæ*.

J. E. Walsh, Q. C., in reply.—Where a bequest is made for an object legitimate and charitable to a person incapable of taking, it fails altogether. [Christian, J.—Where a specific object of a charitable character is mentioned, and the Court of Chancery cannot effectuate the intention of the testator as to that object; and where there is a general charitable intent apparent on the face of the will, the court will substitute an object.] *Evans v. Cassidy*, and *Blake v. Blake*, are both clear authorities for the plaintiff; they went upon the same principle. The authorities are all collected in the latter at p. 355 of 4 Ir. Chan. Rep. Since the time of Henry VIII., the law has not

recognised monastic bodies. The statute of William III. was never repealed, except so far as the Emancipation Act tended to repeal it, and nothing in the latter legalizes the existence of monks. The language of the Acts of Henry VIII., on this subject is violent and abusive, as is that of all the Acts of that period; but their meaning is plain enough. Subsequently Acts were passed to protect and favor the secular clergy. The spiritual supremacy of the Pope is not recognized. [Keogh, J.—Is it a fact that the spiritual supremacy of the Pope is not recognized? Are not Roman Catholic bishops recognized; and if so, does not this element enter into it? Christian, J.—The Roman Church is protected by law as affecting a large portion of the population, and how then can it be said the Pope's spiritual supremacy is unrecognized?] The policy of the Acts I have referred to was to destroy the existence of these bodies; and therefore it was against their taking property as such. It is said on the other side these Christian Brothers had done nothing illegal; but the very existence of a portion of this body in 1855, was a violation of the then law. The heir is not to be disinherited for any purpose except to carry out the intentions of the will; and it never could have been the will of this testator that four or five hundred persons should take his house and garden—*Attorney-General v. Golding* (2 Bro. Ch. C. 428); *Attorney-Gen v. Whitechurch* (3 Vesey, 141). I say, firstly, that the body is illegal; secondly, that if the body be ever so legal the devise to it is illegal by the *cy. pres.* doctrine; and thirdly, that this bequest is void for uncertainty. A devise to the British army would be void; so would a devise to that branch of the legal profession called attorneys. Uncertainty may involve either vagueness in description or extent of numbers. Transpose the words thus,—“Monks called Christian Brothers are my devisees.” In this the subject must be taken particularly, and therefore there is uncertainty. Monks is equivalent to “some monks,” and that so read the devise is uncertain, there are many authorities to show. The following Acts were referred to:—9 Wil. III., c. 1; 2 Anne, c. 7; 4 Anne, c. 2; 8 Anne, c. 3; 21 and 22 Geo. III., c. 24.

April 29.—MONAHAN, C. J., delivered the judgment of the Court.—The material words in this will are “to monks named Christian Brothers;” and the question is, whether this is a sufficient devise to pass this property and take the right out of the heir-at-law. It was necessary to show it had some operation; and accordingly one witness was produced at the trial who detailed the duties of the Christian Brothers, their age as a body; that they had thirty-five houses in Ireland, and seven in England, under one head; and that they held no property individually, but as a body, for certain purposes. Another witness proved that they took the three vows of poverty, chastity, and obedience to superiors; and that they were monks though not in holy orders. The question now is, with this knowledge of the constitution of the body, what construction is to be put on this devise? It is plain, that in order to take successively this body should have a corporate existence, and be capable of holding property as such. If the intention of the tes-

tator was to pass this property to the body as a body, it must fail. But it has been argued that there is enough in this will to enable the individual members to take for their lives as such. We must know who they are. There are forty-two houses of them, and some hundreds of members. If so, we must hold this to be a devise to these hundreds of persons as joint tenants, and so to the survivor of such tenants, and the heirs of such survivor. The testator never intended that. We, therefore, come to the conclusion that he did intend this house and garden to go as to a body; and this cannot take effect, this body being incapable of taking. In such cases as that of the monks of Shandon, the Chancellor held that a charitable bequest was given for a specific purpose, and he merely employed some person, without regard to his legal position, to carry out the trust. The verdict for the plaintiff stands.

Rule discharged.

ECHLIN v. SINGLETON.—May 9, 1862.

Demurrer—Plea of privileged communication.

A plea of privileged communication, which consists of a statement voluntarily tendered, after the occasion for making it had passed, will be bad on general demurrer.

THE summons and plaint complained that the defendant falsely and maliciously wrote and published of the plaintiff in a certain letter addressed by the said defendant to John Cavendish Echlin, and bearing date the 1st day of October, 1861, the words following:—"If the proper definition of swindling be the obtaining of anything on false pretences, certainly the word may be justly applied to the course adopted by Mr. Guy Echlin (meaning the plaintiff) to obtain the tenancy of Ballintranee," thereby meaning that the plaintiff was guilty of swindling. There was a second count, which omitted the innuendo. To this the defendant pleaded, that before the time of the publication of the alleged libel in the summons and plaint mentioned, the defendant was the land agent of persons named Sarah Watson and Isabella Watson, who were owners of a certain farm called Ballintranee, in the County of Carlow; and that the defendant was employed by the said Sarah Watson and Isabella Watson to let the said lands, and to procure a solvent tenant for the same; and was instructed by the said Sarah and Isabella Watson to obtain valid security for the payment of the rent of said lands from the tenant to whom same should be let. And the said plaintiff applied to the defendant, as such land agent, for the purpose of becoming a tenant of the said lands, and represented himself to defendant, and to said Sarah and Isabella Watson, as engaged in the cultivation of land, and as residing at Multifarnham, in the County of Meath; and as occasionally, when in Dublin, staying at the Northumberland Hotel, in the city of Dublin; and as able to give a valid assignment of £98 a year, to secure payment of the rent of said farm during the lives

of said Sarah and Isabella Watson, and the longest liver of them, being the term for which said lands were to be let. And defendant also referred to one John Cavendish Echlin, his uncle, as a person who could certify to the solvency and respectability of plaintiff, and to his ability to give such security as aforesaid. And defendant says that he accordingly entered into communication with said John C. Echlin on the subject aforesaid; and afterwards it was ascertained by defendant that plaintiff was not residing at Multifarnham at the time he so represented himself to be residing there; and that he was not engaged in the cultivation of land, as he represented and led defendant to believe; that he was a clerk in the goods' store of the Midland Great western Railway of Ireland Company, and residing in Dublin at said time; and that he was not known at the Northumberland Hotel; and that he could not give security to the extent aforesaid for the payment of said rent during said proposed term. And defendant says that after making such discoveries it was defendant's duty to let said John C. Echlin know of the conduct in the premises of the plaintiff, who had so referred to him as aforesaid; and said John C. Echlin had an interest in being informed of the matters aforesaid. Whereupon, on the 1st of October, 1861, and in reply to a letter from said John C. Echlin to defendant, on the subject of the letting of said farm to plaintiff, and after and in consequence of a statement by said John C. Echlin to defendant, that plaintiff should apologize for his conduct in reference to his attempting to obtain the tenancy of said farm, defendant wrote the letter in plaint referred to, and therein in part set forth, and which letter was in the words following, that is to say:—

"Oct. 1st, 1861.

DEAR SIR,—I expected nothing else from you than your letter states. If the proper definition of swindling be the obtaining of a thing on false pretences, that word may justly be applied to the course adopted by Mr. G. Echlin to obtain the tenancy of Ballintranee. He never intimated to us that he had a railway situation, but the impression that he was engaged in the management of land; and he gave us to understand that he had sufficient capital of his own. He addresses his letters either from Multifarnham, or the Northumberland Hotel, Dublin; yet, on enquiry at the Dublin station-house of the Midland Railway, I was told that he was clerk of the goods store, and not at Multifarnham; and having called at the Northumberland Hotel to inquire for him, I was told that he was not known there or did not stop at it. He must compensate the Watsons for the loss they have sustained by him. Yours truly,

"THOMAS SINGLETON.

"To J. C. Echlin, Esq."

And defendant says he wrote and published the words complained of, and in the sense alleged, *bona fide*, and without malice, and honestly believing the same to be true, and upon a lawful and privileged occasion, as herein appears. To this the plaintiff demurred, on the grounds that the defence did not disclose any privileged occasion; that the libel was published after

the privilege, if any, determined; that it exceeded it, assuming its existence; that the defence did not allege that the falsehood of the plaintiff's representations was ascertained from Mr. C. Echliu, or that they were in fact false, or that the defendant believed them to be so.

Beylagh (with him *Bourke, Q. C.*), in support of the demurrer.—It is not sufficient that a defendant allege that a duty was devolving on him, he must go on to show what that duty was. [*Monahan, C. J.*—Suppose the case of a discharged servant, and the master consulted by an intending employer, would the latter be justified in afterwards writing to the former that he had discovered the servant to be a robber?] I have found no authority which goes to show he would be justified in so doing. The law of privileged communication will be found in the following cases:—*Owens v. Roberts* (6 Ir. Com. Law Rep. 386); *Ruckley v. Kiernan* (7 Ir. Com. Law Rep. 75); *Bell v. Parke* (10 Ir. Com. Law Rep. 279); *Wallace v. Carroll* (11 Ir. Com. Law Rep. 485); *Toogood v. Spyrring* (4 Tyrwhitt, 582); also reported in (1 Cr. M. & R. 181). *Brooks v. Blanshard* (3 Tyrwhitt, 844) is strongly in point. There the plaintiff had superintended the works of a railway company as engineer; and having become a candidate for the management of another similar undertaking, the defendant wrote to A. introducing a candidate of his own. After the election A. wrote to the defendant, telling him C. had been elected. The defendant then wrote a letter to A. stating matter in disparagement of the plaintiff while engineer to the railway, which letter occasioned the loss of the plaintiff's election on a subsequent vacancy. And it was held, that as the letter containing the libel was written by the defendant after the first election was ended, and before the second was contemplated, without his having been called on to give an opinion about the plaintiff, it was not a privileged communication. In *Prager v. Shaw* (7 Ir. Jurist, 115) it was held that the plea of privilege must show a lawful occasion, and show that it was the defendant's interest or duty to make the communication.—*Tuson v. Evans* (12 Adol. & El. 733). From these cases it is clear the party making the inquiry cannot claim the protection given to the party of whom the communication is made. Besides this was subsequent to the occasion requiring it.

Richey (with him *Serjeant Armstrong, contra.*).—Of the five points made in this demurrer, the two first are identical, and the last three are of very little importance. The statement made by the plaintiff must be taken on this demurrer to have been false, and made falsely for the purpose of fraudulently obtaining possession of a leasehold interest. This was also a fraud upon the uncle, and hence the duty of telling him of that fraud. Otherwise he is left its unconscious instrument. *Tuson v. Evans* differs from the present. This letter was not a voluntary letter. It was written in consequence of receiving a letter from the uncle which reflected on the plaintiff—*Harrison v. Bushe* (5 El. & Bl. 344); *Atkinson v. Congreve* (7 Ir. Com. Law Rep. 109). [*Monahan, C. J.*—Instead of this milk and water plea of privilege, cannot you plead the truth of the libel?] It would be very

hard to bring it up to the designation of "swindling."

Bourke, Q. C., was not called on to reply.

Demurrer allowed.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-Law]

[BEFORE LYNCH, J.]

RE THOMAS FRANCIS COMYN, AN INSOLVENT.

Lease made by assignee—Confirmation by Landed Estates Court—Laches by assignee—Claim for poundage and expenses, vouching accounts.

Where an assignee files an account and never proceeds to vouch it for upwards of twenty years; and in the meantime undertakes to make a lease of the insolvent's real estate to his own son, and then sells the property in the Landed Estates Court, subject to this lease, thereby obtaining a confirmation of it, the Court will in the first instance compel him to file a new account, and to vouch it, and the previous one filed. And it will, notwithstanding such confirmation by the Landed Estates Court, charge him with the letting value of the lands during the whole term of the lease; and he will be directed to lodge that amount in court together with interest at five per cent. And he will be disallowed the amount of his poundage and expenses, and directed to pay the costs of creditor's making the application against him.

THE insolvency in this matter took place so far back as 1835, when Mr. Thomas Gibson was appointed assignee. The insolvent returned real estate in his schedule, to which he was entitled, and personal property to a trifling amount. In 1839, Mr. Gibson filed an account as assignee, but never proceeded to vouch it. From that until 1860, it did not appear that any other account was filed, or any proceedings taken to wind up the insolvents estate. But, in the meantime, the insolvent made a lease of the property to his son, which was afterwards sold in the Landed Estates Court, subject to that lease. It appeared that Gibson, the assignee, was not himself a creditor, but being executor of a creditor, the Rev. Mr. O'Kelly, he was appointed. The matter remained in this position up to July, 1861, when the legatees, under the will of the Rev. Mr. O'Kelly, who were beneficially interested in the estate of Comyn, obtained an order upon the assignee to account, and to proceed to vouch his first as well as his second account, when filed; and also a reference to the chief clerk to report specially on the case. The chief clerk accordingly made up his report, by which, notwithstanding the sale of the property in the Landed Estates Court, by which the lease from the assignee to his son was confirmed, he charged him with the letting value of the land during the whole term of the lease; and also disallowed him poundage and other costs and expenses which he

claimed. To this report nine objections were taken. The 1st was an objection against taking any account at all, and against the disallowance of the poundage. 2nd, an objection to the ruling by which the chief clerk found him indebted to the estate in a sum of \$103, 5s. 1 1/2d. on foot of his first account. 3rd, 4th, 5th, and 6th objections, which were the principal points in the case, were against his ruling with regard to the lease made by the assignee to his son, and the sale in the Landed Estates Court. The 7th objection had reference to the mode of calculating the loss by reason of making the lease to his son; and that the loss, if any, should be based upon the value of an annuity with which the lands were charged. The 8th and 9th objections had reference to the disallowance of certain costs and expenses claimed by the assignee. Upon those objections the case came before the court for argument.

Mr. Lawless, Q. C., and *Mr. Palles*, appeared for the assignee, in support of the objection.

Mr. Kernan, Q. C., and *Mr. Hilliard*, appeared for the legatees of *Mr. O'Kelly*, and in support of the chief clerk's report.

JUDGE LYNN delivered judgment.—He said in this case *Mr. Thomas Gibson*, the assignee of the estate and effects of the insolvent, has filed several objections to the chief clerk's report, made pursuant to the order of the 17th July last. That order directed him, according to the course of the court, to file his account and to proceed to vouch it, and a former account lodged by him which was not duly vouched. By order of July, 1861, the legatees of the *Rev. Patrick O'Kelly* were authorised, on the account being lodged, to file their charge against the assignee, which they accordingly did; and the chief clerk made his report to me after taking evidence on all the matters brought before him. On such accounting on the part of *Mr. Gibson*, it is now alleged that the account should not have been ordered at all, the only persons interested in it being the legatees of the *Rev. Patrick O'Kelly*, who are not creditors upon the schedule of the insolvent. No such objection was made to the order of this court since it was pronounced. *Mr. Gibson* submitted to it and proceeded under it. And now, at this stage, and upon argument of his objections to some findings in the report, he raises the point that the account should never have been ordered at all. *Mr. Gibson* was appointed assignee, not being himself a creditor in his own right, but as being the executor of the *Rev. Patrick O'Kelly*. And the legatees have now vested in them the whole beneficial interest in the property in respect to which *Mr. Gibson's* mere legal title made him, in the eyes of this court, sufficiently represent the interest of the creditors. The assignee is an officer of this court in whom great confidence is placed, and to whom great powers are given; and the protection to the public is, that he has publicly to give an account to the court of the discharge of his duty. And there is no limit to the power of this court in directing him to account. The principal matter of the objections is in respect to the lease of the 6th of October, 1854, made by *Mr. Thomas Gibson*, the assignee, to his own son, *James Gibson*. I hold that in so leasing this property to his son, he

violated his duty towards this court. An assignee has no power to make a lease of the real estate vested in him without the sanction and authority of this court. Irrespective then of the great suspicion attached to such a transaction, I hold the act to have been done in violation of the duty of his office as assignee. An assignee has vested in him all the estate of the insolvent to enable this court thereby to dispose of it for the benefit of creditors; and it was his duty to dispose of it under the direction of the court for that purpose; but in the case now before me the assignee appears to me to have knowingly violated this duty by dealing with the property as if he were the beneficial owner of it and could parcel out of it a benefit for a member of his own family. He made this lease without any sanction or authority from the court, and he studiously kept the court from all knowledge of this act, and violated another plain duty by never since it was made giving any account to the court of the management of the estate. Therefore, in my judgment the chief clerk most properly dealt with this lease, as one which the court could not sanction, as made by the assignee in discharge of his duty, but, on the contrary, made in violation of it. The account, therefore, is properly to be taken, not as upon receipts and disbursements as an assignee, but against him as an assignee who has abused his trust. The chief clerk, in my opinion, properly charges him each year with the letting value of the lands, and thereby takes the case as favorably as he can for the assignee, and brings on him the least possible penalty for his misconduct. He is simply charged as if he held the land in possession at its letting value each year during which he held it, and that value is taken upon the estimate made by witnesses produced by himself; and I see no reason whatever that the assignee can have to object to this mode of being charged. I therefore confirm the ruling in this respect, and decide against the 3rd objection. The next part of the case is the mode of charging him by reason of the sale in the Landed Estates Court. The assignee says that that court had validated the title, and that the Insolvent Court was bound thereby, and must therefore take the lease in question as valid and made without fraud. And that, at all events, the Landed Estates Court has found that the lease has not been made at an undervalue; that such finding was within their jurisdiction, and therefore should be adopted by me; and thereby that the principle adopted by the chief clerk is a wrong one. *Mr. Palles* argued the case with great power in seeking to make out a justification for the conduct of his client; but the plain, palpable fact of a clear violation of his duty stood uncontroverted, and the court could therefore have very little difficulty in dealing with it. As to the first objection, how stands the case? The Incumbered Estates Court (now the Landed Estates Court) acted most correctly and properly. It had, I admit, full jurisdiction to deal with the lease as they found it; but what does that prove? It proves that by the misconduct of the assignee, a Parliamentary title has been obtained by him to protect a title he had fraudulently created. The case was not before the Incumbered Estates Court that the lease in question was made by the assignee in violation of his duty, for it

could hardly be expected that such an admission would be made by the party who was himself in default. No such matter was ever before the court. There was a lease made by the officer of the Insolvent Court, who had in him the legal estate and the power of making the lease, if he had obtained the proper sanction of the court; and the Incumbered Estates Court dealt with it as they found it, being satisfied of the fact, that Mr. Gibson was the assignee; and they accordingly recognised the validity of the lease. No doubt, the point of undervalue was partly raised; that is, admitting its full validity. Still, that it was not *bona fide* by reason of the undervalue. But that case is not the case before me; in that view the undervalue must amount to fraud, if not otherwise impeachable. The undervalue should be considerable that would *per se* infer fraud. No such case is in this court. Here it would be to say my fraud brought me only a very small profit, and therefore it is hard to ask me to pay it back. Therefore to yield to this proposition would be an admission that the trifling extent of the fraud wants justification. In my opinion it was a wrongful act to make this lease at all; and it was a further and a greater wrong to suffer its confirmation by the Incumbered Estates Court; and where a party did an original wrong and then procured its confirmation, he should answer for the consequences; and anything done in the Incumbered Estates Court, through the instrumentality of the assignee himself, cannot now save him from answering for his misconduct; and I cannot take anything done in the Incumbered Estates Court to bind me in dealing with an officer of my own court. I think the chief clerk has not erred on the side of severity, and that his findings are as lenient as they possibly could be to the assignee. They are to this effect: Up to the sale in the Incumbered Estates Court he treats the lease as a nullity, and so takes the account; but then by operation of the statute, notwithstanding his fraud, the assignee gets the confirmation of his act by validating the lease. The leasing then becomes an act he was capable of doing, and the chief clerk deals with him in this respect as an act within his authority, but fraudulent as to the value of the property so leased, and accordingly charges him with the estimated loss occasioned by such undervalue. In my opinion the true estimate of loss is the value of the lands discharged from the lease, as compared with their value charged with the lease. If the assignee had done his duty the lands would have been sold as a farm in possession, for the value of possession of a farm holding like this greatly adds to the price at an auction. And I will, if required so to do, send back this report on the question of value, and the estimated loss by reason of the lands having been sold fraudulently charged with a lease made at an undervalue; but I will overrule the 5th objection, which insists on the propriety of his acts by reason of the lease being made valid by operation of the Incumbered Estates Court, and the finding of that Court as to value binding me. The 6th objection, which is in substance the same as the 3rd, I at once overrule. The 7th objection is the only one to which I attach any weight; and in my opinion, upon a true estimate of value, this ought to be increased. However, I give

the assignee liberty to have the whole property chargeable ascertained; and if this objection goes back, I think the assignee will have more to pay. The 8th objection I also overrule *in toto*. It is in the discretion of the court to allow a claim for poundage to an assignee; but it is a matter of evidence to shew that his acts entitle him to it. But it cannot be contended that an assignee chargeable with considerable sums for his misconduct in dealing with an insolvent's estate, is on the other hand entitled to poundage, which may be fairly said to be a compensation to him for his exertions in making the estate available. In the present case the assignee presented his first account in the year 1839, and the claim put forward there for poundage is queried; and from that period to the present, he never took any step to pass that or any other account until compelled by my order of July, 1861, to do so. It was said, by way of excuse for not accounting, that the legatees and creditors were in equal default for not asking for an account; but I must entirely reject such an excuse. The assignee is not a private trustee, he is a public officer of the court, having a distinct duty to perform to the court as well as to the creditors; he is bound to account and to regulate his conduct under the control and by the rules of the court; and the laches or neglect of creditors is no excuse for his default. This case falls within a class of cases that I will treat with all the severity in my power, when satisfactory evidence is brought before me that a party undertaking a trust has even attempted to convert it to his own advantage or the advantage of any member of his family. An assignee is placed by law as the guardian of the estate he has to administer; and as long as a creditor's assignee acts honestly and without any intention to benefit himself, I shall be always ready to indemnify him in every way in respect of his acts, and not to visit him when I can help it with the result of mere error or mistakes honestly fallen into; but when he uses his office for private gain or family profit, it is my duty to deal with him as severely as the law will permit, and thus keep the administration of justice in this court pure and above suspicion. I therefore overrule this objection with liberty to the assignee to go back to the chief clerk. I will charge the assignee with the moderate rate of five per cent. on the sum for which he is found liable; and I will direct that the balance found by the chief clerk to be due by him, with the interest added, be lodged in court within ten days from this date.

All the objections were thus overruled, and the assignee directed to pay the costs, and was disallowed poundage and expenses.

Attorney for the Assignee—Mr. Scott.

Attorney for the legatees of Mr. O'Kelly—Mr. Moran.

House of Lords.

[Reported by John Blackham, Esq., Barrister-at-Law.]

TAAFFE v. CONNER.

Survivorship—Cross-remainders.

Testator being seised of large real estates, devised the same to his nephew, D. F., for life, with remainder to his sons in tail male; and in default of issue male in the said D. F., he devised the said estates to his three nieces, J., R., and B., "and the survivor" of them, for the term of their natural lives as tenants in common and not as joint tenants without impeachment of waste; and from and after their decease, to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their respective bodies successively, in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred and to take before the younger, and the heirs male of their bodies, and for default of such issue male, then to the daughters of the said J., R., and B.; and for default of such issue, male or female, to the use of testator's own right heir for ever. At the date of the will and of the testator's death, one of the nieces, J., was married and had a daughter, C., who is mentioned by the testator in a former part of his will, and is the respondent. The two other nieces were at the time of the testator's death unmarried, but they afterwards married, and had issue each a son; J. never had any issue male. The nieces J. and R. died, leaving B. then surviving.

Held, 1st, that under the words "and the survivor of them," B., as the survivor, became entitled to the whole estate for her life. 2ndly, that cross remainders were to be implied between the issue male of the nieces; and that C., the daughter of J., could not take anything until there was a failure of issue male of all the nieces.

J. F. being seised of considerable estates, and of leases for lives renewable for ever, by his will dated the 31st of March, 1823, devised all his lands in Ireland whatsoever to trustees, their heirs, executors, and administrators "for D. F.* for life, and after his death† to his nieces, Julia Anne Ferrall, otherwise Connee, Rose Ferrall, and Bridget Ferrall, to the survivors of them, for their lives as tenants in common, and after their decease to the first and every other son lawfully begotten on their bodies, and the heirs male of their respective bodies, successively in equal proportions, the elder of such sons of each of my nieces and their heirs male being always preferred, and to take before the younger, and their heirs male; and in default of issue male, then to the nieces, Julia Anne Connor, Rose Ferrall, and Bridget Ferrall, and in default of issue, male or female, to his heirs." J. F. died in 1823; the three nieces surviving. D. H. F. was heir-at-law of testator, and entered into possession. J. A. C. at the death of testator was the widow of F. C. R. F. married P. N., B. L. F. married

E. T.; another niece, Catherine Irwin, wife of E. I. J. A. C. died 16th Feb. 1860, leaving one daughter, who was found to be a lunatic. R. N. died in 1853, leaving her husband and J. N. F.* her eldest son. B. L. F. is still living, H. T. F. her eldest son. C. I. died in lifetime of D. H. F., leaving J. I., her eldest son, surviving, who died intestate and unmarried in 1854, leaving D. H. I., his next brother. D. H. F., in 1823, and 1853, executed two documents purporting to be wills. These parties having differed as to their respective rights upon the construction of the will. By deed of agreement of 4th March, 1854, it was agreed between them that D. H. I. his heirs and assigns, for his own use and benefit should take a portion of the lands in question; and that the residue of the lands (subject to an annuity to J. A. C.) should be as to one moiety to use of J. N. F., his heirs and assigns; and as to the other moiety, to the separate use of L. B. T. for life, with remainder to H. T. F., his heirs and assigns. A disentailing deed was executed by J. A. C., E. T., B. L. T., H. T. F., and J. N. F. A petition to L. E. C., 21st October, 1854, by J. N. F., was, by order of 12th April, 1855, amended by adding as parties B. L. T. and H. T. F. The daughter of J. A. C. represented by her committee, entered an appearance, and raised the question that under the will of J. F. the remainder limited to the testators, three nieces, after the death and failure of D. H. F., comprised the entire of the testator's estates, and that the lunatic was entitled to some estate in remainder in one undivided third of the said estates. Upon the hearing of the motion by the committee, Judge Longfield, by an order dated the 2nd June, 1859, declared that the sale of the estates of the testator should be stayed, except so far as a portion specified were necessary for payment of incumbrances on the estate. It was ordered, as to retained estates, that this order be without prejudice to the right of any of the parties to raise any question as to any and what estate the lunatic in certain contingencies would take in that estate. J. N. F., B. L. T., and H. F., brought this order before the Court of Appeal, asking the court to vary the preceding order by declaring that by the construction of the will, all the lands named in the order of sale, did not on the death of D. H. F. without issue male, devolve on the three nieces of J. F. for the term of their lives, with the remainder, stated in the will. By an order of the Court of Appeal of the 22nd Nov. 1859, the Court dismissed the appeal. Upon the dismissal of the appeal the committee of the lunatic presented to the Lord Chancellor a petition as a special case. The petition set forth the facts already set forth. His lordship decided that the petitioner did, upon the decease of her mother become entitled to an absolute estate of fee-simple in one-third of the lands held in fee simple, and to an absolute estate in the leases for lives contained in the will, and that no cross remainders could be implied.

Roll, Q. C., and Mr. John O'Hagan (with them Sir Hugh Cairns) for the appellants.—1. "The limitation to the use of my nieces, and the survivor of them, for their natural lives, as tenants in common," must be read as a limitation of the entirety of the estates to

* He is called in the proceedings, D. H. F.

† It is not necessary to state the limitations to the sons of D. F., as he died unmarried.

* The persons taking under the will were required to take the name Ferrall.

the three nieces as tenants in common, for their lives, with remainder to the survivors as tenants in common, for their lives, with remainder to the survivor of them, for her life. A tenancy in common is not inconsistent with an express limitation to survivors; on the contrary, such a limitation is more effectual for its purpose than a joint tenancy, as the survivorship by express limitation cannot be destroyed by severance. The rule which reads words of survivorship, as referring either to the death of the testator, or to the period of enjoyment, is quite inapplicable to life estates. A gift to survivors following life estates must be read as a limitation, and refers to survivorship indefinitely—2 Jar. 699-710; *Doe d. Bornell v. Alley* (1 M. & S., 428); *Haddlesley v. Adams* (22 Beav. 266); *Smart v. Clarke* (3 Resp. 365); *Tilson v. Jones* (1 R. & M., 553). To read it in this case as referring to the death of Daniel Ferrall, would lead to the most absurd consequences in the very probable event of one of the nieces dying in his lifetime, leaving issue. 2. It is plain upon principle, and a long series of authorities, that the words "and for default of such issue male," preceding the limitation to the daughters of the nieces, raise an imputation of cross-remainders among the sons of the nieces. [*Lord Chancellor*.—What necessity is there for implying cross-remainders for the purpose of your argument? The first sons of the nieces would appear to take as a class, and in that case your clients have the whole estate among them.] Undoubtedly that is so. But even if the estate were considered as divided into thirds, with a limitation in each third to the first and other sons of each niece, cross-remainders must be implied amongst the sons of the nieces before any estate vests in the daughters. The consequences of not implying cross remainders would be, that if two of the nieces died without issue, two-thirds of the estates would go to testator's right heirs, notwithstanding the existence of issue male of the remaining niece. This would be clearly at variance with the whole line of authorities which are all set forth in the 42nd chapter of Mr. Jarman's work. 3. Even if Catherine Conmee take any estate, it cannot be a fee. [*Lord Cranworth*.—It appears by the will itself that Catherine Conmee was in existence at the date of the will. It is, therefore, impossible to read the limitation "for default of such issue female," as meaning if no such daughter come into existence. It must, therefore, be read as a remainder, which excludes the idea of a fee-simple.] It must be read as giving a life estate, or, at the utmost, an estate tail, which, considering her lunacy, is equivalent to a life estate.

Sir Roundell Palmer and *B. C. Lloyd, Q.C.*, (with them *P. Longfield, Q.C.*, and *Giffard, Q.C.*) for the respondent—As to the first question, whether there is a survivorship between the nieces. It was submitted that the true construction of the clause is this, viz.:—first, to the three nieces as tenants in common, each for her own life, and after the decease of each, to the first and other sons of each, and then to the daughters of each, and on failure of issue male and female of each niece, then as to her one-third to the testator's right heirs. There is no case in which words such as these, occurring immediately after the names of the nieces, and followed by words denoting that the es-

tates limited are to be held by the devisees as tenants in common, and not as joint tenants, have been held to give a benefit of survivorship between the devisees after the estates took effect in possession. In such cases the words have been interpreted as a description of the persons who are to take either as survivors at the death of the testator, or as survivors at the death of the previous tenant for life. In *Doe d. Abey* the words were quite different, and there were clear expressions showing that the estate was not to go over until after the decease of the survivor; in order to prevent an intestacy, the court held there was to be a benefit of survivorship between the devisees. In *Blissett v. Cranwell* (Salk., 226); *Stones v. Heathley* (1 Ves. Sen., 165), the same interpretation was adopted as contended for in the present case. In *Haddlesley v. Adams* (22 Beav.) the Master of the Rolls seems to say, that if the words "as to survivorship" had occurred before the description of the estates limited, he would have come to a different conclusion—page 272. He says, "Now, *Rose v. Hill*, and all that class of cases, with the exception of *Mabeley v. Strode*, and to which I will refer in a moment, use expressions either of this nature, or tantamount to it—so held to *H. C., M. & G., and the survivors of them*;" and in another place he says, "There are two matters always to be regarded in any devise or bequest—one is, who are the persons to take, and secondly in what manner they are to take." We say if all survived the period at which the limitation is to take effect, they were all to take for their lives respectively, but then the estates they were to take were to be estates as tenants in common, and not as joint tenants.—*Doe d. Prigg* (8 B. & C. 231); *Rose v. Hill* (3 Burr., 1881); *Garland v. Thomas* (1 B. & P., N.R., 82); *Wilson v. Bayley* (3 B.P.C., 195). Next as to the question of cross remainders. This question is independent of the 1st; counsel submitted, that the intention of the testator was to limit the estate in third, as before mentioned. The word "their" all throughout is used by the testator in the sense of each of them respectively. As *their lives, their first and other sons*, and so forth, must mean the life of each, and the first and other sons of each. So, the words after "their death" must mean after the death of each, as there cannot be a contemporaneous decease of all *Willes v. Douglas* (10 Bea., 47). The meaning of the words "on failure of such issue male" means "on failure of such issue male of each niece respectively," and then the gift is to the daughters of the nieces. This was the construction adopted in *Perry v. White* (Cowp. 777.) The construction contended for by the appellants would render it necessary that the daughters of the nieces should take *per capita*. Why should the daughters take *per capita* and the sons *per stirpes*? The rule is, when once a distribution *per stirpes* is commenced, it is followed out through all the subsequent limitations.—*Brett v. Horton* (4 Beav. 239); *Arrow v. Millish* (1 De G. & Sm. 255); *Hawkins v. Hamerton* (16 Sim. 000); *Flinn v. Jenkins* (1 Coll. 355.) Even a division of the income between the devisees for life, as tenants in common, is sufficient to determine a distribution *per stirpes* amongst their issue. Besides, the limitation to the daughters of the nieces gives the fee, inasmuch as

the gift in the preceding clause is of "the rest of the testator's estate," words which carry the fee. *Montgomery v. Montgomery* (3 J. & L. 47.) Now, as one of the nieces had a daughter, who is mentioned by the testator in his will, that daughter must have taken a vested remainder in fee, so that the event mentioned in the last clause "for default of such issue male or female, to the use of my own right heirs for ever," never could happen upon the construction contended for by the appellants, but is quite consistent with the construction of the respondents, which is this, that *quoad* the one-third limited to the niece, whose issue, male or female, should so fail, then to the testator's right heirs; and thus a full meaning is given to every part of the will. Whereas upon the construction contended for by the appellants, this final clause would be unmeaning. The only other interpretation that could reconcile it would be, to give the daughters of the nieces estates in tail, but that cannot be, as the antecedent to the word "such," where it is applied to issue female, is the word "*daughters*," and putting for the word "such its antecedent, "*daughters*," the sentence would run thus, "And in case there should be no daughters," then to his right heirs," which event never could occur, as there was a daughter. Therefore, the whole paragraph must be read distributively, as contended for by respondents, and that interpretation would exclude cross-remainders.

THE LORD CHANCELLOR—My lords, this is an appeal from a decretal order pronounced by the Lord Chancellor of Ireland upon a special case stated under the provisions of the Irish Court of Chancery Regulation Act of 1850. The question involved in it depends upon the construction of the will of a gentleman of the name of John Ferrall. He appears to have been entitled to very large landed estates in Ireland. By his will he devises those estates by gifts, which in effect amounts to a limitation of the estates to his nephew, Daniel Henry Ferrall, for life, with remainder to his first and other sons in tail male; and then there is a remainder for default of such issue male, or in case he antecedently dies, to the testator's nieces, which is expressed in the following way:—"And for default of such issue male in the said Daniel Ferrall, then to the use of my nieces, Julia, Rose, and Bridget, and the survivor of them, for the term of their natural lives, as tenants in common and not as joint tenants, without impeachment of waste; and from and after their decease, to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their respective bodies successively in equal proportions,—the elder of such sons of each of my said nieces, and the heirs male of their bodies, being always preferred, and to take before the younger and the heirs male of their bodies. And for default of such issue male, then to the daughters of the said Julia Anne Conmee, otherwise Ferrall, Rose Ferrall, and Bridget Ferrall; and for default of such issue, male or female, to the use of my own right heir for ever." The only other provision in the will which appears to me to have a bearing upon the question before your lordships is the next clause, by which it is directed that the issue male of the said Julia, Rose, and Bridget, shall not take any benefit under the will unless they assume the name of Ferrall instead of

their own name. My lords, it appears that Daniel Henry Ferrall, the nephew of the testator, died in the year 1853, without leaving issue male, and that the three nieces, Rose, Bridget, and Julia, were living at the death of Daniel Ferrall. Rose died afterwards, leaving the appellant, John Nolan Ferrall, her eldest son. Julia died in February, 1860, having had but one child, a daughter, the respondent, Catherine. Bridget still lives, and has sons, of whom Henry Taaffe Ferrall, one of the appellants, is the eldest. In these circumstances the Lord Chancellor of Ireland has decided that Catherine, the daughter of Julia, on the death of her mother, became entitled in fee-simple in possession to one-third of the devised estates. The Lord Chancellor of Ireland in deciding this case had principally to consider the effect of the first words of limitation in question by which the gift is made to the three nieces and "the survivor of them for the term of their natural lives." And then he had further to consider the effect of the words "and for default of such issue male." And the Lord Chancellor in his judgment appears to have arrived at this conclusion, that the word "survivor" must either be rejected as insensible and repugnant to the general manifest intention of the will, or be referred to the death of Daniel Ferrall, which, the Lord Chancellor proceeds to say, he believes to be the correct construction; "or, at all events, (says the learned judge) I think it must be considered as so uncertain in its meaning as to be incapable of controlling the previous distinct language." With regard to the words "and for default of such issue male," which it had been contended were sufficient to raise an implication of cross-remainders, the Lord Chancellor of Ireland observes, "If the will had gone on, leaving out any mention of the daughters, simply to say, 'and in default of such issue male, remainder to my right heirs,' there would have been no great difficulty in implying cross-remainders in tail between the nieces or their sons; but the actual will as respects the daughters throws insuperable difficulties in the way of this construction." This case has been most ably and elaborately argued at the bar in support of the conclusion stated by the Lord Chancellor of Ireland; but I am unable to concur in the construction of that learned judge. I cannot agree with him in either of the two conclusions at which he has arrived. "I will take first the interpretation of the word "survivor," and what ought to be regarded as the effect of the prior part of the limitation in question, although it is not necessary that your lordships' decision should be founded upon it, because I think this is a case in which cross-remainders ought to be implied. It may not be an inexpedient thing to consider the true interpretation of the antecedent words. It is undoubtedly true, that so far as decided cases are concerned there is much difficulty in fixing with reference to the gift of real estate the true interpretation of this word "survivor." After many fluctuating decisions, the rule laid down by Sir John Leach in the case of *Winterton v. Crawford*, has, with regard to bequests of personal estate, been pretty generally adopted, and I think with great advantage. But it is by no means clear that the same rule has been adopted with regard to the interpretation of the word in a devise of real estate. In gifts of personalty the word

may be taken as referring to the period of distribution. In gifts of real estate it ought to be referred, if the same rule were applied, to the determination of the prior limitations. But some of the cases interfere with this conclusion; and I agree with the observation of the learned author, Mr. Jarman, that it must be left to future decisions to tell us what is the actual rule of construction on this perplexing point in reference to real estate. I think it not possible, and I think it would be very dangerous to attempt to derive from decisions any certain and general rule of interpretation of the word, or at the period to which it ought to be considered as referring. But there is another and a simpler meaning of the word, which I think is the true meaning in this case. The natural and obvious meaning of the word "survivor" is not the person who shall survive or outlive a particular event, but, when it is applied to a class of persons and individuals are named, the natural and obvious meaning of the word is the longer liver of those who are named. And therefore, in this particular case, as in other cases, the word "survivor" should, I think, be regarded not as referring to any particular event previously mentioned, but as referring to that which, as I have already observed, is the natural meaning of the word, namely, that individual person who, out of the individuals named, shall turn out to be the longest liver. It has been sometimes objected that this interpretation of the word "survivor" cannot be adopted where there is a gift to several persons as tenants in common, not as joint tenants. But there is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word "survivor," which is annexed to a tenancy in common. The survivorship involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of the joint tenant. But if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases; but when a gift to the "survivor" is annexed to a tenancy in common and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy. There is no difficulty, therefore, I apprehend, in putting this construction upon the antecedent words of this gift, that the limitation was to the three nieces as tenants in common for life, with a cross-limitation or remainder as to the estate of a niece dying; first to the two surviving nieces as tenants in common for life, and then a further limitation as to the estate of the niece next dying to the "survivor" of the three nieces also for life. And then every word of the antecedent limitation has its natural effect given to it; and then the words of the gift over, introducing the remainder, also have their full and entire effect attributed to them. For the words of the gift limiting the remainder are "from and after their decease to the use of their first and every other son and sons lawfully begotten," and the heirs of those sons. The limitation of the remainder then expectant upon the death of the survivor of the three nieces is to the class of the sons of those three nieces, with a direction that the sons of each niece *inter se* take severally and successively in the order of seniority. The class of persons, there-

fore, taking upon the death of the surviving niece will be the eldest sons of the three nieces, Julia, Rose, and Bridget, in equal proportions; and if there has been no son born of any one of the nieces, then the limitation takes effect in favor of the sons of the other two nieces. So that I should read the antecedent part of the will as operating in the following way, creating a limitation to the three nieces as tenants in common for life, with remainder to the survivors and survivor of the three nieces for life, with remainder to the eldest sons of the three nieces as tenants in common in tail male. The effect of that interpretation will be to give the present appellants, that is, the son of Rose and the son of Bridget, a limitation in remainder expectant upon the death of Bridget as tenants in common in tail male. And if that interpretation be adopted, the words upon which the Lord Chancellor of Ireland has founded his conclusion as giving to Catherine, the daughter of Julia, an immediate fee-simple estate to the extent of one-third of the devised estates will be entirely disposed of; and no estate will arise in favor of the daughter until the entire failure of the antecedent limitation to the sons of the other two daughters. But supposing we adopt the construction which has been allowed by the Lord Chancellor of Ireland, and that we refer the word "survivor" to the event of the contingency of the three nieces being living at the death of Daniel Henry Ferrall without issue male, and that mode of construction throw aside the word as becoming inoperative in the event which has happened,—if we adopt that construction, we then are brought to consider the interpretation which the Lord Chancellor of Ireland puts upon the words "and for default of such issue." Now I cannot concur with his lordship that the implication of cross-remainders is here to be made by reason of the gift over being expressly made in favor of the daughters of Julia, Rose, and Bridget. The implication of cross-remainders depends upon the form of the expression introducing the gift over after the limitation of the prior clause. The law upon this subject unfortunately has been perplexed by a variety of contradictory decisions relating to the construction of gifts over. Originally, nearly 200 years ago, the interpretation which I think has been now adopted was the interpretation settled in an early case in Dyer, and also in the case of *Holmes v. Meynell*, reported in Lord Raymond, and also in Shower's Reports. Some difficulty was afterwards introduced by a notion which was entertained, that this doctrine implying cross-remainders, must be limited to cases where the gift was to two objects alone. And after that difficulty had been got over another doctrine was stated, which may be described as the introduction into words such as we have here, "for default of such issue," of the words "several and respective," which was for some time supposed would have the effect of preventing the implication of cross-remainders by giving over the share of each tenant in common. That appears to have been first introduced by the case of *Comber v. Hill*, reported in Stranger's Reports; and it gave birth to numerous decisions until the whole of the distinction was denied by Lord Kenyon, in the case of *Watson v. Foxon*; and it must be considered, I think, as finally exploded in the case of *Doe v. Webb*,

reported in 1st Taunton; and also by the decision of Lord Eldon in the case of *Green v. Stephens*, in 17th Vesey. I find it nowhere suggested that the character of the devise over makes or ought to make any distinction. I arrive, therefore, at the conclusion that the words "for default of such issue male," in conformity with their own natural meaning, and also in conformity with the rule that must now be considered to have been at length finally arrived at, must mean plainly "for default of all such issue male" as would take under the antecedent limitation. And if that be the natural meaning of the words, and also the meaning which is consistent with the latest and best considered authorities upon the subject, it would be impossible that the limitation to the daughters could take effect as to that part of the estate comprised in and affected by the prior limitations to sons until those prior limitations to sons have become wholly exhausted. If the daughters, therefore, are to take only when there has been an absolute failure of the antecedent limitation to "issue male," it follows, as a matter of course, that when there is a failure of issue male of one niece, but there is issue male of another niece, or of both the other nieces, the gift over cannot take effect. I find no difficulty in supposing (as the Lord Chancellor of Ireland seems to do) that there would be an inconsistency in preferring the sons of nieces to the daughters of nieces: that is to say, in preferring the nephews of a niece to the female issue of a niece. We are not to be governed by the consideration of what may appear to us to be an unreasonable disposition. If anything were wanting to confirm the propriety of arriving at the conclusion that the testator intended to give a preference to issue male, I should refer to the directions given in the 18th clause of the will, as printed in page 49. I must therefore advise your lordships to declare the construction of the will to be altogether opposite to that which has been pronounced in the court below. The decision of the court below has involved an answer to several questions which are contained in the special case; but I should think it quite sufficient if your lordships were to reverse the decretal order of the Lord Chancellor of Ireland and to declare that, according to the true interpretation of the will of John Ferrall, the remainder, limited to the daughters of Julia, Rose, and Bridget, "on default of issue male," taking under prior limitations, does not fall into possession until there be a failure of issue male of all the three nieces described in the prior limitations. The effect of that will be entirely to reverse the ground upon which the decision of the court below proceeds; and inasmuch as the estate is now held under an agreement between the parties, it seems unnecessary that your lordships should give any further answer to the questions which are stated in the special case upon which the Lord Chancellor of Ireland made his decretal order. I must therefore move your lordships that this decretal order be reversed with the declaration I have mentioned.

LORD CRANWORTH.—My Lords,—I entirely concur with the Lord Chancellor in the result at which he has arrived in this case. The question turns entirely upon the construction which is to be put upon the clause in this will. The testator having, first of all, given all his real estate to his nephew for life, with

remainder to his first and other sons in tail male, then proceeds in the clause which has given rise to this dispute, "and for default of such issue male of the said Daniel Ferrall, then to the use of my nieces, Julia Anne Ferrall, otherwise Connee, Rose Ferrall and Bridget Ferrall, and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants, without impeachment of waste." The first question is, what is the estate which the three nieces took. Now, it was argued that each took a separate estate, as tenants in common, with remainder afterwards as to each of their thirds to their first and other sons, and in default of sons then to daughters; and that the now sole surviving niece took only one-third for her life. I think that such a construction cannot be maintained. It would, in truth, make the words "survivor of them," utterly inoperative. The word "survivor" there, does not point to the person who was to take the estate by virtue of being survivor, but to the extent of the interest which the nieces were to take. According to a distinction which, I think, was correctly enunciated by the present Master of the Rolls, in the case cited in the argument, of *Hadlsby v. Adams*, reported in 22nd Bevan, the word "survivor" here, means not to indicate the person who is to take by surviving at any particular period, but to indicate what interest the three nieces are to take. It is just the same as if, instead of "survivor," it had been "the longer liver." The Lord Chancellor of Ireland seemed to think that that construction was excluded by the language of the clause, which is, that they were to take "as tenants in common, and not as joint tenants," and that if the survivor took, that would be taking as joint tenants. But that, I conceive, with all deference to the Lord Chancellor of Ireland, is entirely an erroneous construction. There is no inconsistency in giving an estate to the "survivor," because those who have a life interest are to take as tenants in common, as has been pointed out in several cases, particularly in a case which has been adverted to in the argument, and which occurred in the Court of Queen's Bench, of *Doe v. Aby*, reported in 1st Maule and Selwyn. There the court pointed out clearly, that there was no inconsistency in saying that certain persons were to take as tenants in common, but with the benefit of survivorship, for that, though they had in some respects a less beneficial interest, yet in other respects they had a more beneficial interest, than as joint tenants. At all events, it is sufficient to say it is a different estate, and there is no inconsistency in giving it to the "survivor," though it is said that they are to take as tenants in common. I, therefore, think it clear, that the appellant, Mrs. Taaffe, as the surviving niece, has now the whole interest in her for life; and, subject to her life interest, I think there is a valid gift in remainder in thirds to the first and other sons of each tenant for life, in tail male, and in default of sons, to the daughters of each of the nieces. Then, the question is, whether the daughter of one niece, who died leaving only a daughter, takes in exclusion of the male issue of the other who had male issue. I think, clearly not. I shall not repeat what has been gone over fully by my noble and learned friend, the Lord Chancellor, upon the subject of cross-remainders. I

take it, that the doctrine is now well established, that whether cross-remainders are to be implied or not is a mere question of construction upon the whole face of the will. And wherever there are limitations in tail male, "and, in default of such issue," a gift over, I take it that the presumption is, that that means in default of issue of the whole of them. Now, that is the case here. There is a gift to each of the daughters, with remainder to their first and other sons in tail male, "and, for default of such issue," then over. Now, I think that means, in default of all such issue male. That would be the *prima facie* construction, and I think that, even if it were not the *prima facie* construction, there are indications upon the face of this will to show that was the construction which the testator meant to adopt. I agree with an observation that was made at the bar, that there is nothing more fallacious than endeavouring, first of all, to find out the intention of the testator, and then to construe the words of the will with reference to that supposed intention. But here, I think, it is clear that the testator wished that his estate should run in the male line, to the exclusion of the female line, for he gives it first to his nephew, and his issue male, and then he constitutes each of those nieces as a *stirps* of the new male line. And, I think, that view is strongly confirmed by the circumstance pointed out by the Lord Chancellor, that he desires all the male issue of each of his nieces to take his name and arms; whereas he gives no such direction with regard to the daughters who are to take upon the failure of issue male. If his wish to perpetuate his name was not capable of being fulfilled, by reason of the failure of issue male of the daughter, then he gave it up, and let the thing take its course. Upon the whole, I think that the judgment of the Lord Chancellor of Ireland is wrong, and that the declaration which my noble and learned friend has proposed, is the proper one to be made. With respect to the interests of the several parties, there need be no difficulty, because, inasmuch as the appellants are the surviving niece and her two children, who take all between them, and who, under disentailing deeds, have the whole among them, it is sufficient for us to say that the appellants are entitled to the estate among them.

LORD CHELMSFORD.—My Lords,—I agree so entirely with the opinions which have been expressed, that I should have abstained from adding anything to what has been addressed to the house, if I did not feel that it would hardly be proper to dissent from the judgment of the Lord Chancellor of Ireland, without stating, however shortly, the reasons which have led my mind to a conclusion opposed to that which he has formed. It appears to me that the three nieces of the testator took an estate for their lives, and for the life of the survivor, as tenants in common, and not three distinct estates for life, transmissible in their separate lives. It was conceded in the argument, that the creation of a tenancy in common amongst the three nieces, was not inconsistent with a remainder of the whole estate to the survivor for her life. But some stress was laid upon the collocation of the words expressing the survivorship, and also upon those being in the singular number instead of running in the usual form "for the term of their natural lives,

and the lives and life of the survivors and survivor of them." This, however, appears to me to create no serious objection to the construction which I have adopted. The estate given to the nieces was a vested remainder after the estate tail to the sons of Daniel Ferrall. The three nieces having survived the testator, the remainder vested in them all. If one or two of them had died in the testator's lifetime, the remainder would have vested in the two survivors or in the sole survivor; but the remainder to the sons of the nieces could not take effect till the death of the survivor. This appears not only from the words "and the survivor of them," in the demise to them for life, but also from the words introductory to the remainder of their sons, "and from and after their decease," which, following immediately upon the life estate, which was not to end till the death of the longest liver of the nieces, can only be understood to mean, after the decease of all of them, and not after their respective deceases. This view of the devise to the nieces appears to dispose of the whole case. For, unless the respondents can establish the scheme of the will to be to give a separate third to each of the nieces and afterwards to their sons and daughters, in separate succession to each, the whole foundation for their construction fails. There can then remain no other manner of construing the will than by holding the gift to the first and other sons and the heirs male of their bodies, to be a gift to them as a class. If, according to the argument of the respondents, the estate was originally divided among the nieces in thirds, each of which was afterwards settled upon sons and daughters in the separate line of each, there would be no meaning in the words, "in equal proportions." But upon the other construction, these words become significant in the event (which has happened) of two only out of the three nieces having sons. This view of the will is not interfered with by the words "the elder of such sons of each of my said nieces, &c., being always to be preferred and to take before the younger," which fall in just as naturally with the notion of the devise to the sons of each being intended to them as a class, as with the idea of separate limitations in the line of each niece; as their object is merely to regulate the priority in the separate lines where there are sons to take. This being the opinion which I have formed of the manner in which the sons of the nieces became entitled, it is almost unnecessary for me to consider the question as to the implication of cross-remainders. But if anything were wanting to postpone the interest of the daughters of the nieces until the failure of the sons and their heirs male, the words introducing the devise to the daughters, "and for default of such issue male," would surely be sufficient, as the daughters could not take until all the male line of the sons previously mentioned had failed, which would necessitate the implication of cross-remainders between them. With respect to the interest to be taken by the daughters of the nieces, it was pointed out by my noble and learned friend, Lord Cranworth, in the course of the argument, that the respondent, who is the daughter of one of the nieces, Julia Anne, was alive at the date of the will, as is mentioned in it, and, consequently, on the death of the testator, she took a vested remainder. This would open, from time to

time, to let in other daughters of her mother (if she had any), and also the daughters of her aunts. It seems clear that this vested estate could not be a fee, on account of the ultimate devise to the use of the testator's own right heir. If it were necessary to construe this devise to the daughters of the nieces, I should be disposed to think that the daughters would take estates in tail. The words which introduce the ultimate remainder to the right heir are, "in default of such issue male and female." These words cannot mean in default of sons and daughters of the nieces, because there is a previous limitation to the heirs male of the bodies of the sons, to which the words "issue male" would more naturally refer. If the words "issue male" cannot refer to sons, the words "issue female," which immediately follow, cannot refer to daughters. And this construction being excluded, there is no other which will satisfy the evident intention of the testator, than one which will postpone the estate of the heir-at-law till an indefinite failure of issue male and female. The decision of the previous points of the case, however, render it unnecessary to enter more particularly into this last question.

LORD KINGSDOWN.—My Lords,—I entirely agree in the judgment proposed by the Lord Chancellor. I had prepared a few observations in support of the view of the case which has been taken by him, but those reasons have already been so fully explained by my noble and learned friends who have addressed the House, that I will not trouble your Lordships with them.

Solicitor-General.—It will be in your Lordships' recollection that, at the close of the argument, it was understood between us that the costs were to be paid out of the estate.

Roll.—No; there was no agreement on the subject.

Solicitor-General.—Your Lordships will permit me to remind you that it was stated, that this is a case in which the difficulty has been created by the language of the will, and that it was apprehended by the parties that this question would arise, Catherine being a lunatic, the order of the Incumbered Estate's Court for the estate was without prejudice to the question raised in this case. In that state of circumstances, the parties whose title is now established by your Lordships' judgment came into court, making the present respondent a defendant for the purpose of clearing their own title.

LORD KINGSDOWN.—I thought it had been settled that the costs should be paid out of the estate.

Solicitor-General.—I thought so. I said that if we succeeded we should not object to that.

LORD CHILMSFORD.—I certainly considered that there had been some understanding of that kind.

Roll.—I am told that there has been no agreement between the parties. It is doubtful whether, under the Act of Parliament directing the taking of opinion of the court upon a special case, the court has jurisdiction to give costs. I am not speaking of the costs of the appeal, but of the costs in the court below. I must, therefore, leave it in the hands of the House to deal with it as they think fit. If your Lordships should think it right to give any costs, your Lordships will give them out of the *corpus* of the estate, and not out of the rents.

LORD CRANWORTH.—My Lords,—I think it a reasonable proposition that the costs should be paid out of the estate. It really was a very fit matter to bring before the court. You cannot say that the case was perfectly clear; for the Lord Chancellor of Ireland, assisted by Lord Justice Blackburne, came to one opinion, and this House has come to another opinion.

LORD CHANCELLOR.—With respect to the question of costs, the question is, whether we have all the parties in the case before us, so as to enable us to charge the estate with costs, and in what manner that charge shall have operation. I do not understand that there is any personal estate available for the payment of costs. The ordinary rule is, that the personal estate of the testator should pay for the interpretation of the will; but there being, I believe, no personal estate available for the purpose, I should myself desire that we should give the costs of the appeal out of the estate, if we can. If there is no difficulty upon that subject, I should submit to your Lordships the propriety of making that declaration.

Roll.—I believe that all the parties interested in the real estate, subject to the decision in this appeal, are before the House. The question would be as to the costs in the court below, as well as the costs of the appeal. As to the court below, it is doubtful whether there is any jurisdiction to give the costs, or to do more than declare the opinion of the court upon the special case.

LORD KINGSDOWN.—The court made no order as to costs.

Roll.—The court made no order as to costs. In the Act which gives the jurisdiction there is nothing said as to giving costs, and we are dealing here with the legal estate. The question as to the costs of the appeal is in your Lordships' hands.

LORD CHANCELLOR.—My Lords,—I do not see that there will be much difficulty upon the point, and I would submit to your Lordships the propriety of now dealing with the costs of the appeal. If no order was made in the court below, touching the costs of the proceedings there, your Lordships could not with propriety make an order as to those costs; but, if all the parties interested in the estate are before the House, there is no difficulty in giving effect to the order that the costs of both parties in this appeal should be paid out of the real estate. I would, therefore, submit to your Lordships that the costs of this appeal, both of the appellants and the respondents, be directed to be paid out of the real estate, the subject of appeal.

Decretal order reversed, with declaration and direction as to costs.

Court of Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

MATHEWS v. ARCHER.—Jan. 25th.

Specific performance—Conditions of Sale—Objections to Title, how far barred by co-temporaneous correspondence.

M agreed to sell his interest in a lease of the lands of F to A, under the following conditions of sale

(amongst others). "As the property in question is of small value, and the vendor is unwilling to incur any unnecessary expense or costs, the purchaser is to accept the title, which the present vendor accepted upon the occasion of the purchase of the premises in February last; and such purchaser shall not be entitled to object, on any grounds whatsoever, to the title anterior to the conveyance to the present vendor, dated the first of February, 1861, or to make any requisition in respect to such prior title, but the abstract of title under which the vendor was satisfied, upon the purchase of these premises, and all deeds, documents, and papers, handed over to him or his solicitor upon that occasion, shall be handed to the present purchaser." Pending the negotiation between the solicitors of the parties, M frequently assured A, by letter, that the title was perfectly good.

Held—That the letters written by M amounted to a waiver of the above condition of sale.

This was a suit for the specific performance of an agreement to purchase a leasehold interest, under the following circumstances and condition of sale. By a lease dated the 1st of May, 1844, Robert Graham demised the lands of Fahy (amongst others), to Mrs. Burke, for the term of 99 years: the lease contained a covenant, upon the part of Mrs. Burke, her executors, administrators, and assigns, that they should not sublet the lands of Fahy, without the consent of Graham, his heirs and assigns; and in case the lands should be so sublet, the lessor, his heirs, and assigns should be at liberty, at their option, to re-enter upon the demised premises, or to recover an additional yearly rent of £20. Mrs. Burke, in whom the lessee's interest vested, by a lease dated the 25th of December, 1859, demised the lands of Fahy to A. Ellis, for 87 years. It was contended by the petitioner, that the consent of Graham to that sub-demise was given by a letter, not in his possession; also, that T. Prior, who afterwards purchased the reversion of the lease of 1854, in the Incumbered Estates, but was a witness to the sub-lease, by a deed, dated the 1st of February, 1861, Ellis assigned all his interest in the premises to J. E. Mathews, the petitioner. In the month of April, 1861, a negotiation commenced between Mathews (the petitioner) and T. Archer (the respondent) for the purchase of Rossdhu, as the villa on the lands of Fahy was called. On the 13th of May, 1861, Archer wrote as follows to Mathews:—"I should be glad to come to terms with you, if I could only obtain a proper title. However, from what I could glean from Mrs. Burke (in your own hearing), and the statement of title you sent me, I fear that some difficulty must intervene, owing to its various conflicting instruments. On the whole, I think it would be the better way, if you could have the sale effected through the Landed Estates' Court, as the interest of both buyer and seller would be materially improved." In a letter in reply, Mathews stated:—"As to the title, the shortest way which I can see, is by enclosing the letter explaining it to me. Mrs. Burke resides quite close to this, and Graham, as the owner of the Ballinakill estates. In fact, I knew the title, beforehand, to be perfectly clear; and

the title deeds are, at present, with Mr. J— [meaning his solicitor]." Mathews again wrote, saying:—"My solicitor informs me, that the title is perfectly good; of course, I could not be expected, by any purchaser, to go back on Mr. Graham's title." Again, on the 15th of June, he wrote—"I hope to have all completed in a few days, when, I think, I will be able to convince you, against your will, that your views concerning the title are groundless." Immediately before he sent the abstract of title to Archer, Mathews again wrote as follows:—"The title is perfectly good, and I am prepared to lay it before any solicitor you name, who, of course, if you purchase, will draw your conveyance." The abstract of title furnished to Archer, did not contain any reference to the lease of 1854, from Graham to Bourke, or its contents or covenants, save a recital of an abstracted deed of 1859, in these terms:—"Reciting that Fahy's or Bourke's holding (being the premises in question) had been, previous to the making of said demise from Robert Graham to C. P. Archer, jun., demised by said R. Graham to one M. Bourke for a term of years." The agreement for the purchase of Fahy, which was executed by Archer on the 4th of July, 1861, contained the following condition for sale:—"As the property in question is of small value, and the vendor is unwilling to incur any unnecessary expense or costs, the purchaser is to accept the title which the present vendor accepted upon the occasion of the purchase of the premises in the month of February last; and such purchaser shall not be entitled to object, on any ground whatsoever, to the title anterior to the conveyance to the present vendor, dated the 1st of February, 1861, or to make any requisition in respect to such prior title, but the abstract of title under which the vendor was satisfied upon the purchase of these premises, and all deeds, documents, and papers handed over to him or his solicitor upon that occasion, shall be handed to the present purchaser." In the month of August, 1861, upon Archer's solicitor's applying to the solicitor of Mathews for a copy of the lease from Graham to Bourke, the latter solicitor refused to furnish same, upon the grounds that their request was barred by the conditions of sale. A search was made in the Landed Estates' Court by Archer's solicitor, when it was discovered, in the rental of Graham's estate, sold in 1858, that Lot 4 contained Bourke's part of Fahy; that the latter was held, at a rent of £27, under a lease of the 1st of May, 1844, containing a covenant to expend £150 in improvements, and also one against sub-letting. As Mathews' solicitor furnished no proof of Graham's concurrence in Bourke's sub-lease to Ellis, Archer wrote to Mathews, on the 10th of August, 1861, to announce that he considered the agreement completely at an end. Mr. Mathews now prayed the specific performance of the agreement.

Frederick Walsh, Q.C. (with him *Alex. Rickey*) for the petitioner.—Archer cannot go behind the Mathews title; he is estopped by the conditions of sale; *Duke v. Barnett* (2 Coll., C. C. 337); *Seaton v. Mapp* (ib. 556); *Hanks v. Pulling* (2 Jur., N.S., 688).

A. Brewster, Q.C. (with him *E. Beytagh*) contra. Archer may object to all matters which appear upon

the abstract of title furnished to him, notwithstanding the above condition of sale; *Sellick v. Trevor* (11 M. & W., 722); *Leatham v. Allen* (1 Ir. Chan., 683). The counsel for the respondent were stopped by the court.

A. Richey, in reply, cited *Froms v. Wright* (4 Madd., 364).

THE LORD CHANCELLOR.—This court has full power to enforce, and often does enforce, very rigid conditions of sale, but it requires, that those conditions of sale must not merely be free from all ambiguity, but that they must be kept in good faith. In a suit for specific performance, this court always expects good faith upon the part of the petitioner; and it will not force upon a purchaser, a contract which is not binding upon him. This court will not force upon a purchaser any contract which a court of law would pronounce invalid. Now, here it said, that the purchaser knew that he was getting a bad title; and his letter to the petitioner, wherein he says he would prefer a Landed Estate's Court title, is relied on as a proof of his knowledge. But I do not construe that letter as a declaration, by the respondent, that the title, as disclosed by the abstract of title, is bad, but merely as a statement that he would prefer a Landed Estates' Court title to the one offered to him. Had there been no letter, in this case, from the respondent to the petitioner, I would feel great difficulty in resisting this petition; but, unquestionably, Mathews took pains to impress upon Archer, that the title was perfectly clear and good; and not merely that the title was good, but that the title had been approved of by his solicitor. What did the abstract of title contain? It was defective in not giving Burke's title, through which all the parties derived. It had never changed. How Mathews could have ever taken the title, I cannot understand. I will not say that Mathews had absolute knowledge of the defect in the abstract transmitted to Archer; but we have his deliberate assertion, more than once, that the title was good. And what turns out to be the case? As the abstract of title did disclose sufficient to put a purchaser on his guard, a condition of sale is prepared to bar inquiries into the title, and the sale proceeds. Now, I do not say there was anything morally wrong in this, but it is perfectly clear that Archer signed those conditions of sale without a suspicion that the title was bad. At this very time, Mathews' solicitor knew that the title was bad, but neither Mathews nor his solicitor gave any warning to Archer. Had they done so, upon the discovery of the defect in the title, they would have been but acting fairly. It is clear that Archer signed the conditions of sale without considering their effect upon the title, which he considered perfectly good, upon Mathews' own representations. Looking at all that has taken place, and all the circumstances of this case, I think that the petitioner was not estopped from objecting to the title by reason of the condition of sale. If the petitioner wishes it, I will send the case to the Master, upon payment, by the petitioner, of the costs up to the hearing; or shall dismiss the petition, with costs.

The petitioner preferred the latter course.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

HILARY TERM, 1862.

[CROWN SIDE.]

THE QUEEN, AT THE PROSECUTION OF DUNCAN GRAHAM, v. THE MAGISTRATES OF BALLYCASTLE, IN THE COUNTY OF ANTRIM.—January 24, 25.

Certiorari—*Fishery Acts*, 5 & 6 Vict., c. 106; 11 & 12 Vict., c. 92; 13 & 14 Vict., c. 88—*Jurisdiction of magistrates when a claim of title is put in by defendant.*

Duncan Graham had been summoned for trespass upon a several fishery. The plaintiff gave in evidence the record of the court showing former convictions for similar offences, and certain patents whereby a several fishery in the neighbourhood was granted to the party through whom he claimed, but whether it was the several fishery in question did not thereby sufficiently appear. The defendants put in evidence of long user, and claimed a right to fish therein, and offered security for costs in case plaintiff would institute a civil action. Held, that this was such a bona fide claim of title as ousted the jurisdiction of the magistrates.

In Hilary Term a conditional order for a certiorari, directed to the justices in and for the County of Antrim, had been obtained, for the purpose of having removed into this court all and singular the convictions, together with all things touching the same, for fishing in a several fishery in the bay of Ballycastle, in the County of Antrim, whereof, at a petty sessions in said County, on the 4th November, 1861, Duncan Graham and seven others were, on the complaint of one George Morton, convicted, in order that such convictions may be quashed, on the grounds that such convictions are irregular, "illegal, and void," and that same are illegal and void on the ground that no such several fishery as is, by the said conviction supposed, was proved, or in fact existed; that a right exists in the public to fish in the *locus in quo*, and was insisted on at the investigation of the complaint aforesaid; that the jurisdiction of the justices to hear such complaint or make such conviction was ousted by reason of the accused parties insisting on a *bona fide* right to do the acts complained of; that they insisted on that right at the investigation of this complaint aforesaid, and that the justices exceeded their jurisdiction therein. The summons on which the case was tried before the magistrates at Ballycastle, was for entering upon a salmon fishery in the sea, in the bay of Ballycastle, in the County of Antrim, under the pretence of taking fish therein, said fishery being a several fishery within the meaning of the 11 & 12 Vict., c. 106, not having been authorised by the owner, occupier, or lessee thereof. The affidavits filed by Duncan Graham and the other convicting parties were to this effect, that the public had fished in the *locus in quo* since 1808. At the trial there were only two witnesses for the plaintiff, and the only other evidence he produced was a lease made to John M'Gildowney by the Court of Chancery, in the matter of H. Bush, a lunatic, for

twenty-one years from 1852, in which there was no reference whatever to a charter or patent granting a several fishery in the *locus in quo*. While the affidavits were being prepared for the purpose of procuring a prohibition, the arrests were made of this accused. The warrants purported to be signed by C. Hunt, but were not signed by him, or only signed in blank; no committals were made out, and the warrants were handed to the jailer. At the trial the plaintiff had produced evidence of convictions for similar offences in the month of October next previous, and of another in 1850, also a patent granting a several fishery to Sir R. MacDonnell, which he alleged to be the fishery in question, and to which he deduced title through Sir R. MacDonnell. The defendants produced no evidence of title on their part. The parties were convicted when, in course of suing out a writ of prohibition, they were imprisoned for four days, and then liberated. The *locus in quo* was nearly two miles from shore. At the trial the attorney for the prosecutor swore that the attorney for the convicted parties had admitted in conversation that the prosecutor was entitled to a several fishery in the *locus in quo*.

MacDonough, Q.C., (with him *E. P. Levinge*) moved that the above-mentioned conditional order be made absolute.—In order to obtain a conviction before the magistrates, the existence of a several fishery must first be established. A party may have a several fishery a little way from land, but the *locus in quo* here was nearly two miles out to sea, where there cannot be a several fishery. There was no evidence given by the prosecutor at the trial that the *locus in quo* was part of a several fishery, and no title on his part was produced by grant or prescription. And even if there were evidence of a several fishery existing in the *locus in quo*, the convicted parties had insisted on a *bona fide* right to fish there for herrings and other fish. There was nothing more proved against the parties convicted, than that they had been guilty of an alleged trespass, and yet the magistrates refused to dismiss the case on the prisoner's application, though they offered to give security for costs, and to defend a civil action if the prosecutors would so proceed against them. The allegations of prosecutors' attorney has been contradicted. What a several fishery is, is defined by 5 & 6 Vict., c. 106, s. 94, and the penalties for infringing on the rights of other parties to such several fisheries, are enacted by 11 & 12 Vict., c. 92, s. 41, and the only way that the alleged offence can be brought home to anyone, is by reference from the latter to the former section, and so far there is no doubt as to inland fishery; but the 13 & 14 Vict., c. 88, raises doubts as to fisheries in the sea, and if any several fishery existed in this case, it was a sea fishery. The 13 & 14 Vict., c. 88, s. 1, gives a further definition of a several fishery. But the penal provision can only be enforced under the 11 & 12 Vict., in case the 5 & 6 Vict. is read with it, for there is no new penal provision referable to the altered definitions in the 13 & 14 Vict. The magistrates had no jurisdiction, when there was a *bona fide* claim, as to title made by the persons prosecuted.—*Paley on Convictions*, 188; *Regina v. Dayman* (7 Ellis & Bl., 672); *Gwynne v. Knight* (Cox's Co.

Court Cases, 47); *Regina v. Justices of Donegal* (5 Ir. Jur. N.S. 185).

Chatterton, Q.C., (with him *F. Falkener, contra*).—The question is, whether the magistrates had jurisdiction. It has been already decided that there was a several fishery in the *locus in quo*, and this is not the place to inquire into the propriety of that decision. By the Fishery Act, complaints of this kind are to be brought in the first place before the petty sessions, 5 & 6 Vict., c. 106, s. 99; and if the parties are dissatisfied with the rule made by the magistrates, they may appeal to the quarter sessions. Other parties were convicted on the same day of a similar offence, and, in addition to this, there was quite evidence enough produced at the trial that the prosecutor had a good title to said several fishery; there was the patent to the Boyd family, the lease, the affidavits, and the previous convictions to establish the jurisdiction, and the assertion of title on the part of the defendants, as against the prosecutor, was only for the purpose of ousting the jurisdiction.—*Brütan v. Kinnaird* (1 Brodery & Reg. 432); *Regina v. Bolton* (1 Q.B., 66; *Regina v. Dayman* (7 El. & Bl. 672); *O'Neil v. Allen* (9 Ir. Com. Law, 132.)

The Court was unanimous in their judgment, which was delivered by the Chief Justice, to the effect that they believed the convicted parties had acted in the exercise of a *bona fide* claim to a right to fish in the *locus in quo*, and they directed the certiorari accordingly.

[HILARY TERM, 1862.]

BLAKE v. HANLY.—Jan. 28th.

Pleading—Equitable defence under the Common Law Procedure Act, 1856, section 88

Action of covenant for £120, being six half years' rent, at £20 per annum, reserved by lease, at rent of £40 per annum, whereof only £20 per annum had been paid. Defence on equitable grounds (there being other defences legal and equitable) that the £40 was inserted in the lease by mistake; and that by deed subsequent to the lease but now lost, and founded on a prior agreement and made by and between the parties through whom plaintiff and defendant respectively claim as landlord and tenant, it was covenanted and agreed upon that the said rent should be £20 and not £40, which latter sum was inserted by mistake. Liberty given to amend, reply and demur.

It appeared that pending the sale in the Landed Estates Court of the lands of Corrownasheheen, some old deeds turned up, under which Walter Blake, the owner of these lands and the plaintiff here, believed himself entitled to a larger rent for said lands than he had been receiving or had been paid by the tenants; and on the application of said W. Blake, Judge Longfield, in whose court the matter was made, the following order, dated 24th July, 1862, directing an issue to be tried—"that Walter Blake, the owner, be at liberty to bring an action against the said Roderick J. Hanly (the tenant of said lands) to recover the full amount of rent reserved by said lease of 24th

February, 1779." This lease of 24th February, 1779, was the old document which had suggested this claim to Walter Blake, the owner. An action was brought accordingly. In order to understand the bearing of the case and the nature of the defence, it is necessary to abstract the pleadings from which the facts will sufficiently appear. They were as follow:—The summons and plaint was an abstract of Walter Blake's title to the lands of Carrownasheheen, at £40 per annum, referring to, 1st—Proof that on the 24th of February, 1779, D. Kelly was seized in fee of the lands of Carrownasheheen. 2nd—Lease of said Carrownasheheen for three lives and sixty-one years, at £40 per annum, by said Daniel Kelly to Roger Hanly, dated the 24th February, 1779. 3rd—Grant dated 13th September, 1788, for 999 years of reversion, dependant on determination of said lease of 24th Feb. 1779, by said Daniel Kelly to Walter Blake. 4th—Grant by said Walter Blake to Francis Blake, dated 19th March, 1779, of said reversion dependant on the determination of said lease of 24th Feb. 1779. And 5th—Grant by said Francis Blake to Walter Blake, the plaintiff, of the entire interest of said Francis Blake, dated 19th August, 1852. And 6th—Averring that £120 was due by the defendant to the plaintiff on account of six half-years' rent reserved by deed of lease of 24th February, 1779. The defences were four legal and two equitable. 1st—After execution of indenture of 24th February, 1779, D. Kelly, by deed now lost and date unknown, agreed with Roger Hanly, whose interest defendant now has, for £20 in lieu of said £40 rent for said lands, and released £20 of said rent, avowment of payment of £20 per annum since then to the 1st May last. 2nd—After the interest of Daniel Kelly had been vested in Walter Blake, said Walter Blake, by deed now lost, agreed to accept £20 rent for said lands. 3rd—Before the making of said lease of the 24th February, 1779, said Walter Blake was seized of one moiety of said lands of Carrownasheheen, and made a lease on 16th January, 1779, of said moiety to Roger Hanly for 999 years, the £40 reserved by said lease being the rent reserved for the entire of said lands; and £40 has been ever since paid for both moieties, and accepted in full satisfaction of plaintiff's claim. 4th—Before action, defendant satisfied plaintiff's claim by payment of £240, as endorsed. 5th—Equitable defence. Before and on the 16th January, 1779, Daniel Kelly and Walter Blake were each entitled to an undivided moiety of the said lands of Carrownasheheen as tenants in common. Walter Blake, by said lease of Jan. 1779, demised an undivided moiety of said lands of Carrownasheheen to Roger Hanly, at £20 per annum. Daniel Kelly, by lease bearing date the 24th February, 1779, demised the other undivided moiety to said Roger Hanly. At and before execution of this lease it was agreed that the rent should be £20 per annum, and £40 was inserted by mistake; and the lease was prepared and executed as a lease of the entire of said lands of Carrownasheheen by mistake. After Daniel Kelly had conveyed his interest to Walter Blake, Walter Blake conveyed said interest to Francis Blake, subject to the lease made by Denis Kelly dated 24th February, 1779, recited to have been made for the rent of 20, and also subject to the lease of 16th Ja-

nuary, 1779, at £20, making in all £40 rent. And Francis Blake took the entire of said lands of Carrownasheheen, subject to said two leases, at rents amounting to £40 per annum, and plaintiff claims through Francis Blake. Ever since said lease of 24th February, 1779, £40, and no more, has been demanded and paid in full satisfaction of the rent reserved under both leases. 6th—Further Equitable Defence: In 1848, four assignees of Roger Hanly's interest were in possession of said lands of Carrownasheheen, and claimed to be entitled to the interest demised by said lease of 16th January, 1779, and 24th February, 1779, made respectively by Walter Blake, and Daniel Kelly. Francis Blake, uncle of plaintiff, and through whom the plaintiff claims, being seized of reversion expectant on determination of said leases, and entitled to the estates and interest of said Walter Blake and Daniel Kelly in said lands, proceeded by ejectment for nonpayment of rent against said assignees of said Roger Hanly. Said Francis Blake claimed £92 6s. 3d. arrears of rent for two and a half years, at £40 per annum, as the entire rent payable out of said lands; and said Francis Blake obtained judgment in said ejectment and entered into possession. By articles of agreement made between said assignees of Roger Hanly and defendant, it was agreed that defendant should pay £266 for rent and costs to said Francis Blake, and should also pay other sums amounting to £454 13s. 3d. to said Francis Blake; and that in consideration thereof said assignees should convey all their interest in said lands of Carrownasheheen to the defendant. Before execution and fulfilment of said agreement, said Francis Blake having notice that the defendant was about to purchase said lands, informed defendant and induced him to believe that the head rent payable to him, Francis Blake, for the entire of said lands was £40. And defendant believing that the rent payable for the entire of said lands was £40, became the purchaser and paid rent and costs as aforesaid to Francis Blake, and also paid the other aforesaid sums. Plaintiff claims under and through said Francis Blake. Before defendant redeemed said lands he was informed that since the making of the lease of the 24th February, 1779, no more than £40—being £20 for each moiety—was ever paid by the tenants of said lands of Carrownasheheen. And ever since he so redeemed said lands £40 per annum, and no more, has been paid by defendant to said Francis Blake and to the plaintiff respectively for the entire of said lands of Carrownasheheen; and said sum of £40 has been so paid up to the 1st May last, and the sum claimed by the plaintiff is a further sum of £20 in addition thereto.

Walter Bourke, Q.C., moved to set aside the fifth (being the first equitable defence) pleaded by the defendant on the grounds that same disclosed no defence good in substance to the said summons and plaint, because that same does not amount to an equitable defence, and because, even if it does, same is not cognizable in a court of law. The court has no jurisdiction, and cannot properly entertain the questions raised by said fifth defence in this action. The fifth defence is purely equitable, and presumes the existence of a deed subsequent to the lease of the 24th of February, 1779, which deed was founded on an agree-

ment prior to the lease, and whereby the mistake as to the amount of rent reserved by the lease was set right, and whereby the proper rent was agreed on between the parties to the lease to be £20 and not £40 per annum. The defendant wants to have the lease of February, 1779, reformed accordingly by a court of law. This cannot be done by means of this fifth defence. Before the Common Law Procedure Act of 1856 it was not open to a court of common law to entertain an equitable defence. The defendant should on these grounds have gone into Chancery instead of coming here. What course can this court take in the matter? A court of equity would refer the matter to its officers to be investigated, and after the master had reported, the matter would come back, and the alterations might thus be effected; but there is no officer here, and nothing analogous to the machinery of a court of equity. You will not permit the instrument to remain unchanged and yet alter its effect, and any extent of parol evidence cannot be made the foundation for amending an instrument on the analogy of a court of equity. There is a good defence in law here, and there is no necessity to go to a court of equity, yet there has been an equitable defence filed, and if you cannot do all that a court of equity can do, you should not interfere at all. [O'Brien, J.—Will you be satisfied to reply and demur? By striking off the defence the defendant will be left without any remedy]. The application with reference to an equitable defence which is inapplicable, should be to have it struck off the file, and it cannot be demurred to—*Considine v. Tullyedy* (2 Ir. Jur. 188,) and the 88th section of the Common Law Procedure Act of 1856, in express words points out the course to be adopted in such cases. *Percy v. O'Caga* (2 E. Jur., N.S., 44); *Suce v. Izod*, (2 Eng. Jur., N.S., 573). An equitable plea of a similar nature was allowed to stand, and considered as a reformation of the instrument—*Steele v. Haddock* (10 Ex., 643); *Burgoyne v. Cottrell* (24 L. J., N.S., Q.B., 28). *Wood v. Dwarris* is here inapplicable as there is no written contract.

J. E. Walsh, Q.C., with him John Harkan, contra.—It is hardly possible to imagine a case in which a court of equity can give complete relief without doing that which a court of law cannot do, but this is no reason why a court of law should not take cognizance of an equitable defence for the purpose of putting an end to contentions, and it would be virtually repealing the Act to refuse permission to file an equitable defence in a case in which a court of equity would do something more than a court of law. [O'Brien, J.—Suppose the case of a joint-bond for £40, and you file a bill in equity on the grounds that the £40 was inserted by mistake, and that it should have been £20, would a court of equity grant you that relief without reforming the instrument?] I don't ask a reformation of the deed of 24th February, but require merely that the subsequent deed should be established, whereby the intent of the parties to the deed of 24th February may be ascertained. It is no preventative to a court of law, interfering that a court of equity would go farther—*Wood v. Dwarris* (11 Ex., 493); *Steele v. Haddock*. Reforming a deed is no part of an equitable defence; there is in equity merely an injunction recognizing the deed—*Luce v.*

Izod (2 E. Jur., N.S., 573); *Colles v. Prendergast* (10 Ir. C. L. R., 336).

Cur. adv. vult.

Judgment was given on January, 31, Lefroy, C.J., being absent.

O'BREX, J.—This is an application to set aside an equitable defence on the grounds that it is not an equitable defence within the provisions of the Common Law Procedure Act. There is doubt as to whether the facts disclosed by the defence are such that an injunction would be granted, and without terms, by a court of equity, and it is open to the plaintiff to say besides that it is not within the provisions of the Common Law Procedure Act, on the authority of *Colles v. Prendergast* and *Wood v. Dwarris*. We give liberty to the defendant to amend, and the plaintiff can then reply and demur.

HAYES, J.—My doubts as to the propriety of this pleading are still greater. This is an action on covenant to recover six years' rent; the defendant says substantially that the deed was executed by mistake, and that the rent reserved should be £20 and not £40. The grounds of the plea is a mistake in the lease, and I don't understand how that question can be open on demurrer. I think it an unwise exercise of our discretion to allow such a plea to be disposed of by a jury which can be far better enquired into as an equitable plea; therefore, I confess I would rather that the court had decided otherwise.

FITZGERALD, J.—I concur with my brother O'Brien in giving liberty to the defendant to amend, and to the plaintiff to demur. I give no opinion on the defence, though my impression is that it is a good defence. The section allowing an equitable defence must be construed liberally.

Agent for the Plaintiff, Edward O'Loughlin.
Agent for the Defendant, John Egan.

EASTER TERM, 1862.

LLOYD v. THE LIMERICK AND WATERFORD RAILWAY COMPANY—April 25.

Railway and Canal Traffic Act, 17 & 18 Vict., c. 31—Railway Company Carriers—Conveyance of live stock—Special contract—Reasonableness of conditions.

A special contract for the conveyance of horses by railway was signed by the person sending them, whereby it was agreed that the defendants should in no case be responsible for the delivery of said horses at any particular time, and should be free from all liability with respect to them whether in loading or unloading during conveyance, or while in the Company's vehicles or on their premises. This contract was contained in a printed form, and was called condition A.; under condition B., at a higher rate, the Company were to be liable for any injury pointed out at delivery. Plaintiff paid at lower rate. The horses were injured in transit by the rail, and the special contract was pleaded in defence to an action for damages. To this there was

a replication by plaintiff, and on demurrer to the replication it was Held—

That condition A., by itself, was unreasonable, and that the contract could only be made reasonable in case the alternative condition B. were reasonable; that condition B. was unreasonable in obliging the party to point out the injury at the time of unloading, and consequently that the contract was unreasonable.

THIS was an action for £300 damages for injuries sustained by the plaintiff's horses while in the charge of the defendants, and for breach of contract. The summons and plaint contained three counts, namely 1st count, that the defendants were carriers from Limerick to the Limerick Junction Railway Station; that as such carriers they received seventeen horses from the plaintiff to be carried for reward to the Limerick Junction Railway Station, and there delivered within a reasonable time. Breach thereof alleged. That the said horses were injured, owing to the want of due care on the part of the defendants. 2nd count, that the defendants agreed with the plaintiffs to carry seventeen horses, and delivered them as in first count mentioned. Averment of conditions precedent. Breach thereof alleged, whereby said horses were injured. 3rd count, that defendants being carriers contracted to carry said horses as in first count mentioned, and deliver them in time to reach Dublin same day. Breach thereof and negligence alleged, whereby said horses did not reach Dublin till the close of the same day, and were thereby injured. Damages £300. Six defences were put in, viz., first, for a defence to the first, second, and third counts, and to each respectively that the plaintiff did not deliver to the defendants said horses for the purposes, and on the terms alleged. 2nd, further defence to the 1st count, that defendants did carry said horses from Limerick to the Limerick Junction Station, and there delivered same within reasonable time, taking due care thereof. 3rd, further defence to the 2nd count, same as last defence, omitting allegation of due care. 4th, further defence to 3rd count, that defendants carried said horses to, and delivered them at the Limerick Junction Station, at such an early hour on the day of their departure from Limerick that they were there in sufficient time to be carried thence to Dublin, so that they should reach Dublin before the close of the same day. 5th, further defence to the 1st, 2nd, and 3rd counts, and to each of them, that said horses were received by defendants from plaintiffs to be carried by defendants as aforesaid at a certain special reduced rate of charge, and under and subject to a certain contract made between the plaintiffs and the defendants, and signed by the plaintiff, whereby it was agreed that the defendants should in no case be responsible for the delivery of said horses at any particular time, and should be free from all liability in respect of them, whether in loading, unloading, during conveyance, or while in the Company's vehicles, or on their premises, and that said injuries complained of occurred at some of these times aforesaid. 6th, further defence to 1st, 2nd, and 3rd counts, and to each of them, that defendants carried said horses as aforesaid with due care, within a

reasonable time, and without delay or detention, and that alleged injuries did not occur by neglect, default, or breach of duty on part of defendants. It appeared that before the plaintiff delivered the horses at the Railway, he wrote a letter to the station master, at Limerick, requesting to know whether his horses could be forwarded to the Limerick Junction Station in time to reach Dublin, and be shipped to England the same day, to which the station master replied by a memorandum, that "the horses might be sent for the special 8, a.m., train next day." The printed form to be filled by the sender of live stock, purported to be signed by Mr. Whiteside, the plaintiff's assistants. It was not signed by him, though it was by the clerk under his authority, but Mr. Whiteside had no authority to depute a third person to do so. Liberty had been obtained by the plaintiff to reply to the fifth defence, that the contract in defence mentioned was contained in the printed form presented for signature at the time the horses were received, setting out said printed form in full, and averring that such contract is unjust and unreasonable. Replication accordingly to fifth defence. The printed form referred to contained a statement of two rates of charge and conditions referable to each respectively. Condition A., for the lower rate, absolved the Company from all liability in respect of said horses. Condition B., attached to the higher rate of 20 per cent extra, was that the Company would not be liable for any injuries unless it was pointed out to the Company's agent at the time of unloading; that the Company should not be responsible for the delivery of horses at any particular time, or for any particular market or race meeting; that the Company would not be liable for more than the value of horses specified in the Railway or Canal Traffic Act, 1854, unless the excess of such horses' value be declared at time of delivery, and there will be a charge of 5 per cent extra on such excess of value. The ticket to be given up on arrival. The plaintiff had paid at the lower rate. To this replication the defendants filed a demurrer that it did not disclose ground of reply to fifth defence, good in substance, because it affects to put in issue matter of law and judicial opinion only; and because it is immaterial whether such contract be just and reasonable or not; and because if material the justice and reasonableness thereof sufficiently appears by the terms thereof and by the facts of said defence; and because the plaintiff, by admitting existence of said contract signed by himself, and by withdrawing question as to reasonableness thereof from enquiry, is estopped from averring that it is not just and reasonable. The demurrer book contained the following points:—1. That the question whether said contract was just and reasonable can only be material under the provisions of the Railway and Canal Traffic Act, 1854; and it does not appear whether the plaintiff has relied on said Act in his pleadings. 2. That even if the plaintiff does rely on said Act, the gist of the action is not for any loss or injury within the said Act. 3. That even if the gist of the action were for such loss or injury, it would be immaterial whether such contract be just and reasonable or not. 4. That if the justice or reasonableness of such contract or of any of the conditions thereof be material, they

sufficiently appear by the terms thereof, and the facts in said defence stated. 5. That the plaintiff by admitting the existence of said contract signed by himself, and by withdrawing the question of the reasonableness thereof from enquiry at the trial, is estopped from averring that it is not just or reasonable. 6. That the second breach in the first paragraph discloses no ground of action good in substance; because no duty is shown in the defendant's to prevent said horses from being frightened, and the residue of said count is answered by the third condition of said contract without any question of justice or reasonableness. 7. That the allegations of injury in the first, second, and third paragraphs respectively is remote and disconnected from, and no part of the gist of the action, which is answered by the third condition as aforesaid. 8. That the replication is bad for referring to the jury mere matter of law and of judicial opinion.

W. Boyd (with *Sergeant Sullivan and Chatterton, Q.C.*) in support of the demurrer.—The condition embodied in the contract is reasonable, and the question in the case of *M'Manus v. The Lancashire and Yorkshire Railway Co.* (4 Hurl. & Nor. 327), does not bear on this one, it is distinguishable in every point. The party bringing the goods to the railway have the option of paying either the low or the high rate; and if he knowingly pays the low rate, he is barred from afterwards questioning the condition, which is a reasonable one. The Railway and Canal Traffic Act was passed to facilitate the transport of horses, and any contract signed under it must be taken to be reasonable.—*Shaw v. The York and North Midland Railway Co.* (13 Q.B., 347).

Dillon (with him *J. E. Walsh, Q.C., contra.*)—The Land Carriers Act was passed to relieve carriers of embarrassments; and all cases decided before the passing of the Railway and Canal Traffic Act, 17 & 18 Vic. c. 31, are *dehors* consideration here.—*Carr v. Lancashire and Yorkshire Railway Co.* (7 Ex. 707), was decided in 1852; *Coggs v. Barnard* (Smith's Leading Cases, vol. 1, 147). *Simons v. Great Western Railway Co.* (18 C.B. 805) are not to be reconciled with *M'Manus' case* (4 Hurl. & Nor.); and *Harrison's case* (6 E. Jurist) do not bear on the present one. The question is, whether the two conditions, separately or together, can be considered by the court as just and reasonable. The condition A cannot be regarded as reasonable, and no additional charge superadded can make it reasonable. No one can make a contract and hold out that he is not liable on the face of it. What is the meaning of condition B? That the company is not to be liable for injury unless pointed out at the time of delivery, i.e., when it is and necessarily must be unknown. The four authorities—*Partington's case* (1 Hurl. & Nor.) decided in 1856; *Wise v. Gt. W. Railway* (1 Hurl. & Nor. 63) in 1856; *Simons v. Gt. W. Rail.*, same year; and *M'Manus' case* in the Court of Exchequer, cited in argument on the other side, cannot be supported since the decision of the latter case in the Exchequer Chamber (4 Hurl. & Nor. 327). But the condition B is equally unreasonable, and the contract falls to the ground.

The following cases were referred to in argument:—*Shaw v. The York and North Western Railway*

Company (13 Queen's Bench, 347); *Pardington v. South Wales Railway Co.* (1 Hurl. & Nor. 392); *Harrison v. London, Brighton, and S. East Railway Co.* (6 E. Jur., 954; *Lewis v. The Great Western Railway Co.* (5 Hurl. & Nor. 867); *Real v. South Devon Railway Co.* (5 Hurl. & Nor. 875; S. C. 29 L. Jour. N. S. Ex. 441); *Philips v. Edwards* (3 Hurl. & Nor. 813); *Philips v. Clark* (2 C. B., N. S., 156); *Simons v. Great Western Railway Co.* (2 C. B., N. S., 620); *Peck v. North Staffordshire Railway Co.* (29 Law Jour. N. S. Q. B. 97); *Ransome v. The Eastern Counties Railway* (8 C. B. N. S. 709); *Lyons v. Mills* (5 East. 428); *M'Cance v. London and North Western Railway Co.* (6 E. Jur., N. S. 1304; S. C. 3 Law Jour. N. S. Ex. 65); *Times Fire Assurance Co. v. Hawke* (28 Law Jour. N. S. Ex. 317).

Cur. adv. vult.

May 8th.—PER CURIAM.—We disallow the demurrer in this case on the grounds that the condition A, as it stands by itself, was an unreasonable one, and that the contract for conveyance could only be made reasonable in case the alternative condition B were reasonable; and as that part of the condition B which obliged the party to point out at the time of unloading any injuries the animals might have sustained in their transit or conveyance was unreasonable, and therefore that the contract was unreasonable.

Agent for the plaintiff—R. D. Kane.

Agent for the defendant—Messrs. F. & E. Morgan.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

HARE v. COPELAND.—Jan. 28, 1862.

Demurrer—Liability of banks—Construction of 16 & 17 Vic. c. 59, s. 19.

There is no obligation on a Banking Company to ascertain the genuineness of a payee's indorsement upon a cheque or draft payable to order before paying same when presented.

A summons and plaint which complains that a Banking Company has paid away money of the plaintiff upon a cheque drawn by the plaintiff and payable to order, but the indorsement upon which is a forgery, and charges that the same happened through their gross negligence and that of their servants and agents, but does not allege any act of wilful misfeasance on the part of the defendants or their servants and agents will be bad on general demurrer (Christian, J., dissentiente).

THE summons and plaint alleged that the plaintiff opened an account with the Royal Bank of Ireland, and lodged £100 with them, which they held payable to his order; that on the 12th July, 1861, the plaintiff drew a cheque directed to the said Royal Bank of Ireland, requiring them to pay £190 7s. 7d. to Messrs. Stewart & Kincaid or their order; that the said Bank then and thence hitherto had ample funds to pay same; that one Peter Lynch forged the signa-

ture of said Stewart & Kincaid as an endorsement on the back of said cheque, and presented same for payment, to wit, on the 13th day of July, 1861; that the said forged endorsement is manifestly not in the handwriting of said Messrs. Stewart & Kincaid or either of them, and is manifestly in the handwriting of said Peter Lynch; and the respective handwritings of said Stewart & Kincaid and Lynch were well known to the servants and agents of the said Bank at their office where same was presented for payment by said Lynch; yet the said Bank then wrongfully cashed said cheque, and paid money of the plaintiff to the amount of £190 7s. 7d. to said Peter Lynch; and said cheque was cashed, and said money of the plaintiff was paid to said Peter Lynch, by the gross negligence in the premises of the said Bank and their servants and agents in that behalf. That the said Peter Lynch has absconded with the said money, and the said money has been thereby wholly lost to the plaintiff; yet that the said Royal Bank, although often requested so to do, have refused to pay the said money to the plaintiff to the plaintiff's damage of £190 7s. 7d. To this the defendant demurred, on the following grounds:—1. That the said cheque is a draft or order on a banker; and that when the same was presented to such banker, that is to say, to the Royal Bank, it had on it an endorsement purporting to be that of Messrs. Stewart & Kincaid, the parties to whose order the same was made payable; and that by the provisions of 16 & 17 Vic. c. 59, s. 19, the said Bank are not liable for paying said cheque when the said endorsement was forged, even if their servants and agents were guilty of gross negligence in having paid the same. 2. That the count does not allege any act of wilful misfeasance on the part of the Royal Bank, or their servants and agents, in having paid the said cheque when it purported to be endorsed with the endorsement of the parties to whose order the same was made payable; and that gross negligence on the part of the servants and agents of the said Bank in paying same on a forged endorsement cannot make the Bank liable for having paid same, under the provisions of the 16 & 17 Vic. c. 59, s. 19, where no misfeasance on the part of the servants and agents of the Bank is alleged.

Heron, Q.C. (with him *Exham*), in support of the summons and plaint.—The purport of a plaint is for the jury, unless there be averments in it which bring it within a particular Act of Parliament. The 19th section of the 16 & 17 Vic. c. 59, which will be relied on by the other side, runs thus:—"Provided always that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof." Now, there are two ways of construing an Act of Parliament like this which takes away a common law right; there is the

rational construction and there is the literal construction. In this instance we get no help from the title of the Act, from its preamble, nor from its other sections. In the judgment of Baron Parke, in *Perry v. Skinner* (2 M. & W. 471), he makes the following remarks upon the construction of Acts of Parliament:—"The rule by which we are to be guided in construing Acts of Parliament is, to look at the precise words and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the Legislature should be done." A literal construction of this section, such a construction as will be asked for by the other side, would lead to manifest injustice. This indorsement did not purport to be the indorsement of Messrs. Stewart & Kincaid. If I do not know a writing to be the signature of my most intimate friend, how can it purport to be his signature? at least it is for the jury to say. In *Planche v. Braham* (4 Bingham's N. C. 17), it was left to the jury to say what was a representation of part of a dramatic production, so as to subject the person representing it to a penalty under the 3 & 4 Wil. IV., c. 15. In *Grant on Banking*, at page 28, we read, speaking of this statute,—"It may be also doubted, perhaps, whether in a case where the payee of a cheque was also a customer of the banker's, and so they would be presumed to know his handwriting and what is not his handwriting, an indorsement purporting to be his would be a sufficient authority to them to pay the bearer, within the meaning of the statute, if such an indorsement were shown to be not the payee's handwriting but a forgery. The statute does not apply, it will be observed, to drafts drawn on a banker *and made payable to order on demand*, but to drafts for a sum of money payable to order on demand; and the sum in a cheque, such as these above mentioned, is not payable (i.e., such as it is their duty to pay) to order on demand." In *Coles v. The Bank of England* (10 A. & E. 437), the question of negligence in both plaintiff and defendant was left to the jury; *Davis v. The Bank of England* (2 Bingham, 393) is also in point. The case of *The British Linen Company v. The Caledonian Insurance Company* (7 Jur. N. S. 587), is an authority for the plaintiff. That was a letter of credit, but letters of credit are described to be drafts or orders for the payment of money within this Act; and the British Linen Company were held liable for money which they had paid upon a forged indorsement.

M'Donough, Q.C. (with him *Harrison*), in support of the demurrer.—The distinction between a rational and a literal construction of an Act of Parliament is a strange one. In modern times it is easy to procure an Act to be passed compared with former times, and this is a reason for sticking by the literal construction. What is material here is the state of the document, not the state of the mind of a bank clerk. In all actions on the case concurrence by the plaintiff in negligence is sufficient to defeat the action. In cases which arose upon the Statute of Frauds, it was sought to reply fraud to a plea of the statute, and it was decided this could not be done. *Hinton v. Dibbin* (2 Q. B., N. S. 646), was a case on the Carrier's Act,

and it was sought to get rid of that Act by importing negligence, but the attempt failed. The case of *Coles v. The Bank of England*, is a greatly misunderstood case; it misled a judge in the Queen's Bench here in the case of *The Bank of Ireland v. Grace*, which afterwards went to the House of Lords. The terms of this section are precise and positive.

At the conclusion of the argument *Mr. Daniel (amicus curiæ)* mentioned to the court that a case apparently in point had been recently decided in England, but that the only report of it was to be found in the *Times* newspaper, where the judgment of Martin B. was given.

Cur. adv. vult.

May 7.—The court differing in opinion, their lordships delivered their judgments seriatim.

CHRISTIAN, J.—The plaintiff claims a sum of money, stating he has an account in the Royal Bank of Ireland. The defendants refuse to pay it, saying they have already paid away the sum in question to an order of the plaintiff. This being so, one would have thought the pleading simple enough, viz., a count for money had and received (the payment of a forged cheque being no payment at all). The defendant might have said they admitted the general rule but pleaded a statute particularly exempting them; but instead of this the parties have thought proper to resort to a novel and experimental method of pleading. [His lordship read the summons and plaint.] The statute is not referred to, nor is it stated that the cheque was payable on demand, nor are several other things mentioned. The defendants have thought proper to demur to this. Dialectically speaking, it is as if the plaint were the ordinary one for money had and received, as if there were a defence stating the facts which are now stated in the plaint, and a demurrer to this defence taken by the plaintiff. Were it not for one of the cases cited at the bar, I should have thought that the words "on demand" would be implied, but that case is directly in point; and though the report of it is highly unsatisfactory, because the grounds of the judgment are not given, yet such judges as Lord Campbell and Lord Wensleydale would be the least likely to go wrong on such a point. These words are not here; and so far there is wanting in the plaint what would bring it within the section. Upon the second question, that of the construction of this section of the Act of Parliament, I am of opinion that the words "purport to be indorsed" cannot be restrained in the way sought to be done by the defendants. Let us suppose a pickpocket seen by the cashier of a bank to steal a cheque and then indorse it, and then present it for payment, no one would contend that such a transaction would be included in the statute, yet this consequence must follow if the words are to be so restrained. In *Perry v. Skinner* (2 M. & W. 471), Parke, B., in giving judgment says, "The rule by which we are to be guided in construing Acts of Parliament is, to look at the precise words and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the Legislature should be done." Here

we need not vary or modify the word, but adopt one of its acknowledged meanings; for, on looking to Webster's Dictionary, I find "import" "signify" amongst the meanings of the word "purport." To this result I come, that the question of purporting is a question for the jury. It is one of fact and of evidence, with a heavy burden of proof on the plaintiff. If there be nothing more in the case the judge will direct a verdict for the defendant; there is no onus on him to prove anything positively; if otherwise, the judge is bound to leave the whole case to the jury. Apply this to the present case. Can we affirm that it conclusively appears to the court that this cheque did purport to be indorsed by the Messrs. Stewart & Kincaid, and that there are no materials here which make a jury necessary? There are three facts all tending the other way; firstly, the indorsement did not profess to be done by procuration; secondly, the handwriting of the Messrs. Stewart & Kincaid was well known to the Bank. To these add the fact, that the officers of the Bank were guilty of gross negligence, which last fact is admitted by this demurrer. I will suggest this question,—did the Bank know that Lynch had not authority from Stewart & Kincaid to indorse; and if so, what is the effect of this, supposing the plaintiff can prove it? Can he then prove it? Are there no materials for proving it apparent, such as ought to go to a jury? The one fact which the defendants have to go upon is, that Stewart & Kincaid's name appeared on the cheque; but that fact, if I have rightly construed the Act of Parliament, is not sufficient. A case was mentioned at the close of the argument which had been reported in the *Times* newspaper, and was said to be in point, concerning which case I differ from some of my brethren on two grounds; firstly, I think the case ought not to be quoted; and secondly, I fail to discover any application it has to the present. One of the greatest evils of the present day is the multiplicity of inaccurate reports. Here have we waited until Easter Term, and the action of this court been paralyzed for so long, in order that we might find out whether observations attributed to Martin B. in the *Times* newspaper were rightly reported; and it turns out now that Martin B. is represented as saying the Act professed to do the very thing which it does not profess to do. The report which I hold in my hand, and which has been obtained from the very respectable firm of solicitors, the Messrs. Freshfield, is brimful of inaccuracies. It might pass for a transcript of the newspaper account, and is evidently taken by one of that class of unprofessional persons who scribble down everything they hear while they understand nothing of it all. It is self-contradictory and unintelligible. The other members of the court are disposed to treat it differently. Let us see then if it has any application here. How much weight shall we give to a dictum of a judge uttered at *Nisi Prius*? I have read this report over and over again, and I am not sure that I know even now what the facts were. What Martin B. said was, that indorsement by procuration was one kind of indorsement, and therefore included in the Act, under the words "purport to be indorsed." Here the case is wholly different; the Bank admit gross negligence. I see no point of contact between the two cases, except

that they both arise upon the same statute. In my judgment the present case is wholly new. Upon both these grounds I am of opinion that the demurrer ought to be overruled.

KEOGH, J.—This is a question of the greatest interest to the commercial, and, especially, to the banking, community? The Act was passed in August, 1853, and in the centre of it occurs this nineteenth section. I do not think it was without good reason, that it found its way there. Cheques were previously paid to bearer, as we all know, and the Legislature contemplated imposing a large additional business upon banks, and introduced a new kind of cheque—the one upon a stamp. The business of the banks has, in consequence, been increased a hundred or a thousand fold. Formerly, their liability was gone as soon as the cheque was paid; but the moment this new system commenced, the banks must have had an enormous liability imposed upon them, unless contemporaneously they were protected in some way. Must the bank know the authenticity of every signature—suppose that of a man who resides upon the Continent? What is the protection? If there be none, the banks must have closed their books and ceased to transact the business of the public. This section gives the protection, and an adequate one, if it is not frittered away by the ingenuity of the lawyers: “It shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.” I fail to comprehend any language which can be invented to throw a shield over the bankers, if this does not. These words are plain and intelligible. So much for the object of the Legislature. My Brother Christian has referred to the pleadings. Do these pleadings bring these bankers within the terms of the Act of Parliament? What is a cheque? What is understood to be a cheque by any lawyer—any bank—any bank customer? A cheque is what is payable on demand. Again, what are we to understand by “purport?” Does “purport to be indorsed,” simply mean “be indorsed?” If so, there would be no *casus* for the Act to operate upon. It is said the allegations in this plaint take this case out of the Act; on the contrary, I think they make it one of the cases intended to be comprehended in this section. I stop not to inquire what the civil and criminal consequences of this construction are. I hesitate not to believe, that if a bank clerk were to pay a forged cheque, knowing it to be forged, he would become an accessory before the fact. The case of the British Linen Company does not come within the Act at all: that was the case of a letter of credit, which is within the schedule only, and it is there for revenue purposes. But even though this case, so far, be within the section, it will not interfere with my construction, because the words “on advice” are there. Are these words to be thrown out? Are they to go for nothing? Why, from pole to pole, transactions are conducted by British merchants on the strength of these words, “on advice.” When we, the members of the court, in common with the members of the bar, can escape from the fatigues and labours of this place, and visit

the Continent, as is so customary, I know what sort of a security we take with us, and the nature of the orders we carry upon continental bankers. I go with my brother Christian, however, in what he says upon the multiplicity of modern reports. We are overwhelmed with jurists and journals and reports, of every variety and description, concerning which it were to be wished that some modern Omar might appear and make short work with them. The case, so playfully, and, at the same time, so truly, handled by my brother Christian, did not, however, paralyze the action of this court, at least so far as I am concerned, for I could have decided this question on the last day of last term with as little doubt as I have ever felt about anything. I have no doubt now, beyond the degree of doubt which one must always feel when in opposition to the opinion of my brother Christian. Neither can I reject the words of Baron Martin, as set out in the document procured from the Messrs. Freshfield, who are solicitors to the Bank of England; for why should I reject the words of this report, taken, probably, for the purposes of the suit, while I do not reject, and while this court does receive the words given in these reports, whose multiplicity is complained of? I, therefore, think that this demurrer ought to be allowed.

BALL, J.—I concur in the judgment of my brother Keogh, and also in the grounds upon which he has given that judgment.

MONAHAN, C.J.—It will be scarcely necessary for me to add anything to what has already fallen from the court upon this demurrer. I concur in the judgment of the majority of the court. The question here is simple as to facts; it is upon the construction of an Act of Parliament. I look upon this pleading as advisedly prepared to raise the question of that construction on the demurrer; and it would be the same question, whichever party demurred. What, then, is the true construction? The state of things before the passing of the Act, if considered, must take away any doubt. The intention of the Legislature is to be gathered from the object they had before them. [His Lordship read the section.] The banker is to be protected though he pays upon the forged order or cheque. What does the word “purport” mean, but that the cheque is to purport to be indorsed, on looking at it? And it can make no difference in the meaning of the word, whether the handwriting of the payee is known to the bank or not. It can make no difference whether the forgery is ill done or well done. What other meaning, then, can be given to this pleading than that the pleader has sought to take his case out of the section of the Act? The meaning of the report from the Messrs. Freshfield is exactly what my brother Christian has put upon it, and I am glad of its assistance, manre the inaccuracies which it contains, in common with many short-hand notes and other notes which may come before us. I will not reject it because it is disfigured by slipshod grammar. Now, I do not contend that this Act of Parliament will give the bank any protection if they act *malâ fide*. But what is the statement here? That a cheque was payable to the order of Messrs. Stewart and Kincaid. Everybody knows, as my brother Keogh has said, that a cheque is what is payable

instant, and if not, it is no cheque. Therefore, this comes within the mischief of the Act, and so, within the object of the Act. Writing the name across, as alleged in the pleading, means forgery. It is not stated that the bank knew it to be a forgery, but that the endorsement is manifestly not in the handwriting of the Messrs. S. and K., and that their handwriting was known to the officers, &c., of the bank. These are averments of facts which may prove knowledge, but do not amount to knowledge, and are consistent with the fact that, knowing as they did, they hastily and negligently paid the cheque, without examining it sufficiently. I do not think that the House of Lords, in the case of the British Linen Company, decided what they are alleged to have done. That was the case of a letter of credit. It is urged that letters of credit are included in the schedule to the Act, but that is only for revenue purposes. There is the case of *Raphael v. The Bank of England*, to be found in Roscoe's *Nisi Prius*, p. 293; and the case of *Goodman v. Harvey* (4 Adol. & El., 870), which contain this principle, that gross negligence may be evidence of *mala fides*, but is not equivalent to it, is not itself *mala fides*. There is also a case in the current volume of the Queen's Bench reports, which is an authority for this, that if the pleader states a number of facts which fail to bring him within a statute, that question may be raised on demurrer. It would be an extravagant amusement for us to send the parties to try a case, where, if the plaintiff proved all his facts, he must fail. I, therefore, concur in the judgment of the majority of the court, that this demurrer ought to be allowed.

Demurrer allowed.

Metropolitan Court

OF THE ARCHDIOCESE OF DUBLIN.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

[BEFORE DR. RADCLIFF, Q.C., V.G.]

THE REV. ROBERT FITZGERALD MEREDITH, CLERK, PROMOVENT; THE BISHOP OF LIMERICK, ARDFERT, AND AGHADOE, IMPUGNANT.—May 13.

Benefice—Joint owners—Right of presentation—Duplex querela—Composition to appoint by turns—Jus patronatus.

In 1836 a parish was, pursuant to 7 & 8 W. 4, c. 43, duly divided into three separate parishes, A., B., and C. The patronage of the original parish belonged to six persons as joint owners, whether as parceners, joint tenants, or tenants in common, did not appear. By a deed of the 10th of June, 1851, executed by the several persons then entitled, as representing the said six persons as patrons, reciting the intention to make partition of the advowson, donative, and right of presentation to those three parishes, the said several parties mutually covenanted with each other, that those representing two of said patrons, and their heirs and assigns, should for ever have the advowson, donative, and presentation to A., and those representing two others to B., and those representing two others to C., as tenants in common for their share and proportion; and the deed contained mutual covenants by said several persons, that said respective persons should hold their

share of said rectories, &c., freed and discharged from all right, &c., of the other parties and for further assurance. But no express grant was contained of any of the benefices. By a presentation of the 11th October, 1861, the persons to whom A. had been so allotted, presented the promovent to it. The other patrons did not join in that presentation. Held, that the deed of June, 1851, did authorize the parties to whom it was allotted to present without the concurrence of the others, and that the effect was in reality a composition to appoint by turns, though not applying to each benefice.

Semble, that the covenants and agreements in the said deed did amount to a legal release of the right of the other patrons.

Held, also, that after service of an inhibition from the metropolitan on the bishop, the bishop could not act on a second presentation served on him after, though dated and executed before such service.

If the church were litigious, the bishop himself should issue the writ "jus patronatus."

A CONDITIONAL order for a monition had, in February, 1862, been obtained by the promovent directed to the impugnant, commanding him to admit the promovent to the Rectory of Ballyguishlane, in the County of Kerry and Diocese of Limerick, and to cause him to be instituted and inducted into the possession thereof. The parish of Castle Island, of which there were in 1836 six patrons who were joint owners, was, by the Lord Lieutenant and Privy Council, duly divided, pursuant to 7 & 8 W. 4, cap. 43, into three separate parishes, one of which is the parish of Ballyguishlane aforesaid, and by a deed of the 10th of June, 1851, the several persons entitled to the patronage of Castle Island, agreed to give the patronage of Ballyguishlane to Col. Drummond, Mrs. Drummond, Mr. Fairfield and Mr. Townsend, their heirs and assigns for ever; [these parties represented two of the original patrons]; and the right of patronage to the other two parishes was, in like manner, agreed to be held by those representing the other two respective sets of patrons, and a presentation of the 11th of October, 1861, signed only by Mrs. Drummond and Mr. Townsend, (Col. Drummond and Mr. Fairfield being dead,) but not signed by the other patrons, presented the promovent as clerk to Ballyguishlane. The bishop refused to act on this; and after the service of the monition and inhibition on the bishop, another presentation, dated before such service, was served on the bishop, signed by the same persons as had signed the other presentation and several others of the patrons. The bishop, by a petition on the acts, set forth his reasons for not acting on said first presentation, and to this the promovent filed an answer. These, and the other facts in the case, will be found fully stated in the judgment.

Dr. Ball, Q. C. and Dr. Elrington, for the bishop, showed cause against the order for the monition, and argued that the parties representing the six patrons ought to have signed the deed of June, 1851, as having the legal estate in the advowson; and, not having done so, the presentation signed by those representing only two, could not confer the right. Also, that as there was a second presentation on the 11th of February, signed by those representing four of the six patrons, the bishop had the right of selection of the two clergy-

men so presented. The deed of partition only gave an equitable and not a legal right; and though it might operate by estoppel to oblige all to present the nominee of one, yet the bishop should see that all joined. The church was litigious, and a writ of *jus patronatus* ought to have been issued. 1 Burns Ecc. 41, 22; *Westfaling v. Westfaling*, (3 Atk. 465); *Attorney-general v. Bishop of Lichfield* (5 Ves. 828.)

Dr. Battersby, Q. C. and Dr. Walsh, Q. C., for the promovent, contended that the deed of June, 1851, was a perfect deed of partition; or, at all events, a good composition; and even if nothing passed under it, it operated as an estoppel, and no one could claim against it. The church was not litigious; and if the *jus patronatus* were necessary, the bishop himself should have issued it. Deg., cap, 3, P. 1, p. 16; Watson, 113.

Cur. adv. vult.

May 23.—*DR. RADCLIFF, Q. C.*—This is a proceeding by way of what is called technically a *duplex querela* instituted by the Rev. Robert Fitzgerald Meredith, clk., who complains to the Metropolitan of the Province, of the Bishop of Limerick having, without sufficient cause, refused and delayed to institute him into the rectory and parish of Ballyguishlane, in the County of Kerry and diocese of Limerick, to which he alleges he was duly pre-sented by the true patron thereof. If the promovent has been aggrieved in the manner stated by him, his proper remedy is by means of a *duplex querela*. It is an ancient remedy, though seldom resorted to, the patrons alone being entitled to proceed by an action of *quare impedit*. The promovent having made an affidavit pursuant, save in one respect, to the 57th Irish canon, applied for a monition, at the commencement of the proceedings. The defect in his affidavit was, that he failed to depose, as required by the Irish canon, that two months had elapsed since he first tendered his presentation to the bishop, which is the common law rule of the Church, but which period has been abridged by the 95th English canon to 28 days in England. The bishop, however, waived the point, which, if raised, would have been merely technical, and the monition accordingly issued on the 24th February, 1862, requiring the bishop, according to the usual form, to institute the promovent to the benefice in question within the time thereby limited, and in case of his failure to do so, citing the bishop to appear and show cause why (the right having devolved on the archbishop through such denial and refusal of justice) the promovent should not be instituted and inducted by the Archbishop of Dublin, and also inhibiting the bishop from doing anything to the prejudice of the promovent. The bishop appeared to the monition, and, by a petition on the acts exhibited on the 17th April, alleged his reasons for not having instituted the promovent, and which are solely founded on what the bishop was advised are legal defects in the presentation. To this petition the promovent on the 3rd May exhibited an answer, and on these pleadings, with the documents and letters thereby referred to, the case was fully and ably argued and discussed. It appears that, prior to 1836, the parish of Ballyguishlane formed part of the large union of Castle Island, the patronage whereof

belonged to persons whose titles are set forth in a certain instrument dated 27th November, 1836, which has not been produced here. By an act of the Lord Lieutenant and Privy Council, dated the 4th January, 1836, that union was pursuant to the provisions of 7 & 8 W. 4, c. 43, and with all necessary consents, divided, and three separate and distinct parishes thereby erected, one being the parish in question. The patronage of each separate parish remained as before in the patrons of the entire union, but whether as parceners, joint tenants, or tenants in common, does not distinctly appear, by reason of the non-production of the instrument of the 27th November, 1836. Nothing further appears respecting the three parishes so erected up to the 10th June, 1851, when a deed called articles was executed by and between the parties representing all the patrons, which recited the act of council in which said instruments of 27th November, 1836, are shortly recited, and also recited that the parties thereto, by reason of the deaths of some who were living in 1836, and otherwise, were the patrons, but gave no information respecting the title, whether the patrons held as parceners or as tenants in common—for the recitals would seem to negative a joint tenancy—but I would rather infer from the deed that the title was one of coparceners, whose heirs and assignees would be entitled to all the privileges conferred by such a title. The deed then recites the desire of the parties thereto, as far as in their power, to make such partition of the advowson, donative, presentation, and right of patronage to the rectories and parishes as is hereinafter particularly expressed, and it is witnessed that in pursuance thereof, and in consideration of the mutual covenants therein contained, they of the third and other subsequent parts covenanted with Lady Headley of the first, and Henry A. Herbert of the second part, that they, their heirs and assigns, should have and enjoy for ever the advowson, donative, presentation, and right of patronage of the rectory and parish of Castle Island (being one of said three parishes), as tenants in common, and not as joint tenants; for their share and proportion of said rectories and benefices, freed and discharged of and from all right, title, share, claim of advowson, and donative, presentation and right of patronage, and demand of them, the said other parties and patrons. There is a similar provision and covenant by Lady Headley and Mr. Herbert, and the two other patrons, respecting Ballyguishlane, and also similar provisions and covenants, to give the patronage of the third erected benefice to the other patrons, their heirs and assigns. There are mutual covenants for further assurance, and also that each set of patrons would, if required, concur in nominating and presenting an incumbent to their respective parishes. But there is no express legal conveyance made of the respective parishes to the respective patrons, though in all other respects the rights of all the parties are fully provided for, and protected by this deed under the hand and seal of every person interested. The main question in this case is what is the legal effect and operation of this deed. The advocates of the bishop contended that it amounted to an equitable contract that each set of patrons should nominate or present to the benefice allotted to them, but to give it legal effect, all the

patrons should join in the presentation, whilst the advocates of the promoveut contended, first, that it operated as a valid composition or partition; and secondly, that it amounted to a release of all the other patrons to each set of patrons of the particular benefice allotted to them respectively, so as to vest the legal right in them alone. The law seems to be clearly settled that coparceners and tenants in common might enter into a composition to present by turns, coparceners having the privilege to make such composition by parol, being one heir, and having the right to present by turns if they do not agree. But tenants in common (viz., those who have an equal right to the advowson, but by several titles or several rights) cannot make such composition to present by turns without deed; and if no such composition or partition be made in writing or by deed, all must join in the presentation. See Dyer Rep. 29a, where the rule is laid down, in 28 H. 8, and has been recognised in several subsequent cases, and is stated in Co. Litt. 186, b. The coparcener or tenant in common having the turn under composition might, by the common law, present in his or her own name alone, and maintain an action of Quare Impedit—*Bishop of Salisbury v. Phillips* (1 Salk. 43, S. C. 1, Raym. 535); Watson, 68. And in 1 Raym. the case was strongly argued on the same principles as by the advocates of the bishop here, that a similar deed was only good by way of estoppel; for in case of land it would not amount to a partition. But such argument did not prevail. There were, no doubt, formerly difficulties in the proceeding in such cases, from the effect of usurpations driving patrons to writs of right; for even if parceners had agreed to present by turns, though it was a partition as to the possession, so that each might maintain an action of quare impedit, yet they must, at common law, have all joined in a writ of right—*Corbet's case* (1 Rep. 87, b). These difficulties were removed in England by 7 Ann c. 18, and in Ireland by 1 Geo. 2, c. 23, secs. 6 & 7. Sect. 6 providing by declaratory enactment that usurpations shall not displace the estate of a patron or turn it to a right, so as to prevent the patron from proceeding by quare impedit. And Sect. 7 provides that if coparceners, joint tenants, or tenants in common, be seized of any estate of inheritance in the advowson of any church or vicarage, &c., and a partition is or shall be made between them to present by turns that thereupon everyone shall be taken and adjudged to be seized of his or her separate part in his or her turn; and, if there be two, and they make such partition, each shall be said to be seized,—the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn. In like manner, if there be three, four, or more, everyone shall be said to be seized of his or her part, and to present in his or her turn, by which the difficulty of all being obliged to join in a writ of right was removed, as noted by the editor of the Reports—1 Rep. 87 b. n. z. 1. There is no change made in the law by this Act respecting what shall constitute a partition, thus leaving such matters as at common law, the partition by coparceners being capable of being made by a parol composition to present by turn, save so far as might be affected by the Statute of Frauds;

and partition between tenants in common to be made as before by a composition in writing or by deed to present by turns. If, therefore, in this case the agreement had been made to present by turns (whether the patrons were parceners or tenants in common would be immaterial, as the agreement is by writing and deed under hand and seal) there could not have been a question raised respecting the right of patronage being vested in those patrons alone to whom the parish in question had been allotted. But it has next been contended for the bishop that the deed of the 16th June, 1851, is not a composition to present by turns, and therefore not a partition within the 1 Geo. 2, and is of no avail for want of a legal grant. On this point there seems to be no difference between coparceners and tenants in common; and if coparceners could make a valid partition or composition by giving more than one turn to one of themselves, so might tenants in common. That coparceners might do so seems plain—Watson, 68; Co. Entries, 468; and if they could, by deed or agreement, have two turns allotted to one, there is no principle or reason to prevent more than two turns being allotted to one. So if one coparcener could be deprived of one turn, and if all the turns of presentation could have been allotted to the other two, there would be no principle or reason to present in the case of there being two advowsons an allotment of the presentation to one benefice to one coparcener, and the second to the other coparcener. If such could have been good in the case of coparceners by deed, it would also be valid in the case of tenants in common. There is nothing unreasonable in such a partition as is here. A large living is divided into three; and instead of all the six patrons agreeing to present in turns, they agree that two of them shall present for ever to one benefice, two of them to another, and two of them to another, just as in the case above suggested, and it seems to fall within the rule laid down in respect of the partition of one advowson; and though here they might have granted a separate benefice and advowson to each set of patrons, they were not bound to do so if they could effect their object by a composition respecting the turns of presentation without conveying the estate or title to the advowson. But this is a composition in reality to present by turns, though the turns do not apply to each benefice,—one being allotted to two patrons, one to two others, and one to two others. I therefore think that by virtue of the deed of the 10th June, 1851, Colonel and Mrs. Drummond, Mr. Fairfield, and Mr. Townsend, parties thereto of the 3rd and 6th part, became entitled to present a clerk to Ballyguishane without being joined in the presentation by the other patrons. Being of this opinion it is unnecessary for me to consider the second branch of the argument urged for the promoveut, that the covenants and agreements in the deed of 1851 amount to and constitute a legal release of all right and title of the other patrons, though if it were necessary to decide that point I should incline to that view. If the covenant that such persons shall hold, &c., "freed and discharged of and from all right, title, and claim of the other" be a release, it would seem to vest all in the above named patrons, even if only tenants in common—Co. Litt. 270, b.; *Brooks-*

be's case (1 Cro. EL 174); *Bennett v. Bishop of Norwich* (ib. 600). But if the title be in coparcenary, as it seems to be, a release by one would be clearly valid and binding in law. It remains to consider if the promovent has made out his right to relief. Since the execution of the deed of 1851, the right to present to Ballygnishane has, by the death of Mr. Drummond and Mr. Fairfield, been vested in Mrs. Drummond and Mr. Townsend alone. On the death of the Rev. Mr. Sandes, who was the incumbent in August, 1861, the promovent obtained a presentation, dated 11th October, 1861, purporting to be that of six true and undoubted patrons of the benefice, one of them an infant represented by two gentlemen as guardians under the Court of Chancery. But it was only signed by Mrs. Drummond and Mr. Townsend. This presentation was submitted to the bishop, who very properly refused to institute thereon for want of the other signatures. The promovent states in the reply to the act on petition of the bishop, that to remove the bishop's objection he caused a copy of the deed of 1851 to be submitted to him to satisfy him that Mrs. Drummond and Mr. Townsend were solely entitled to the advowson without the concurrence of the other parties; but that the bishop, notwithstanding, refused to act on the presentation, or to institute him without a presentation of said six patrons. The motion was served on the 24th February; and from the correspondence with the bishop's chaplain, it appears that he waives all formal objections, and the case is to be decided on the effect of the deed of 1851. A second ground of objection on the part of the bishop was suggested by his act on petition that another presentation, dated 15th February, 1862, was made in the name of all six patrons, but signed by Mrs. Drummond, Mr. Townsend, Lady Headley, and Mr. Herbert; and that the church is and has been in litigation; and that no writ of *jus patronatus* has ever been issued out from a bishop. But inasmuch as such presentation, though made and dated 15th February, was not laid before the bishop till after 24th February, when he was inhibited from doing anything to the prejudice of the promovent, such presentation could not materially, if at all, affect the decision of this case. Besides, the church was not litigious by tenants in common presenting several clerks, as was shown by the cases cited in argument and those collected in Deg. part 1, cap. 3, p. 19. Even if it had been rendered litigious before the inhibition had been served, the bishop should have issued his *jus patronatus*, if such were necessary, of his own accord; and such not having been issued, affords no answer in a proceeding of this nature—Conset, p. 6, s. 9, p. 351. Here, then, is a case of a clerk duly presented by the true patrons without any claim by any other patron, without any intervention of any other clerk, and without any personal objection to Mr. Meredith, to whom institution has been refused on the ground merely that other parties have not signed his presentation. I must therefore decree and declare that the bishop has not shown sufficient cause why the promovent should not be instituted and inducted into the living in question, and the institution hath devolved on the Archbishop of Dublin; but as the bishop has acted with great fairness in waiving technical points on which he might have relied, I make the decree without costs.

Court of Appeal in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

STACK v. ROYSE.—April 23 & 24.

Covenant to settle after-acquired lands—Judgment against the covenantor void as against those lands.

R. conveyed the lands of A., of which he was seized in tail in remainder, together with all and singular of the lands and premises which he then was or thereafter might be entitled to in reversion, remainder, or otherwise howsoever to trustees to the use of himself for life, remainder as he should appoint among the issue male of the marriage, remainder over. He also covenanted to do any act or execute any conveyance if required of the lands of A., or any other lands and premises of which he should at any time thereafter be possessed of or entitled to, for the further and absolute carrying the settlement, and the true intent and meaning of the parties thereto into full legal and perfect execution. In 1819 a judgment was recovered against R.; and in 1839 he became entitled, as heir-at-law of his brother, to the lands of B., which were not mentioned in the deed of 1794. R. died in 1859.

Held (affirming the decision of the court below) that the trusts of the deed of 1794, which were perfect and complete, attached upon the lands of B., when they descended upon R.; and that the eldest son of the latter was entitled to hold them discharged of judgment.*

By the settlement made on the 17th of May, 1794, in contemplation of the then intended marriage of Robert Royse and Elizabeth Stack, it was witnessed that in consideration thereof Robert Royse granted and confirmed unto trustees the lands of Ballinreelick, together with all other the lands, tenements, and hereditaments which Robert Royse then was or thereafter might be possessed of or entitled unto in reversion, remainder, or otherwise howsoever, with the appurtenances, and all the estate, right, title, claim, and demand of Robert Royse in or to those lands, and all other lands he might be thereafter possessed of or entitled to. To hold the same, together with all and singular other the lands and premises which Robert Royse then was or might be thereafter possessed of or entitled to, with their and every of their appurtenances, to the use of Robert Royse during his life, and after his decease to the use that Elizabeth Stack should receive a jointure out of the said lands, or any other lands, tenements, or hereditaments Robert Royse might at any time thereafter be possessed of or entitled to, with powers of distress and entry upon the said lands therein named, or any other lands, tenements, or hereditaments which Robert Royse should at any time thereafter be possessed of or entitled unto. And it was thereby agreed that it should be lawful for Robert Royse by deed or will to give, grant, or devise to, or in trust for the issue male of the intended marriage, or to one or more of them, all the lands of

* 12 Ir. Chan. 246.

Ballinreenick, or any other lands he might be thereafter possessed of, charged with the jointure and subject thereto, to the use of the first and other sons of the intended marriage in tail male. John Stack on the 16th day of November, 1819, obtained a judgment in the Court of Exchequer in Ireland, against Robert Royse for the sum of £6,000, late currency. John Stack died in the year 1827. His wife, Catherine Jane Stack proved his will; and on the 13th of June, 1838, she caused the judgment to be re-docketed, and to be duly revived in Hilary Term, 1840. Robert Royse was, at the rendition of the judgment, heir-at-law of his elder brother, Vere Royse, an idiot, and had, as the committee of the estate of the idiot, in 1796, obtained a grant from the crown of the custody of the idiot's estate. Vere Royse, the idiot, attained his age of 21 years in 1792, and thereupon, by virtue of his father's marriage settlement, dated 7th April 1770, became seized of the lands of Knockabooly, situate in the County of Limerick, and held under the See of Limerick by a lease for lives renewable for ever. A renewal of the latter lease, dated the 28th of October, 1801, was executed by the then Bishop of Limerick, to Robert Royse, the committee of the idiot, for three lives therein named, of whom Thomas Royse is the survivor. By a deed dated the 18th of November, 1819, Robert Royse exercised his power of appointment in favour of his eldest son, Thomas Royse, his heirs and assigns. Vere Royse died in September, 1839, and thereupon the lands of Knockabooly descended to Robert Royse. By an order bearing date the 16th of April, 1841, the receiver appointed in the matter of Garrett Hugh Fitzgerald against Robert Royse, was extended to the matter of Catherine Stack's judgment over both the lands of Ballinreenick and Knockabooly. The receiver entered into receipt of the rents, and applied the same in payment of head rents and renewal fines, and of incumbrances prior to Stack's judgment, the entire amount of which is now due. Robert Royse died intestate on the 18th day of April, 1859, leaving Thomas Royse, his eldest son and heir-at-law him surviving, who, without obtaining the leave of the court, entered into possession and receipts of the rents of the several lands over which the receiver had been appointed. Catherine Jane Stack having died, Nathaniel Massey Stack, the petitioner and appellant, obtained administration with the will annexed of the goods unadministered of John Stack, deceased; and on the 27th of June, 1860, he obtained a conditional order to continue against Thomas Royse, as heir-at-law of said Robert Royse, the proceedings instituted by Catherine Jane Stack. The motion to shew cause against the conditional order came on to be heard on the 11th of December, 1860, when the Master of the Rolls made an order to the following effect:—"That the motion do stand over until the 1st day of next Hilary Term; and it appearing to the court, having regard to the lease dated 28th day of October, 1801, of the freehold lands over which said receiver was appointed; that petitioner was entitled to revive the said judgment as against the said freehold lands, and thereupon to issue an *elegit* against the said lands; and counsel for the said Thomas Royse insisting that petitioner was not entitled to revive the said judgment

or issue an *elegit* as against said lands, it was ordered that your petitioner should be at liberty, if so advised, to take the necessary proceedings to revive the said judgment against the said freehold lands, and to issue an *elegit*, without prejudice to the said Thomas Royse filing a cause petition to enforce the equity relied on by his counsel under the provision of the deed of the 17th day of May, 1794." N. M. Stack accordingly issued a *scire facias* to revive the judgment, and obtained judgment thereon against all the parties defendants, save Thomas Royse, who relied on the Statute of Limitations. The petitioner thereupon served notice of motion in the Rolls, that as regarded the fee-simple lands over which the receiver was appointed, the cause shewn should be allowed; but that as to the freehold lands, the conditional order of the 27th day of June, 1860, might be made absolute, and that the proceedings might be continued. By an order of the 30th of April, 1861, the motion was by consent set down in the list of causes for Trinity Term; and on the 4th of November, 1861, his Honor allowed the cause shewn against the conditional order of the 27th of June, 1860.* From this order Nathaniel Massey Stack now appealed.

A. Brewster, Q.C. (with him *R. R. Warren, Q.C.*, and *Exham*), for Thomas Royse, in support of the ruling below.—If a man covenants to settle all after acquired lands, those lands are bound by that covenant in priority of all debts. Robert Royse became a trustee for the trusts of the settlement of 1794, when he acquired the freehold lands of Knockabooly—*Hardey v. Green* (12 Bea. 182); *Wilkins v. Wilkins* (4 Jur. N. S. 47); *MacLurcan v. Lane* (5 Jur. N. S. 56); *Lewis v. Maddock* (8 Ves. 149); *Jones v. Kearney* (1 Dru. & War. 169); *Oreed v. Carey* (7 Ir. Chan. Rep. 295). This was a complete contract by Robert Royse, therefore the case is not analogous to those of *Ennis v. Smith*, (1 Jon. & Car. 401) and *Mornington v. Keane* (2 De G. & Jon. 292).

Serjeant Sullivan (with him *E. H. Burroughs* and *Tudor*) for Nathaniel M. Stack, the appellant.—The effect of the covenant in the settlement of 1794 was to create a personal obligation upon Robert Royse to convey the after acquired lands when his title to them should accrue. That covenant creates no estates in the lands—*Carleton v. Leighton* (3 Mer. 617); *Lyde v. Mynn* (1 M. & K. 683); *Mornington v. Keane*, (*supra*). [*The Lord Justice of Appeal*.—Although the covenant was merely personal, the lands were bound by it.] Until the estates of Vere Royse fell in, Robert Royse could have dealt with those lands as he pleased. Possession under the Sheriff's Act would appear to be tantamount to possession under an *elegit*, per Pennefather, B.—*Ennis v. Smith* (1 Jon. & Car. 410); *Metcalf v. The Archbishop of York* (1 Myl. & Cr. 547); *Falkiner v. O'Brien* (2 B. & B. 214); *Antrobus v. Smith* (12 Ves. 39); *Meek v. Kettlewell* (1 Phil. 342); *Holroyd v. Marshall* (2 Giff. 382); affirmed on appeal (7 Jur. N. S. 319).

R. R. Warren in reply.

April 24th.—THE LORD CHANCELLOR.—I am of opinion that the decision of the Master of the Rolls should be affirmed. There is no question here, as

* 12 Ir. Chan. Rep., 246.

there was in many of the cases, as to the intention of the parties to the deed of 1794. It was clearly the intention of all parties to subject the after acquired property to the trusts of the deed of 1794; therefore, the only question for us to consider is, can a man by a deed for valuable consideration bind after acquired lands. Now, the case of *Medcalfe v. The Archbishop of York* (1 Myl. & Cr. 547), is a very strong authority as a proof of how far covenants will bind after acquired property; so are the cases of *Rowlatt v. Rowlatt* (1 Jac. & W. 280); and of *Meek v. Kettlewell* (1 Hare, 464). In those cases the distinction is taken between trusts actually created and trusts to be carried out by a subsequent act. In *Mornington v. Keane* (*supra*) there was no absolute grant binding the after acquired lands with the annuity. This question was very fully discussed in the case of *Creed v. Carey* (7 Ir. Chan. Rep. 419); and I am of opinion that the lands of Knocknabooly descended upon Robert Roysse affected by the covenant contained in the settlement of 1794, and discharged of Mr. Stack's judgment.

THE LORD JUSTICE OF APPEAL.—I agree with the Lord Chancellor that the decision below should be affirmed. The words of the deed of 1794 are quite sufficient to fix the after acquired lands of Knocknabooly with the trusts of that deed. Even if there were not an express trust, a bill for specific performance would be sustainable to carry out the contract as to the after acquired lands.

Appeal dismissed, with costs.

A. Brewster, Q.C., asked for the costs of the proceedings below as well as those of the appeal.

Serjeant Sullivan, contra.—The Master of the Rolls was so dissatisfied with the conduct of Thomas Roysse in going into possession in despite of the receiver, and without obtaining an order from this court dismissing him, that he did not give any costs. Were it not for the cases of *Britton v. McDonnell*, and *Kenny v. Clarke* (5 Ir. Eq. Rep. 275, 280), he would have attached him. Mr. Thomas Roysse refused to tell us under what title he went in possession.

THE LORD CHANCELLOR.—The proper course for the respondent would have been to have attached the party who turned the receiver out of possession, and then let Mr. Roysse get rid of the receiver by legal means. There is no doubt that the two cases cited altered the old practice as to parties going into possession. But as one of the "reasons for appeal" is grounded upon the fact that the Master of the Rolls did not make the conditional order of the 27th of June absolute *with costs*, the costs below are within our discretion, and we dismiss the appeal with all the costs.

THE ATTORNEY-GENERAL v. DILLON—April 24 & 25.

Will—Construction of—Charitable trust—Imposition of, by parol.

This court will execute a trust which the devisee of a testator has verbally promised to perform, when it is satisfied—

That the intention of the testator was clearly explained to the devisee,

That the devisee agreed to carry that intention into effect,

And that, but for such undertaking by the devisee, the testator would not have given his property to the devisee.

This case came before the court upon an appeal, from a decretal order of his Honor, the Master of the Rolls, directing certain issues to be tried by a jury. A cause petition, by way of information at the relation of the Rev. Thomas Mathews, the Roman Catholic Priest of the parish of St. Mary, in the town of Drogheda, was filed by the Attorney-General. It was stated, that the Rev. James O'Brien, formerly the Parish Priest of Slane, in the county of Meath, prior to his death frequently informed the Rev. Thomas Mathews, with whom he was on terms of great and long intimacy, that he intended to bequeath a considerable portion of his property to him for charitable and religious purposes, viz., £2000 in trust, to found a convent of the Sisters of Mercy, in the parish of St. Marys', Drogheda, and £200 to be distributed in charity amongst the poor of the parish of Sydare, and £200 amongst the poor of the parish of Slane, in the county of Meath. The Rev. James O'Brien made his will on the 22nd of September, 1849, and devised all his real and personal property to his brother, the Rev. Denis O'Brien, P.P. The cause petition charged that the testator had previously informed the Rev. Denis O'Brien of his intention as to the disposal of the sums of £2000, £200, and £200, and that the Rev. James O'Brien had agreed to accept the devise upon trust for those charitable purposes above mentioned. The cause petition and the affidavits in support thereof, stated that the testator having heard that the Rev. James O'Brien was ill, went to visit the latter on the 22nd of September, 1849, and met at his house Wm. E. Grainger, and the Rev. Denis O'Brien, that all three, in the presence of each other, conversed with the testator about his performance of the charitable intentions and objects above mentioned; whereupon the testator declared that he secured their fulfilment, as he had left all his property to the Rev. Denis O'Brien, charged with a trust for charitable purposes. A conversation ensued between the parties present in reference to the will, and as it was not deemed sufficiently distinct as to the charitable objects and trusts, it was proposed to the testator that he should add a codicil to his will, which he did in the following terms:—"I, James O'Brien, Parish Priest of Slane, county Meath, do hereby ratify and confirm the above will, and all and each of the provisions, and I also record the fact, that I have instructed my said brother, the Rev. Denis O'Brien, in whose integrity I confide, in the presence of my friend William Edward Grainger, and the Rev. Thos. Mathews, to make certain charitable disposals in certain localities at his convenience, dated this 22nd day of September, 1842." It was witnessed by W. E. Grainger, and Thomas Mathews, P.P. Both before and after the execution of the codicil, the testator stated in the presence of the above gentlemen, that his desire was to leave the sums of £2000, £200, and £200, for the charitable objects above mentioned; and the Rev. Denis O'Brien promised to carry out the testator's intentions. The Rev. James O'Brien

died in the year 1849, shortly after the making of this will and codicil. Upon his death, the Rev. Denis O'Brien was made Parish Priest of Slane and Rathbenny, and entered into possession of all the real and personal estate of his brother, the Rev. James O'Brien; but although frequently applied to by the Rev. Mr. Mathews, the relator, he refused to pay over the sum of £2000 to the charitable purpose above mentioned. The Rev. Denis O'Brien died in the year 1857, and Anne Dillon, the respondent, his sister, took out letters of administration to the Rev. Denis O'Brien, and having filed a cause petition to administer his assets, the Rev. T. Mathews filed a charge in the cause, claiming the above sums of £2000, £200, £200; but Master Murphy ruled that relator should establish his rights by a plenary suit. A sum having been set apart in that suit to answer these claims, the Rev. T. Mathews filed this cause petition in the name of the Attorney-General. The respondent denied that any trust was created as to the £2000. and alleged that a discretion was given by the codicil to the Rev. Denis O'Brien, who, she believed, had expended more than £200 in the parish of Slane. On the 13th of January, his Honor, the Master of the Rolls, directed that four issues should be tried by a special jury to determine, whether the Rev. James O'Brien had made the alleged statements as to the above sums of money in the presence of the Rev. Denis O'Brien, the Rev. T. Mathews, and W. E. Grainger, and whether the Rev. Denis O'Brien undertook to apply those sums to the charitable objects as alleged. From this order the respondent, Anne Dillon now appealed upon the ground that his Honor should have dismissed the cause petition.

Serjeant Sullivan (with him *E. Lawless, Q. C.*, and *J. D. Mathews*) for the relator.—If a person makes a promise to a testator, who thereupon makes a present disposition of his property, acting on the belief that the person promising will carry out those intentions, if the promise be clearly proved, equity will hold it to be binding upon the conscience of the person who made it, and will declare him to be a trustee—*Sharry v. Garty* (2 Ir. Chan. 351, 358); *Russell v. Jackson* (10 Hare, 204).

The Solicitor General (with him *A. Hamill*) for Anne Dillon.—The Master of the Rolls was not satisfied with the evidence of the making of the promise by the Rev. D. O'Brien, therefore he directed issues. This court should be slow to impose a trust created by parol upon funds devised without any allusion thereto. In *Sharry v. Garty* there was a written promise. To impose a trust created, as that contended for here is, is to make a will by parol. The codicil is too vague in its language to impose any trust upon the property; "to make such a trust mandatory, there must be a complete withdrawal of discretionary power from the legatee, or there is no trust created—*Lefroy v. Flood* (4 Ir. Chan. R., 1-11). Lord Westbury when Solicitor General, laid it down in his argument in *Lomax v. Ripley* (3 Sma. and Giff. 65), "first, that it is necessary that the purport and object of the testator should have been clearly expressed to the legatee. Secondly, that the legatee should have agreed to carry into effect such object. Thirdly there must be circumstances such as to show that, but for such,

promise the testator would not have given the property to the legatee." The first only of those requisites can be contended for in this case—the second and third wanting.

Edward Lawless, Q. C., in reply, cited *Podmore v. Gunning* (7 Sim., 644), and *Gray v. Gray* (11 Ir. Chan. R., 218).

April 28.—THE LORD CHANCELLOR.—In this case the propriety of an order made by the Master of the Rolls is called in question. That order (which cannot be called a final order, but rather an interlocutory one) directed certain issues to be tried by a jury. The object of those issues was, that his Honor might be informed whether the precise facts existed to sustain the case made by that relator. From the fact of his Honor having suspended his decision until the findings of the jury were made known, we must suppose that he was of opinion that there were facts to warrant him in directing the issues. The respondent, the Rev. Mr. Mathews, here denies that there is any doubt as to the facts; and his allegation is, that he has proved the facts stated by the Attorney-General in his information—in other words, that the evidence as given was sufficient to establish the proposition, in furtherance of which the Master of the Rolls directed the issues. I am of opinion that the evidence in the cause was quite sufficient without the aid of the findings of a jury. The allegations of the relator are substantially the following:—That the Rev. James O'Brien, at the time that he was making his will, expressed his intention to devote a portion of his property to charitable purposes; a certain sum to be given towards the founding of a convent of the Sisters of Mercy in Drogheda—other sums to be given to the poor in certain parishes; that the testator made his will without inserting therein any such provisions, but giving all his property to his brother, the Rev. Denis O'Brien, not as executor, but as residuary legatee; that after the making of the will, a conversation took place between the testator, the Rev. Thomas Mathews, the relator, and Mr. Grainger, a friend of all the parties, a resident in the Rev. James O'Brien's parish, and a gentleman of position in that county; that that conversation turned upon the omission of the objects of the testator's charity from the will, whereupon the testator said in the presence of the Rev. Denis O'Brien, that the latter had undertaken to carry out his intentions. Had the matter rested there, we would have a communication imposing a trust upon part of the property, and an express admission of that trust by the legatee. But the argument of the counsel for the appellant went principally to show that the issues were necessary, in consequence of the evidence being vague and inconsistent—in other words, that the court would require the assistance of the jury to see whether the allegations of the relator were made out. That argument was merely, however, as to whether there should be issues or not. We now come to the evidence in the cause, and in my opinion it is perfectly clear and satisfactory. In the first place we have the affidavit made by Mr. Grainger. Then it is said that Mr. Grainger admitted to some one, that prior to his making his affidavit, his memory was refreshed. Now, the fact of a man's mind being refreshed as to the details of an occurrence already firmly imprinted on

his mind, does not, in my opinion, invalidate that man's testimony, as he does not give his evidence carelessly or recklessly. Then we have the affidavit made by the Rev. Mr. Mathews, but, in my opinion, whether the money was to be expended by the Rev. Denis O'Brien or the Rev. Mr. Mathews, makes no difference. Then it was said that the poor generally were to be the objects of the testator's bounty, and that this sum of £2,000 was not given for a definite purpose. Now, the testator appears to have had a very great dread of that body of gentlemen called the Commissioners of Charitable Donations and Bequests, and, therefore, I can well understand his being very unwilling to define the charitable purposes to which he wished certain portions of his property to be devoted. His saying that he had told his brother, the Rev. Denis O'Brien, what his intentions were, and that the latter had promised faithfully to execute them, was very natural. Therefore, looking at the whole of this case, I see no reason, to doubt the accuracy of Mr. Grainger and of the Rev. Mr. Mathews, nor, why this case should be sent any further. The authorities are clear upon this question, and this case comes within them, without enlarging the doctrine there laid down, which would be unadvisable. In *Russell v. Jackson* (10 Hare, 211), I find Vice-Chancellor Page Wood, after adverting to the facts of the case, saying, "Does not that amount to an undertaking—a promise on their part to carry out the intentions which the testator had expressed in his will? The true test of the answer to the question is this, would the testator have left his property to the defendants, if the defendants had stated in answer to that question that they would not carry out the disposition which the testator intended to effect by means of the trust which he had declared in the instructions? No one can doubt that if those defendants had stated that they would not carry out the intentions of this testator, this disposition in their favour would not have been found in this will." Those observations are quoted with approbation by Vice-Chancellor Page Wood, in *Wallgrave v. Jebbs* (2 Kay & J., 321), where he gives his version of the doctrine laid down in *Russell v. Jackson* in these words—"Where a person, knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a case of trust; and the court will not allow the devisee to set up the Statute of Frauds, or rather the Statute of Wills, by which the Statute of Frauds is now, in this respect, superseded; and for this reason, that the devisee, by his conduct, has induced the testator to leave him his property. And as Lord Justice Turner says, in *Russell v. Jackson* (sup.) "No one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will." I do not see how this doctrine could be carried farther than that. *Warren v. Rudall* (1 Johnson & H., 1), is to the same effect. We were referred to the elaborate argument of the present Lord Westbury, when Solicitor-General, in

Loman v. Ripley (3 Sma. & Giff., 48). All that argument goes to show, that, to impress funds with such a trust, it must be proved, that there was an express contract between the testator and the devisee. I do not understand that part of his argument in which he contends that, after the death of the devisee, the trusts cannot be carried out. I cannot see anything to prevent the execution of trusts in such a case. Then it was said that the codicil fixed a charitable trust upon the property in question, and that this court cannot interfere. In support of that argument, *Lewin on Trusts* was cited; but there is no case in support of such a doctrine. The codicil merely comes to this, that after the conversation, which took place subsequent to the execution of the Rev. James O'Brien's will, the parties present thought it necessary to make some allusion to the subject of their conversation, and that the codicil does, not by imposing any trust upon the property, but by (independently of the will) reciting the fact of the Rev. Denis O'Brien having undertaken to carry out his brother's wishes and directions. The same view is taken by Mr. Jarman, in his *Treatise on Wills* (438), when speaking of the effect of recitals, and his observations amount to this, that where mention is made of certain funds in a will, but by the will the funds are not clothed with any trust, if there be a recital of a trust in reference to those funds, this court will clothe the funds with that trust when the latter has been made out to its satisfaction. I am of opinion that the relator is entitled to a decree; we may either declare the sum of £2,000 well charged on the property of the Rev. Denis O'Brien, or we may send back the case to the Master with a direction. The Attorney-General is of course entitled to an account of the expenditure of those two sums of £200 each; but perhaps he will not think it worth his while to insist upon it, as admittedly the Rev. Denis O'Brien expended large sums in charity. Interest upon the £2000 should be computed only from the death of the Rev. Denis O'Brien. For by the terms of the codicil, he was to lay out the monies in question "at his convenience," i.e., he had the whole period of his life to expend them. As there was a sum set apart in the cause of *Dillon v. O'Brien* to meet this demand, that fund must bear the relator's costs.

THE LORD JUSTICE OF APPEAL.—I am of the same opinion as the Lord Chancellor. The question for us to determine is, whether the Master of the Rolls rightly decided that issues should be sent to a jury in this case, or whether, without any further inquiry, he ought to have determined the rights of the parties. Of the legality of the trusts imposed by the Rev. James O'Brien upon part of his property, there can be no doubt; nor is there any doubt but that if the Rev. Denis O'Brien promised the testator to carry out those trusts, he can be compelled by this court to perform them. The question then is, did the Rev. Denis O'Brien knowingly promise to undertake the trusts imposed upon him by his brother? If he did, the case of *Moss v. Cooper* (1 Johnson & H., 352), is a strong authority. At page 370, Vice-Chancellor Page Wood says, "It was argued that anyone might be deprived of the benefit of a legacy given absolutely to him, if a trust could be fastened upon him by some

person, wholly without authority, stating to him that the gift was intended to be upon a trust. But I apprehend that the answer to this argument is, that, to bring about such a result, it is necessary to show that the testator really had the intention imputed to him." The argument of the Solicitor-General was, that as the objects of the testator's benevolence depended upon the discretion of the Rev. Denis O'Brien, the charity failed. Such is the doctrine laid down in *Morrice v. The Bishop of Durham* (10 Ves., 524). "If a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take." Here, however, the trusts are expressed and capable of execution. They are clearly expressed in Mr. Grainger's affidavit. It has been urged as an objection to that affidavit, that it was made twelve years after the occurrence deposed to took place; but no one has ventured to charge Mr. Grainger with misrepresentation; therefore, we have no alternative but to receive his affidavit. If Mr. Grainger's statement be false, it must be so deliberately. But the language of the codicil corroborates Mr. Grainger, and confirms the will. I will merely advert to the following passages in Mr. Grainger's affidavit. He says "that he had been present at the house of the said Rev. James O'Brien in company with the late Rev. Denis O'Brien, his brother, and the Rev. Thomas Mathews, parish priest of St. Mary's, Drogheda, on or about the 22nd day of September, 1849, and that a conversation had ensued between the several parties in reference to the will of the Rev. James O'Brien, and that as the will was not deemed sufficiently distinct as to the charitable objects and the trusts undertaken by the Rev. Denis O'Brien, it had been proposed as necessary to add a codicil to said will; and he further said that immediately before and after the execution of said codicil the said Rev. James O'Brien stated, in the presence of this deponent, and in the presence of the said Rev. Denis O'Brien, and said Rev. Thomas Mathews, his will and desire to leave 'the sums in question to the respective charities,' and that he, the said Rev. James O'Brien, executed the codicil accordingly. And deponent further said, that the several sums for the several localities were those expressly intended by said Rev. James O'Brien, as the charitable objects alluded to in the codicil of his will, and that the said Rev. Denis O'Brien undertook to carry out said trusts." There is no room left for doubt in this case. As to the Rev. Mr. Mathews, he cannot throw any light upon the case. I agree with the Lord Chancellor in his observations as to the interest, &c.

Declare the sum of £2,000, with interest from the death of the Rev. D. O'Brien, well charged upon the personal property of the Rev. D. O'Brien. Costs of the appeal to be paid out of the fund. Reserve the question of the costs in Mathews v. Dillon, and Dillon v. O'Brien.

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND MR. JUSTICE CHRISTIAN.]

PIGOTT v. DUNNE.—May 15.

THE decision of the Lord Chancellor in this case (4 Irish Jurist, N.S. 194) was affirmed by this court.

Court of Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

ANDERSON v. HERON.—Jan. 25, 28.

Power—Construction of—Whether power of leasing be warranted by.

By a marriage settlement, dated the 13th of May, 1801, William Vernon conveyed to trustees a house and garden situated in the town of Sligo, which he held under a lease for lives, with a covenant for perpetual renewal, in trust, for himself for life, and after his decease "to the use of all and every the child or children of the body of the said William Vernon by the said Jane Daly, his intended wife, to be begotten, for such estate and estates, in such parts and shares, and proportions, manner and form, and subject to such provisos, restrictions, and limitations, and with such remainders over as the said William Vernon at any time or times hereafter by any deed or deeds, instrument or instruments in writing, with or without power of reservation, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any writing purporting to be his last will and testament, to be signed and published by him in the presence of and attested by three or more credible witnesses, shall limit, direct, or appoint; and in default of any such limitation, direction, or appointment, and in the meantime, and until such direction, limitation, or appointment where the same shall happen not to be a complete and entire appointment of the whole estate and interest of and in all and singular the lands, houses, hereditaments, and premises hereby granted and released, or intended so to be, to the use of all and every the child and children of the body of the said Jane Daly by the said William Vernon, to be begotten equally, to be divided between or among them, of more than one share and share alike, and they to take as tenants in common, and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing." And in case of the death of any child without issue, his share was to go over equally amongst the survivors; and if but one child to that child, remainder to the right heirs of William Vernon. There was issue of the marriage four sons and five daughters. Laurence Vernon, the eldest son, attained the age of twenty-one years on the 2nd of April, 1833. By a deed of that date, purporting to be in exercise of the above power, William Vernon appointed the premises in the town of Sligo, from and after his own decease, to the use and behoof of the said Laurence Vernon and his assigns for ever, during the term of his natural life, and from and after his decease to the use of the issue of his body lawfully to be begotten upon the body of any wife which he may marry, in such man-

ner, shares, and proportions as he shall appoint, and in default of such appointment then to such issue share and share alike; and if but one child, then to such one child. And in case the said Laurence Vernon shall happen to die without issue, to be by him lawfully begotten, then and in such case that all the said lands, tenements, hereditaments, and premises so by these presents appointed to the said Laurence Vernon shall from and after his decease go to and be held and enjoyed by his brother, James Daly Vernon for and during the term of his natural life, and from and after his decease to the use of the issue of his body lawfully to be begotten upon any wife which he may marry, in such shares and proportions as he shall appoint; and in default of such appointment, then to such issue, share and share, alike of more than one; and if but one, then to such child." In case both Laurence and James Daly Vernon died without issue, their father appointed the premises to two of their sisters as tenants in common. The above deed of appointment contained the following declaration:— "And it is hereby declared and agreed that the said Laurence Vernon and James Daly Vernon respectively shall have full power of making leases of any part or parts of the said lands or premises for any term of lives, or years, lives and years, concurrent with or without a covenant for perpetual renewal, reserving, however, the full improved yearly value at the time of making such lease or leases without taking any fine or consideration for the same. And it is hereby also declared and agreed that it shall and may be lawful to and for the said Laurence to charge and encumber all and singular the said hereby appointed lands, tenements and premises with any sum not exceeding the sum of £60 yearly, as and for a jointure for any wife he may hereafter marry, or with any sum by way of jointure not exceeding £8 by the year for every £100 which he shall actually receive as a portion with such wife." In his will dated the 31st of January, 1840, William Vernon recited the fact of the appointment to Laurence, and charged the land appointed, as well as other lands devised to Laurence, with a rent-charge. William Vernon died in the year 1847, whereupon Laurence, who never married, entered into possession of the appointed premises, and so continued up to his death, which took place on the 9th of August, 1849. On the 10th of January, 1853, a fee farm grant of the premises appointed by the deed of 1833, was made to James Daly Vernon, then in possession, by the owner of the reversion. By a deed dated the 15th of October, 1861, James Daly Vernon, in exercise of the leasing power contained in the deed of 1833, demised a plot of ground in the town of Sligo, portion of the premises so appointed, to Charles Anderson, the petitioner, for the term of three lives, with a covenant for perpetual renewal. By a letter dated the 15th of May, 1861, the Ulster Banking Company, through Mr. Heron, the respondent, their registered public officer, proposed to purchase from the petitioner his interest under the lease of 1861, in case he could make out a good title. The petitioner accepted the proposal. Upon the abstract of title to the premises being furnished to the solicitor for the Ulster Banking Company, it was objected that the deed of appointment of 1833 was void, as not

being within the scope of the power reserved to William Vernon in the settlement of 1801, and consequently that the lease from James Daly Vernon to the petitioner was void. Mr. Anderson now filed his cause petition for specific performance of the agreement.

Sergeant Sullivan (with him *F. Walsh, Q.C.*, and *E. S. Dix*) for the petitioner, contended that the leasing power in the deed of 1833, was within the scope of the power of appointment created by the deed of 1801—*Evers v. Challis* (7 Ho. of Lo. Cas. 531).

The Solicitor-General (with him *A. Brewster, Q.C.*), *contra*—contended that the leasing was not warranted by the power, and cited *Doe d. Gilman v. Elvery* (4 East. 313); *Crompe v. Barrow* (4 Ves. 681); *Bridewell v. Elves* (1 Eas. 442, and 7 Ves. 332); *Crozier v. Crozier* (3 Dru. & War. 353, 370); *Phipson v. Turner* (9 Sim. 227); *Bray v. Hammersley* (3 Sim. 513); *Rickets v. Loftus* (4 Y. & Coll. 519); Sug. on Powers, 8th ed. 54-6, s. 2.

Jan. 28.—Upon this day THE LORD CHANCELLOR said, that on the whole of the case he was of opinion that the case came within the principle of *Crompe v. Barrow* (4 Ves. J. 681); that the appointment of 1833 was in excess of the power; and he dismissed the petition with costs.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

SLATER v. TRIMBLE—SLATER v. LENNON.

Nov. 23, 25, 1862.

Ejectment—Infancy—Lease—Confirmation.

A., while an infant, made a lease to B. Subsequently, and while A. continued an infant, a demand of possession was made, and an ejectment brought, by A. by C., his next friend. Before the trial of the ejectment A. attained his age of 21 years, and made a lease of the lands to C.. Subsequently, and still before the trial, A. received rent from B., and executed a confirmation of his lease. At the trial, on this state of facts, a verdict was directed for the defendant, and the verdict was upheld by the Court.

THE facts of these cases, which were identical in their nature, sufficiently appear from the judgments. The cases came before the court upon motions to set aside verdicts had for the defendants at the Longford Summer Assizes for 1861.

Serjeant Armstrong, M'Donough, Q.C., and *Dowse*, appeared for the plaintiff.

J. Brooke, Q.C., *M'Causland, Q.C.*, and *J. Richardson*, for the defendants.

The following authorities were cited:—2nd Inst., 673; Id. 380b; Fitzherbert, N. B., 202; *Zouch v. Parsons* (3rd Bur. 1793); *Thrustout v. Bray* (2nd Str. 103c); *Doe v. Rouse* (1 Ell. & Bl. 419); *Doe v. Bluck* (3rd Camp. 447); *Kyan v. Lauder* (9 Ir. C. L.); *Maddon v. White* (2 T. R. 159); 4 Bac. Abr. 374; *Thornton v. Flingworth* (2 B. & Cr. 825); Littleton, s. 259; Chambers on Infancy, 433, 440; *Kiston v. Elliott* (2 Bulst. 69); *Kelley's Case* (Brownl. 120); *Kelsey's Case* (Cro. Jac. 324); *The*

person, wholly without authority, stating to him that the gift was intended to be upon a trust. But I apprehend that the answer to this argument is, that, to bring about such a result, it is necessary to show that the testator really had the intention imputed to him." The argument of the Solicitor-General was, that as the objects of the testator's benevolence depended upon the discretion of the Rev. Denis O'Brien, the charity failed. Such is the doctrine laid down in *Morris v. The Bishop of Durham* (10 Ves., 524). "If a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take." Here, however, the trusts are expressed and capable of execution. They are clearly expressed in Mr. Grainger's affidavit. It has been urged as an objection to that affidavit, that it was made twelve years after the occurrence deposed to took place; but no one has ventured to charge Mr. Grainger with misrepresentation; therefore, we have no alternative but to receive his affidavit. If Mr. Grainger's statement be false, it must be so deliberately. But the language of the codicil corroborates Mr. Grainger, and confirms the will. I will merely advert to the following passages in Mr. Grainger's affidavit. He says "that he had been present at the house of the said Rev. James O'Brien in company with the late Rev. Denis O'Brien, his brother, and the Rev. Thomas Mathews, parish priest of St. Mary's, Drogheda, on or about the 22nd day of September, 1849, and that a conversation had ensued between the several parties in reference to the will of the Rev. James O'Brien, and that as the will was not deemed sufficiently distinct as to the charitable objects and the trusts undertaken by the Rev. Denis O'Brien, it had been proposed as necessary to add a codicil to said will; and he further said that immediately before and after the execution of said codicil the said Rev. James O'Brien stated, in the presence of this deponent, and in the presence of the said Rev. Denis O'Brien, and said Rev. Thomas Mathews, his will and desire to leave "the sums in question to the respective charities," and that he, the said Rev. James O'Brien, executed the codicil accordingly. And deponent further said, that the several sums for the several localities were those expressly intended by said Rev. James O'Brien, as the charitable objects alluded to in the codicil of his will, and that the said Rev. Denis O'Brien undertook to carry out said trusts." There is no room left for doubt in this case. As to the Rev. Mr. Mathews, he cannot throw any light upon the case. I agree with the Lord Chancellor in his observations as to the interest, &c.

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Serjeant Armstrong, M'Donough, Q.C., and *Dowse*, appeared for the plaintiff.

J. Brooke, Q.C., *M'Causland, Q.C.*, and *J. Richardson*, for the defendants.

The following authorities were cited:—2nd Inst., 673; Id. 380b; Fitzherbert, N. B., 202; *Zouch v. Parsons* (3rd Bur. 1793); *Thrustout v. Bray* (2nd Str. 103c); *Doe v. Rouse* (1 Ell. & Bl. 419); *Doe v. Bluck* (3rd Camp. 447); *Kyan v. Lauder* (9 Ir. C. L.); *Maddon v. White* (2 T. R. 159); 4 Bac. Abr. 374; *Thornton v. Flingworth* (2 B. & Cr. 825); *Littleton, s. 259*; *Chambers on Infancy*, 433, 440; *Kiston v. Elliott* (2 Bulst. 69); *Kelley's Case* (Brownl. 120); *Ketsey's Case* (Cro. Jac. 340); *The*

Duchess of Kingston's case (2 Sm. L. C.); 2nd Inst. 483.

O'BRIEN, J.—In these cases we are all of opinion that the verdicts which were had for the defendants in both cases should stand. The facts of these cases are very peculiar. Without going through them I shall merely refer to a few dates which may explain and shew the grounds on which we have come to the conclusion which we have arrived at. The tenants, the defendants in these cases, hold under leases dated in May and June, 1860, made by Mr. Slater at a time when he was under age. In the month of January, 1861, a demand of possession was made, in one case by the plaintiff, in the other by his uncle. I do not think, however, that that affects the principle on which we determine the case. Immediately after that demand of possession was made, on the 16th January, 1861, ejectments were brought laying the title as accruing a few days before. Defence was taken in February. The parties did not go to trial at the next Assizes, but the case was allowed to stand over; and subsequently to the Spring Assizes the plaintiff attained his age; and on the 29th April, 1861, he executed to his uncle, Mr. G. W. Slater, a lease of the whole of the lands, including those held by the two tenants. In the month of June, 1861, two further facts took place in the case of each of the tenants, who are defendants on these records. Mr. A. Slater, the plaintiff, then received from each of them the rent which accrued due under his lease up to the 1st of May, 1861; and about that same time he executed on the back of the two leases confirmations thereof. After this the ejectments were proceeded with, and the parties went to trial. Singularly enough, the ejectments of January, 1861, were not abandoned. An ejectment was not brought by George W. Slater, the elder, claiming under his own title, but the parties went on with the ejectment which had been brought in the name of the minor. With the motives for this course we have nothing to do. There must have been good reason for adopting it. On the trial, however, the state of facts which I have described was established; and it was conceded on both sides that the confirmation so far as the execution of the instruments was concerned was perfectly valid. The concession was proper, as there was no reason for avoiding the instruments on the ground of their having been unfairly procured. But the defendant in each case insists upon the state of facts thus established,—first, that the ejectment could not succeed, because it was brought during minority to defeat and avoid a lease made also during minority. And he also contends that even supposing that that was not a conclusive answer to the ejectment, still that the subsequent acts of Mr. Slater amounted to a confirmation of the tenant's lease in each case and disentitled the plaintiff from recovering. For the plaintiff, on the other hand, it was argued, first, that the lease of the 29th April, 1861, which was made to Mr. G. W. Slater, put it out of the power of the plaintiff to make any confirmation of the leases to the defendants, because it deprived him of the estate in the lands, and therefore he could not after that execute any confirmation or in any degree establish the previous leases. And further, it is argued that even independently of

that lease of the 29th April, 1861, the confirmation of the tenants' leases was made after the bringing of the ejectment; and that no such confirmation made after action brought could avail to entitle the defendants to verdicts on the matters which were to be tried. I ask is this so? I shall assume, for the purposes of my judgment, that the plaintiff here had a right during minority to bring the ejectment. But if he had that right what was the effect of it? Can it be contended that any act of the infant during his minority, whether that act was an entry or an ejectment could have the effect of avoiding absolutely the previous lease? Such a proposition would be decidedly inconsistent with those principles by which the court is governed in treating cases of infancy. An act of this sort—a lease made during infancy—is not void, but is voidable only till it is set aside. At whose election is it voidable? At the infant's. When? Certainly not during minority. I find that principle stated in clearer, shorter, and more authoritative language in 4th Bacon's Abridgment, 374, where it is stated that "though the infant may avoid his feoffment by entry during his non-age, yet he cannot have a *dum fuit infra etatem* till he comes to his full age; for he is allowed to enter that he may save to himself the profits in the meantime; but such entry being the act of an infant, seems to be as voidable at full age as his feoffment." In short, the infant has a right to have his power of election preserved as well to confirm as to avoid; and that power he cannot be deprived of by any act done in his minority. Well, then, assuming that to be so, we have this state of things,—a lease made by a minor which is voidable by him. A proceeding by him during minority which, giving it its full effect, amounts only to an expression of his intention at a time when he could not give effect to his wishes to set aside that lease. Then the infant reaches his full age, and he gives a receipt for the very rent under the lease, and executes an endorsement on the lease confirming it. There are grounds for contending that considering the nature of the action of ejectment, considering that the plaintiff succeeds upon the ground of the defendants being a trespasser, and that that renders the defendant liable for mesne rates,—there are strong grounds I should say for holding that the very fact of the plaintiff giving a receipt for rent during the period for which by his action he seeks to have the defendant declared a trespasser, is almost decisive against his recovering, the effect of the recovery being to treat the party as a trespasser when the plaintiff has received rent for that period, and to give mesne rates for that very same period. But I do not think it necessary to rest the case on that alone, because the receipt of rent and the endorsement do not merely, in my opinion, give the defendant a title as to that period, but, being a confirmation of the lease, relate back to the commencement of that lease. That proposition was controverted by Serjeant Armstrong this morning. With great respect to him, I think it cannot be denied; the very meaning of the word implies it. The very term "voidable" applied to a former instrument, considered with reference to the word "confirmed," shows that the instrument is good until it is avoided. The confirmation precludes its being

avoided, and then it is good from its beginning. Mr. M'Donough argued upon the case of *Thornton v. Illingworth* (2 B. & Cr. 825), where there was a contract made with an infant during minority; and it was held that a ratification by a subsequent promise after action brought was bad. But how can that be brought in aid here; for on looking at the judgment at p. 826, we find that the decision of Mr. Justice Bayley was based on the fact that the promise was originally void. He says, "In the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before it, it does not make it a legal debt from the time of making the bargain." That is to say, the moral obligation which previously existed is considered by law sufficient to support a promise made after full age; "but," he says, "it does not make it a legal obligation from the time of making the bargain." A further promise must be made before action brought. But here the case is different. The very meaning of the word "voidable," and the doctrine to which I have referred, that the confirmation makes the instrument good from the beginning, render the present case very different from that relied upon by Mr. M'Donough. Assuming, therefore, that this confirmation and receipt of rent together would have been an answer to the ejectment by the plaintiff, can the plaintiff rely on the lease of the 29th April, 1861, as disentitling him to make the subsequent confirmation of the previous lease to the defendant? I have already observed that this action is brought, not by G. W. Slater, but brought and continued by A. Slater. The provisions in the lease to Mr. G. W. Slater, and the covenants in it, may give a very good right of action by G. W. Slater against the present plaintiff. It would be open to G. W. Slater to contend that A. Slater deprived himself of all his estate by that instrument; but this ejectment is brought in the name of A. Slater; it is in the name of the man who received the rent in June, 1861, and who executed in that year the confirmation which I have stated. Well, now, I cannot do more than read the opinion of Mr. Justice Christian come to on the trial, and which I, for my part, adopt. He says that whatever title the lease of the 29th April, 1860, gave to G. W. Slater, it could be of no avail for him as one of the plaintiffs in the case; and that as to A. Slater, he ought not to be allowed to rely on it in derogation of his own grant. I perfectly concur in that proposition. I have already referred to the payment of rent. I do not think it necessary to refer to the 224th section of the Common Law Procedure Act. In an ordinary case, no doubt, if the plaintiff's title had expired subsequently to the bringing of the action, still he would be entitled, under the 224th section, to a verdict and to judgment for his costs of suit; but it would be a novel thing to apply that principle to a case where a plaintiff for the purpose of defeating his own act had put the title out of himself. But I do not think that arises here, because in my opinion the defendant was entitled to rely, as between himself and

the plaintiff, on the confirmation; and on sound principles of law and justice it is not open to plaintiff to say to the defendant, "I executed the instrument of confirmation and I received rent; but at the time I did so I had no power or right to do so, and therefore I insist that those acts are invalid; and that notwithstanding them I am entitled to treat you as a trespasser up to such a period as will enable me to make you responsible for the costs, though by the confirmation and receipt of rent I dealt with you as a tenant." I think it would be contrary to every principle of justice, and contrary to the cases, to allow him to resort to such an argument, and therefore I am of opinion that the verdict should be entered for the defendant.

HAYES, J.—Without dissenting from the reasons advanced by my brother O'Brien, I have arrived at the same conclusion by partly a somewhat different road; and at the risk of repeating a good deal of what I might have already mentioned, I shall shortly state what in my judgment is the law in this case. A minor is in law looked on as a person of infirm judgment, and by reason of that he is declared incapable of absolutely binding himself by contracts, subject to certain exceptions; and that infirmity of judgment is deemed to affect all his instruments. In pursuance of this principle a lease or contract under seal does not absolutely bind him. If the lease reserves rent, there is a *prima facie* presumption that the infant has rightly exercised his judgment; and the law having bound the lessee by the contract, will not allow it to be interfered with till the infant has attained his full age, and the lessor is thus unable to decide, until he reaches his age, whether both shall be bound. It is stated in *Cole on Ejectment*, 584, that an infant cannot, by entry or ejectment during his infancy, avoid a lease or conveyance made by him apparently for his benefit at the time. Now, a lease rendering rent is a lease made apparently for the infant's benefit. On the other hand, if a lease has been a parting with the land without rendering rent, the law presumes this to be a bad exercise of the infant's judgment, and allows him to get rid of that act even during his minority; because otherwise the infant might be reduced to starvation, and anyone acting for the infant may bring an ejectment. Such being, as I think, the state of the law, we have here a demand of possession and an ejectment brought, the demand being made while the infant was still under age. At that time the lease of 1860 being only voidable was a good instrument, binding both the tenant and the landlord till avoidance after the attainment of age by the latter; and in that state of things the action is brought. In my judgment it was not competent for the plaintiff to give himself any title during the action, and for the purposes of the action which he had not when the action was brought. That conclusion I have arrived at from the 194th, 204th, and 224th sections of the Common Law Procedure Act. There is a section which seems to vary a little the rights of the defendant, but not those of the plaintiff. Such being the state of things, in my opinion the plaintiff had no right to rely on the lease of April, 1861; and that being out of the way, it is plain that he cannot resist the effect of the defendant's leases, which for the purpose of this ejectment are to be looked upon as valid ones.

FITZGERALD, J.—I concur in the decision of the court; but points have been discussed at the bar, and judgment given upon them, in reference to which I do not find it necessary to express any opinion, as I have one clear ground which in my mind is not displaced, and which enables me to concur in the decision of the court. At the same time it must not be understood that I would not concur in the views expressed upon the points to which I refer. I merely abstain from expressing an opinion; the more particularly in this case, because no one can shut his eyes to this, that no act of the court at present can determine any right between the parties; for the position of the court is, that an unanimous decision would determine no right, but merely say that the plaintiff is entitled to judgment for costs and nominal damages, but no other rights. My brother O'Brien has fully stated the facts of one of the three cases, which are all alike. I will refer to the case of *Slater v. Trimble*. In all three an action of ejectment was commenced during the minority of the plaintiff. I pointed out in the course of the argument that it was not his action, but that he might adopt it if it was for his benefit. In that case the next friend of A. Slater alleging that A. Slater had an absolute right to recover the lands in question and damages, instituted the action. The allegation was, that in January, 1861, A. Slater was entitled to possession; that from that time or some time previous, the defendant, Trimble, was a trespasser, and that A. Slater having established his right was entitled to send to the jury the question of damages for mesne rates; so that it is precisely analogous to the old action of ejectment. You must establish an absolute right and shew that the defendant is a trespasser; and then, in place of bringing an action for mesne rates, you can have them established in that action. The 264th section of the Common Law Procedure Act does not, I think, aid the plaintiff, for it only seems to refer to the case where title expires; whereas here the plaintiff has put the title out of himself by conveyance. Such was the state of things; but we must deal with the action subsequent to the time when the plaintiff came of age as an action by himself alone, in which he is the sole plaintiff. Mr. Slater became of age on the 27th April. No step was taken in the ejectment till the notice of trial, which was given on the 26th June. But before that, on the 14th June, a transaction takes place as between him and his tenant. That is a receipt for rent which I have before me. Here is an unequivocal act, not depending on intention at all; it is an act by Mr. Slater receiving rent, in which in the receipt he treats Trimble as tenant for these lands, I care not how, in the period intervening between the lease made in 1860, and the 1st May, 1861. The act is unequivocal, but it was one liable to be impeached. Slater could have shewn that it was done in error or mistake, ignorance or fraud; or that his acts had been done while he was in a state of intoxication. It was open to allege these matters; and I find that in the case of *Slater v. Brady*, they actually were alleged, and the questions arising from them were sent to the jury, who in that case found for the defendant. In the subsequent cases of *Slater v. Trimble*, and *Slater v. Lennon*, which are now before us, the plaintiff asked no question of the kind to be sent to the jury, and the acts were not controverted. In the

course of the case I asked Mr. McDonough to state how in this action of ejectment in which A. Slater alleged that from the 1st November, 1860, to May, 1861, the defendant was a trespasser, and so wrongfully withholding possession, that Slater was entitled to recover the lands and get damages and costs, A. Slater could be allowed to allege this when he had on the 14th June, and before adopting that proceeding in ejectment, by an unequivocal act admitted that the possession was rightful. Well, I know the ingenuity of counsel; but from none of the counsel was there an attempt to answer that proposition. I find that the cases establish that the payment of rent operates as an estoppel against the tenant and shuts his mouth. Then it is admitted that estoppels are mutual. Even if they were not I would be of opinion that the law could not allow itself to be made the instrument of so great a fraud as to permit what is done here; and I find that the authorities are clear. In *Croker v. Orpen* (2 Jebb & Symes, 545), a lease had been made subject to a right to the landlord, his heirs and assigns, to enter and search for mines, &c.; and further to have 200 or 300 acres at their election of the land most contiguous to the mines, making an abatement to the tenant for the same. Mines were discovered; the landlord gave a notice, and demanded possession of 300 acres. So far title was complete but for this, that after the notice the landlord received rent for the whole, omitting to abate the rent according to the covenant. On the trial it was contended, on the part of the defendant, that this act prevented the plaintiff from recovering, and the judge sent it to the jury in this way, "Did the plaintiff intend to waive the right of entry?" And the court held that the waiver did not depend on intention, but that there was here an unequivocal act by the receipt of rent. So here in this case the receipt of rent due on the 1st May, 1861, is an act which may be impeached; but which, if not impeached, is a conclusive admission by the landlord that the tenant was lawful tenant, and is a flat bar. It is not necessary to resort to the doctrine of *pleas puis darrein continuance*. If this was an ordinary action of trespass, and pending the action the landlord had received rent, it would be a clear case for the tenant that after action brought the landlord had admitted the tenant's right by the receipt of rent. This is the short ground on which I put the case, which seems to me to be unanswerable. If the plaintiff was not entitled to succeed in the action on the evidence he gave, then the verdict should be entered for the defendant. There is another view with which I concur, that is that put by Judge Christian. I should be prepared to hold that the act of confirmation unimpeached had a retroactive effect on the lease, and rendered it valid from the beginning; and that the plaintiff ought not to be allowed for his own purposes, in order to entitle him to recover costs, to say "this act was fraudulent;" because it would be a gross fraud to allow him to rely on a lease not communicated to the tenant. I must, on the finding, come to this conclusion, on the further presumption, that this motion has been on the part of the plaintiff a gross fraud, in which the law ought not to permit him to succeed. On these grounds I concur that the verdict should be entered for the defendants.

[Reported by Walter Bourke, Esq., Barrister-at-Law.]

[HILARY TERM, 1862.]

POOLE v. GRIFFITHS, Jan. 28.

Production of documents—Order under Common Law Procedure Act, 1853, section 64, and section 55 of the Procedure Act of 1856.

THIS case was an ejectment on the title for 1342 acres of the lands of Scart, in the county Waterford. It appeared from the affidavit of the defendant in the case, that he derived his title from one J. G., under a lease for ever, made in the year 1793; that there was a previous lease of the same premises, bearing date 1701, for 91 years, which was recited in the subsequent one; that it was of importance to him to have the earlier lease produced, and that he believes one part of it is in plaintiff's possession. An order had been obtained on the usual conditions, that C. D. Griffiths, within three days from service thereof, do answer on affidavit what documents he has in his possession or power relating to the matter in dispute, or what he knows of them, and whether he objects, and if so on what grounds, to the production of such as are in his custody or power.

Edward Johnston (with him *Serjeant Sullivan*) moved, that said order be set aside, as being made on an *ex parte* application, and not warranted by the practice of the court; and because the plaintiff in the cause, C. D. Griffiths, would be bound to state the entire of the deeds and documents connected with the subject matter of the ejectment, even those exclusively relating to the plaintiff's (said C. D. Griffiths) own title. The order is larger than wanted or intended. If Mr. Griffiths have sent these deeds to England, placing them in the custody of a mortgagor, how could he comply with such an order? I do not argue whether this is a case in which the lease should be produced or not, but that it is quite impossible to comply with such an order in any case, and three days only given. What securities would mortgagees have, if the deeds on which they should bring their ejectment had to be given up in this way? This is not a proper order under the Common Law Procedure Act, 1853, section 64; it should be confined to the deed of 1701. *Shaftesbury v. Arrowsmith* (4 Vesey, 66); *Lopez v. Deacon* (6 Beav. 254). [*Fitzgerald, J.*—It seems to me that an order in accordance with the 55th section of the Act of 1853 would answer all purposes.]

Tandy, contra—Under the 64th section of the Common Law Procedure Act of 1853, it was necessary to identify the document, and the 55th section of the Act of 1856 was enacted to enable a discovery of the documents, whatever they might be, and of objections to their production. The preliminary notice shows, that the parties were not taken by surprise. There was no objection of the kind on the notice of motion.

Rule:—That the order of the 24th of June be varied so far as requires said defendant to state what documents he has in his power or possession, relating to the matter in dispute, and that the affidavit directed to be made under said order be confined to the lease of 1701, and that said defendant do state in said affidavit, whether he has said lease in his possession

or power, or what he knows as to the custody thereof, and whether he objects (and if so, on what grounds) to the production thereof, said affidavit to be made within one week, and to pay costs of motion.

Agent for plaintiff—George W. Shannon.

Agent for defendant—D. Mahoney.

TRINITY TERM, 1862.

LINDSAY v. BAYLEY—April 15.

Setting aside defences as embarrassing and irrelevant, Common Law Procedure Act, 1853, section 57.

THE summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £100, for that plaintiff, at and before commission of alleged grievances was, and still is possessed of a certain close called Violet Hill, part thereof consisting of the bed of the River Tolka, and that plaintiff ought to have the benefit of said river running in a certain manner, yet defendant wrongfully intending to injure plaintiff in this behalf, &c., on a certain day, and at sundry other times, wrongfully and injuriously erected and made, or caused to be &c., a certain dam in the bed of said river, and continued same, and thereby prevented the water of said river from running in manner aforesaid, by reason whereof, &c. Second count averred possession by plaintiff of another close, to wit, Violet Hill now, and at time of commission of grievances hereinafter mentioned, and right of plaintiff to have water of River Tolka flow in a certain manner, and wrongful erection by defendant with intent to injure plaintiff of a mound in said river, whereby, &c. Third count—Whereas plaintiff at time of commission of grievances hereinafter mentioned was and still is possessed of a certain other close called Violet Hill, and defendant was and still is possessed of another close, and a certain river, to wit, the Tolka, ran between said close of plaintiff and said close of defendant, so that the lands on one side belonged to plaintiff, and the lands on the other side belonged to the defendant, and formed portions of the said several closes respectively, and the bed or channel between the banks of said river ought to be of a certain width, and free from obstruction, so that the water should flow in a certain manner, the defendant on a certain day, and since, erected a dam in, and caused obstructions to said bed or channel, so as to divert the flow of said stream from the said banks of defendant, and turn the force of said stream against the banks of plaintiff, and caused them to be undermined, whereby they were injured, &c. Fourth count—And whereas plaintiff was and is entitled to other lands, and to the flow of a stream or watercourse along them, defendant on a certain day, and at sundry other times wrongfully diverted the flow of said stream, and caused it to flow in a violent manner, whereby said lands were and still are injured. The defences were, first, that plaintiff ought not to have benefit of said river running in manner aforesaid. Second, that the said mound or dam is not in bed or channel of said river Tolka, and does not wrongfully prevent the water of said river running as alleged. Third, to second count, that plaintiff ought not to have benefit and advantage of the flow of the water of said river in manner alleged. Fourth, that said dam or

mound is not made or erected in or upon the bed of said river Tolka as therein alleged. Fifth, to third count, that the banks therein mentioned ought not to have been, or continued, of such width, or so free from obstructions that the water should flow in manner alleged. Sixth, similar to fourth defence. Seventh, to the fourth count, that the dam therein mentioned does not prevent the flow of the stream from running in its usual course, or cause same to flow with greater force than of right it ought to upon the lands of plaintiff as alleged. Eighth, further defence to first, second, and fourth counts; that said three counts are brought for one and the same cause of action, &c., that up to and prior to the year 1847 said river flowed, and its ancient natural course was in a certain channel running along and against said close of plaintiff, and that in 1847, and less than twenty years from the grievances alleged in said counts, a certain cut or channel was wrongfully made through a certain close of defendant, adjoining said river opposite said close of plaintiff, near the said natural course of said stream, whereby a portion of the water of said river was diverted from its ancient natural course as aforesaid, and made to flow through said close of defendant for a short distance, and after so flowing to fall again into its natural course; and defendant says that by reason of the continuance of diversion of said river, that is to say from the year 1847, and for a period of time less than 20 years, and up to time of commission of said alleged grievances, it did flow past said bank of said plaintiff at a less depth and more gently than it ought to have done in its ancient and natural course, and defendant further says that he did at the time of the commission of said alleged grievances, and within twenty years after said wrongful diversion stop up and fill the said cut and channel so wrongfully made in said close of defendant. Ninth, similar to eighth defence.

O. C. Morris (and with him Ball, Q.C.) moved that the seventh defence be set aside as being embarrassing, ambiguous, and not tending to raise a material issue, inasmuch as it is doubtful whether it is pleaded as a traverse, or an assertion of right, and does not confess and avoid, or show any title to do the act complained of; and also that the 8th defence be set aside on the grounds that it was imperfect, embarrassing, and did not expressly assert what was suggested therein, and rose no material issue, nor confessed and avoided, and was argumentative; and also that the fifth defence be either set aside as raising no material issue, and not traversing or answering the matters complained of, or be amended by altering the word "banks" into the words "said bed or canal between the said banks of plaintiff or defendant."

Harty (with him J. E. Walsh, Q.C.) resisted the motion on the grounds that there was an ancient bed and a modern channel, and that the obstruction had been erected, not in the ancient bed, but in the modern channel of the river, and thereby restored things to their ancient condition.

PER CURIAM.—We make no rule as to setting aside the several defences objected to. The defendant may amend the seventh defence by striking out therefrom the word "wrongfully" before the words, "prevent the flow of the stream." We also give him leave to amend the eighth defence by adding after the words,

"Stop up and fill the said cut and channel so wrongfully made and dug in the said close of the defendant," the words "without altering the said ancient bed and channel of the said river." The fifth defence may be altered by putting before the word "banks" the words "The bed or channel between them." Costs to be costs in the cause.

Agents for plaintiff, G. R. Wade.
Agents for defendant, J. F. Bayley.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

THELWALL v. YELVERTON.—April 23, 25.

Jurisdiction—Bill of exceptions.

Where, upon the settling of a bill of exceptions, the judge before whom the case was tried has sanctioned the insertion into it of answers given by the jury to questions propounded to them at the trial, but which questions formed no part of the original issues, but were eliminated by the judge, and left to the jury with a view to their arrival at a true verdict, it is not competent to the court out of which the record came, upon motion by the plaintiff or defendant, to amend the bill of exceptions, or the postea with which it is incorporated, by striking out the answers so inserted. (CHRISTIAN, J., dissentiente.)

THE action had been brought to recover a sum of money alleged to be due from the defendant to the plaintiff, on account of furniture, board, lodging, and necessaries, supplied to the defendant's wife. The defences to the various counts were simple traverses, and the issues were in the terms of the defences. The substantial question was, whether the lady to whom the necessaries had been supplied was the wife of the defendant. At the trial before Monahan, C. J., at the Hilary after sittings, 1861, there was evidence adduced of two ceremonies, the one performed between the parties, themselves, in Scotland, the other celebrated by a Roman Catholic priest, in Ireland. The judge told the jury, that in order to find a verdict for the plaintiff, they must first ascertain that a valid and binding ceremony of marriage had been performed between the defendant and Maria Teresa Yelverton, otherwise Longworth, the lady to whom the plaintiff had supplied the necessaries in Scotland, or that they must ascertain that a valid ceremony of marriage, between the parties, had been performed in Ireland, and in order to this latter finding, they must first find that for twelve months prior to the date of the ceremony, the defendant had been a professing Roman Catholic, and he further told them, that if they found the fact of the alleged Scotch marriage, they need give themselves no further trouble in relation to the ceremony performed in Ireland, or the question of the defendant's religion. The jury returned for answer, that they found a valid marriage had been contracted between the parties in Scotland; that they also found the ceremony in Ireland, to constitute a valid and binding ceremony of marriage, and the defendant to have been a professing Roman Catholic for twelve months prior

to its date. Verdict for the plaintiff—there was no objection taken at the trial by the defendant's counsel to the course adopted by the judge in so splitting the main issue into two, but a bill of exceptions, five in number, to the charge of the learned judge, upon other grounds, was tendered in the usual form and received. Upon settling this bill of exceptions, the above questions relating to the several marriages, and the religion of the defendant, and the answers given to them by the jury, were set out and formed part of the record.

Ball, Q. C. (with him *Jellott*) for the defendant, moved to amend the bill of exceptions by striking out the answers of the jury.—The jury were asked if a marriage had been contracted in Edinburgh, 1857, and if it was a binding one according to the law of Scotland; they were also asked, if there had been a marriage contracted in Ireland. The answers to these questions are not answers to the original issues, but to collateral questions raised on the trial. I find no fault with what the Lord Chief Justice did, in raising and putting these questions, but I say that the answers to them cannot appear on the bill of exceptions. Were there a motion for a new trial, it might be otherwise; but the argument of this bill must not involve a new trial motion. The law regulating bills of exceptions, is the same for both countries, for England and Ireland. The statute which gave the right to them, (and which was made Irish by Poyning's Law) was the 13 Edward I., c. 31, which enacts that, "If the king, upon complaint made of the justices, cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the exception with the seal of a justice, the justice shall be commanded that he appear at a certain day to confess or deny his seal, and if the justice cannot deny his seal, they shall proceed to judgment according to the exception." Then came the Irish Statute of 28 Geo. III., c. 31, the first section of which has been uniformly misconstrued by the Irish judges, as the House of Lords determined in *Lord Trimlestown v. Kemmis* (9 Cl. & Fin., 749 and 5 Ir. Law Rep. 380.) That section runs thus—"whereas it hath been holden that bills of exceptions taken to the opinion of a judge at Nisi Prius, are not examinable in the court in which the action is brought, and can only be examined upon a writ of error brought in a superior court, whereby the party offering such bill of exceptions is subject to great delay and costs—be it enacted, &c., that it shall be sufficient if the judge, to whom such bill of exceptions shall be tendered, sign the same, and that it shall not be necessary for him to put his seal thereto, and that such bill of exceptions so signed shall remain with the clerk of Nisi Prius, and be incorporated in the *postea*, and be returned therewith to the court in which the action is brought—which court shall have authority to examine the same, and give judgment thereon, or make such order, either by arresting the judgment, granting a *venire facias de novo*, or otherwise, as shall be agreeable to justice." The Irish judges erroneously conceived that under this last clause they had a latitude to review the entire merits of the trial. The point arose in *Trimlestown v. Kemmis*, and the House of Lords held that the law was the same in Ireland as in England, and that the Court of Exche-

quer Chamber in Ireland (from which the appeal to them had come) had no power to select any particular portion of the evidence set forth in the bill of exceptions, not being the subject matter of an exception taken at the trial, and to affirm or reverse the judgment of the court below, upon argument built upon such portion of the evidence alone, or upon considerations of its weight or bearing upon the merits of the case. Tindal, C. J., in delivering the opinion of the judges, says—"The question becomes this, whether the Court of Exchequer Chamber in Ireland has, under the 28 Geo. III. c. 31, a larger power in adjudicating upon a cause brought before them by writ of error after a bill of exceptions tendered, than a Court of Error in England would have under similar circumstances? and we think it has not—we are of opinion that this Act gives no authority to the court to proceed upon any other rule or ground of decision than that which, before the Act, belonged to and governed the decision upon a bill of exceptions; for the words "to give judgment thereon," mean either for the plaintiff or defendant, according to the merits of the exceptions; the words "to order the judgment to be arrested," mean only in case any matter appears on the record of the action which calls upon the court so to do; the words "to grant a *venire facias de novo*," mean the ordinary judgment where the exceptions are allowed; and the words "or otherwise as shall be agreeable to justice," mean that the court shall make any other order which the consideration of the bill of exceptions, as a bill of exceptions, calls upon them by law to make." The case of the *Bank of Ireland v. The Trustees of Evans's Charity* (4 Ir. Com. Law Reports, 624 & 5 House of Lords, 389), is to the same effect. The words "agreeable to justice" mean agreeable to the merits of the exceptions, not the merits of the trial. Suppose there were three or four issues on the record, as follows—Was Mrs. Yelverton married in Scotland? was Mrs. Yelverton married in Ireland? &c. That would be a stronger case, and yet, even in that case, we should be entitled to have judgment on the exceptions, not upon the merits. —*Davies v. Loundes*, first reported in 4 Bingham's N.C., 478, and afterwards in 1 Manning & Granger, 473, was very similar to the present case. The defendant for whom the verdict was found, sought to have the opinions of the jury on three questions thrown out by the judge inserted into the bill of exceptions, and the Court of Appeal refused to do this, and Tindal, C.J., in giving judgment, says, "The proper object of the bill of exceptions is to contain the exception made to the directions and ruling of the judge, together with so much of the evidence given at the trial as is necessary to make the exception intelligible to the Court of Error, and furnish grounds for the allowance or disallowance of the exception. Upon legal reasoning, therefore, there can be no stronger ground for insisting that this communication of the jury to the court should be set out upon the bill of exceptions, than that it should be set out in the *postea* immediately preceding the verdict." It may be asked, what is my object in seeking to expunge these answers? but, I reply by asking, what is the plaintiff's object in desiring to retain them on the bill of exceptions? It is in order to have the benefit of a

new trial motion. [*Christian, J.*—Suppose that six of the jurors believed the Scotch marriage valid, and the Irish one invalid, and the other six believed the Irish marriage valid and the Scotch one invalid, the twelve might yet agree that Mrs. Yelverton was the wife of the defendant. *Keogh, J.*—It has not been suggested that the jury would be at liberty thus to compound their differences, and out of two half marriages make one whole one.]

Serjeant Sullivan, (with him *Whiteside, Q. C.* and *Townsend*) contra.—The judges are bound to leave this matter upon the record, but they can deal with it as they please when the bill of exceptions comes to be argued. [*Monahan, C. J.*—I knew when settling the bill of exceptions, that if I struck out these answers, there would be no appeal, and the point could not be discussed either in this court or the House of Lords.] I am now upon a point of jurisdiction, and I go the length of saying the court has no jurisdiction to meddle with the postea after the judge has settled it. [*Keogh, J.*—There ought to be an authority for such a motion as this.] There ought, and where is it? None has been produced on the other side. [*Christian, J.*—It is unusual for the findings of the jury to appear on the postea, and therefore there may be no case in point.] A summons is the proper course. [*Jellett* here referred to *Culley v. Doe dem. Taylerson* (11 Adol. & El. 1013 note.)] That case only placed one part of the record behind the other; the substance was untouched. In *Davies v. Lowndes*, Tindal, C. J. required no answers to the questions. I see no end to questions of this kind, if the present one be entertained. The suggestion thrown out by *Christian, J.*, of six to one and half a dozen for the other, is the most convincing reason why this bill of exceptions should not be touched. The purpose of this motion is to confuse the record, and blind every court before whom it may come as to the real issues—it seeks to have the judge's charge stand as delivered—the questions stand, and the answers to those questions be struck out. The result must be the grossest injustice. The judge said, I want to have two questions answered,—was there a Scotch marriage? was there an Irish marriage? [*Christian, J.*—And he told the jury if they found the first to throw the second out of their consideration.] Suppose these answers erased, and that the case goes before an English tribunal, which knows nothing of it, how is it to tell but that it was six to one, and half a dozen for the other? [*Christian, J.*—My difficulty is founded on *Davies v. Lowndes*. The answers in this case were given in defiance of the charge.] This is not a motion to strike out the finding on the Irish marriage.

Whiteside, Q. C.—This is a motion of the first impression, a motion to the full court to coerce the judge, and while I address the full court I do it under protest, for I conceive that I ought only to be addressing the Lord Chief Justice. In *Culley v. Taylerson* there was an admission by the counsel. [*Christian J.*—The bill of exceptions in England forms no part of the postea, and therefore that case is no authority for the court to interfere here.] The finding on the second marriage cannot impeach the finding on the first. Lord Eldon was twice married, and if that be ground of impeachment he was never married. A

judge cannot charge the jury twice. In the case of the *Mersey Docks Trustees v. Jones* (8 Com. B., N. S. 124), the plaintiffs obtained a rule calling on the defendant to show cause why they should not be at liberty to amend the special case by inserting therein a statement to raise the question of estoppel, and the rule was discharged, and it was rightly argued that the court had no power to alter the form of a special case agreed on by the parties, or to interfere in any way except in case of fraud—*Vines v. The Corporation of Reading* (1 Y. & J., 4); *The King v. Ward* (6 N. & M., 38); *The Earl of Glasgow and others v. The Hurler Alum Company and another* (3 H. of L. Cas., 25).

Jellett in reply.—These answers must be either part of the bill of exceptions or part of the postea; there is jurisdiction to amend both. In *Culley v. Taylerson* "a preliminary objection was taken for the defendant in error by Granger, who contended that the exceptions appeared not to have been tendered till after verdict. He referred to *Armstrong v. Lewis* (2 C. & M., 274), and pointed out that the record was properly made up, in this respect, in *Wright v. Doe d. Tatham* (1 A. & E. 3). He admitted (as *Paterson, J.* had stated, that, in fact, the exceptions were tendered before verdict; but he contended that the record was conclusive, and that after the bill was sealed no alteration as to facts could be introduced by amendment; as to which he referred to *B. Ridgman v. Holt* (Shower's Par. Ca., 122, 3). *W. H. Watson*, contra, contended that the order was immaterial; but that, at any rate, the record might be amended, and he referred to *Richardson v. Mellish* (3 Bing., 334); *Doe d. Church v. Perkins*, 3 T. R., 749). Per *Curiam*.—We think the amendment may be made." Suppose them a part of the postea, then *Richardson v. Mellish* (3 Bing., 334) is an authority. So is *Powell v. The Atlantic Steam Navigation Company* (11 Ir. C. L. R., 347). The section of the Common Law Procedure Act on amendment gives the power. The bill of exceptions does not necessarily contain the verdict at all; so the statute of Westminster, and the 28 Geo. 3., c. 31, s. 1. In old times the bill was handed in when the exceptions were taken, and it was only in process of time that, owing to the hurry of *Nisi Prius*, the present practice was had recourse to. To the same effect is the form of Bill of Exceptions in the Schedule to the Common Law Procedure Act, 1853. The jury here find the facts and the conclusion of law upon them, and there is no record of a postea so framed. See *Chitty's Archbold and Cole on Ejectment* (appendix 774); *The Earl of Glasgow v. The Hurler Alum Company* is inapplicable.

Cur. adv. vult.

April 28.—*MONAHAN, C. J.*—This, though not technically, is substantially an appeal motion. The case was tried before me, and, on settling the bill of exceptions, the question was raised whether it should be in its present condition. I decided that it should be in its present condition. I will mention shortly the nature of the amendment sought for. The only question to be tried was, whether Mrs. Yelverton was the wife of the defendant or not. A great deal of evidence was given to prove two facts—one, that a

valid marriage had been contracted in Scotland; the other, that a valid marriage had been celebrated in Ireland. I said, and there was no objection raised at the time, that I should leave the two questions distinctly, and I told the jury that if they found the fact of the Scotch marriage, they need not trouble themselves about the Irish one. The defendants counsel immediately after tendered two sets of exceptions—one pointed to the one marriage—the other, to the other. But no objection was taken to my leaving both these questions to the jury. The motion now is to expunge the answers, as I understand it, it is not to expunge the questions. The first objection to this application is, that the court has no jurisdiction to interfere with the bill of exceptions; that no Act of Parliament gives them jurisdiction to interfere. I do not mean to say that, in the case of a mistake, the judge or the court has no power to interfere with that, but the opinion of the majority of this court is, that it cannot interfere with the bill of exceptions. No case has been cited in point; some few cases were cited in which, without taking the trouble of going before the judge, an application was made to the court on the ground that the judge would not object. If this were such a case, the case of a mere slip, there is no doubt that the court might interfere. A second question is, whether the court ought to interfere, supposing it had the jurisdiction. The majority of the court think that even if there were jurisdiction, they ought not, in the present case, to do what they are asked. In *Davies v. Lowndes*, the judge told the jury that there were certain questions which they must determine, in order to find a verdict. The jury gave answers without being asked for them, and the counsel applied to the court to have their answers introduced into the bill of exceptions. The court decided it was not a case in which they would introduce the answers. The majority of this court think that a very different thing from the present case, in which the answers are on record. In reply to the statement that there is no case to be found, since the statute of Westminster, like the present, suffice it to refer to *Nepean v. Doe dem. Knight* (2 M. & W., 894). On looking at page 911, we have the judgment of the Court of Exchequer Chamber given by Lord Denman, and from that it appears the jury's findings "that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years," were on the record. So that whether rightly or wrongly done, it is not accurate to say this is the only case in which such findings have appeared upon the record. I thought it was not for me, when this came before me, to decide summarily that these findings of the jury should be excluded, and the majority of the court are of opinion that even if the court had jurisdiction, this is not a case for removing them. I say nothing, however, of the effect of leaving them. It may be that they will be disregarded on the principle that *utile per inutile non vitatur*: it may be otherwise.

BALL, J.—I concur in the statements of the Lord Chief Justice.

CHRISTIAN, J.—There are some observations thrown out by the Lord Chief Justice which I do not go along

with. I am of opinion that the court have every jurisdiction to entertain this motion. I ought to state the grounds I have for so thinking, as it might be of importance afterwards. I think I ought to assign my reasons. There is a marked distinction between the present and all the cases in which the judge has been held supreme in what he has done. In the latter the judge has confined himself within the province precisely marked out for him. There the court can derive their knowledge of what the verdict was from the judge alone. In them there is an obligation on the judge to give the court information through the *postea*. Similarly where the court above want to know what was the evidence, what the direction, what points were left to the jury, &c., it is from the judge alone that the information must come; and one line or figure of what he has thus supplied the court above cannot alter. No doubt, cases of necessity arise in which the judge will ask the assistance of the court; and there again the court is confined to the information which the judge gives them. In every one of these the judge has done what the law has obliged him to do; but if the judge thinks it proper to adopt a course highly novel and exceptionable by putting upon the *postea* matter which was not given to him upon the *Nisi Prius* record; to wit, the opinions of the jury; for this is not the verdict, for I do not consider these findings to be on the bill of exceptions at all, but on the *postea*; then it becomes quite a different thing from the cases I have mentioned. The distinction is obvious and palpable, and must approve itself to every mind on consideration. The question here is this, was the judge right in putting this upon the record? It was voluntary. Hence it is the clear duty of the court to entertain that question. In the one case the judge is ordered by the law, in the other he is not. What was the issue in the present case? Whether this lady was the wife of the defendant. It was no part of that issue to find the validity of any particular marriage or the date of any marriage. There was evidence on a variety of points given at the time—evidence of cohabitation, &c. One juror might have said I have the cohabitation to go upon; another juror might have said I have been told that the defendant must have been a Roman Catholic for twelve months; I believe that; another juror might have said, I am satisfied by the evidence of reputation. What the law requires is, that the jury should be unanimous on the issues left to them upon the record and on nothing more. Was it ever heard of that a judge should say to the jury, I will not take your finding unless you satisfy me of your opinion on certain other questions. These were pieces of evidence; I will not call them collateral issues. The judge had a right to direct the attention of the jury to these questions, and even to get their answers to them, and to put them on his note-book for his own purposes; but having done this he goes a step farther, and puts these answers upon the *postea*. No doubt, he did so in the interests of justice; but I say when he has so done he has taken the case altogether out of the category of cases I have mentioned in which the court cannot interfere. I say the court have a right to inquire whether the judge has a right to alter the con-

dition of the *postea*. One observation on this part of the case let me repeat. Much has been said of the judge's seal or signature being appended, and the consequent immutability of the bill of exceptions, but I do not consider these answers to form part of the bill of exceptions at all but of the *postea*. It is the theory though not the practice that the bill of exceptions should be complete and signed before the jury come into court. I am clearly of opinion that the principles regulating this motion are the principles regulating a motion to amend the *postea*, not to amend a bill of exceptions. It remains to be asked, was the judge right in the present case? And I do not give an opinion, because this is a motion to amend the record; and if I thought it a case where justice would be eventually done, thinking also that what was done was wrongly done, I should not express that opinion. But I reserve to myself the right to decide on the propriety of this step upon the hearing of the bill of exceptions. With that reservation I concur in the judgment of the other members of the court.

KEOGH, J.—I wish to keep myself as free as possible until the argument of the bill of exceptions. I was of opinion that the court had not jurisdiction to grant this motion; but upon the other question, I like my brother Christian, reserve to myself the most perfect liberty to discuss everything which may arise on the argument.

No rule on the motion.

AIRD v. KIRBY.—April 29.

Practice—Security for costs—Landlord and Tenant Consolidation Act.

A NOTICE of motion to require the defendant in this case, an overholding tenant, in an action of ejectment, to give security for costs pursuant to the 75th section of the Landlord and Tenant Consolidation Act, the 23 & 24 Vict., c. 154, had been served on the defendant.

M'Kenna, for the defendant, applied to the court to have the motion discharged, no one on the part of the plaintiff appearing to move it.

BY THE COURT.—There must be notice of the application to discharge the motion served on the plaintiff.

STANNUS v. HESHAN.—April 29.

Practice—Security for costs—Landlord and Tenant Consolidation Act.

Beytagh, for the plaintiff, applied to compel the defendant, an overholding tenant, in an action of ejectment, to give security for costs, damages, and mesne profits, pursuant to the 75th section of the 23 & 24 Vict., c. 154, the Landlord and Tenant Consolidation Act. The notice of motion had not named a day on which it would be moved.

BY THE COURT.—The notice served on the defendant must state the day of moving.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

RE ALEXANDER SIM, A BANKRUPT.

Reputed ownership—Bill of sale by way of mortgage—Demand of possession by mortgagee—Possession by bankrupt with his consent.

Where a trader executes a bill of sale of chattels, by way of mortgage, which contains a clause that he is to retain possession of the goods until a certain day, by which time he was to have paid the advances made him—the mortgagee, notwithstanding this clause, demanded possession of the goods three days after the execution of the mortgage, which was refused by the bankrupt on the ground that it was inconsistent with the terms of the deed, in which refusal the mortgagor appeared to acquiesce, and they continued in the apparent ownership of the mortgagor at the time of his bankruptcy. Held, that the goods and chattels were in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner, and that they passed to his assignees.

THIS case came before the court upon charge and discharge. The facts appear in the very able judgment of Judge Lynch. The bankrupt was an extensive miller in Sligo, and a question had been argued on former days as to the validity of a bill of sale given by him to his solicitor, Mr. Baptist Kernaghan, as security for moneys advanced to him by Mr. Kernaghan, and also in respect of a claim made by the latter for having paid a debt due by the bankrupt to the Clydeedale Bank. The validity of the bill of sale was impeached by the assignees on various grounds, and that was the question for the decision of the court.

Armstrong, Serjeant, and Kernan, Q.C. in support of the bill of sale: they cited *Harris v. Ricket* (4 Harlton & Norman); *Hutton v. Critwell* (1 Ellis & Blackburne, 15).

Hempill, Q.C., and Heron, Q.C., were for the assignees: they cited *Re Murray* (9 Ir. Chan. Rep. 291) *Freshney v. Carrick* (1 Harlton & Norman 653) *Hornsby v. Miller* (1 Ellis & Blackburne; 5 Jurist 938).

JUDGE LYNCH, in giving judgment, said—This case has been submitted to this Court on the charge of the assignees and the discharge of Mr. Kernaghan; and the question is as to the right to the household furniture of the bankrupt taken possession of by this Court, same having been in the possession of the bankrupt at the time of the adjudication. *Prima facie* the property belongs to the assignees, having been found in bankrupt's possession at the time of his bankruptcy. But Mr. Kernaghan claims them as his, having been transferred to him by a bill of sale, executed on the 3rd of August, 1861; and Mr. Kernaghan having proved this deed now claims them as his property. The charge of the assignees admitting the execution of the bill of sale, sets up, in answer to the title made under it, several matters of fact, amongst others, that the bill of sale of the 3rd of August was a contem-

poraneous transaction with a bond and warrant of attorney given in order to bind Hetherington's tenements; and that both together were an act of bankruptcy, as conveying substantially the whole of the bankrupt's property to secure a bygone debt to Mr. Kernaghan. And indeed did the case rest on the transaction of the 3rd of August, 1861, it would be clear enough that Mr. Kernaghan's title would fail on the grounds stated. But Mr. Kernaghan has gone into evidence to show that this bill of sale, executed on the 3rd of August, 1861, was then executed in pursuance of an agreement entered into long previously, and by which before the advances were made which form the consideration of the bill of sale, it was agreed that such bill of sale would be given. Many arguments have been advanced before me to induce me not to act on this testimony; but they were ingenious reasonings against the testimony given, and I never for one moment admitted to my own mind the possibility of acting against the testimony of Mr. Kernaghan, not met by any counter statements by any witness, and corroborated remarkably by what occurred before me—the character of Mr. Kernaghan himself is hardly necessary to be added to a case so plainly sustained by the evidence given before me. I, therefore, as a fact find “That this bill of sale was executed on the 3rd of August, 1861, in pursuance and in performance of the agreement made to give it on the occasion of the agreement to make the advances;” therefore the question, on the authority of the cases of *Harris v. Rockett* (1 H. & N. 1) and *Hutton v. Critwell* (1 Ellis & B. 15) is altered, and the title under the bill of sale, and the transaction evidenced by it, must be regarded as matters stood in June, 1860. Now, in my opinion, it is quite impossible to impeach the dealing of June, 1860, on any of the grounds put forward here. Some general statements of fraud in that transaction are put forward. There is no foundation whatever for any such charges. The dealing with Mr. Kernaghan was, as far as he was concerned, a perfectly honest and *bona fide* one, and his title then acquired is beyond impeachment or suspicion. He advanced his money on the faith of this security—he did so *bona fide*, to keep Mr. Sim in trade, and his advances were applied to trade purposes by him; and as far as Mr. Kernaghan is concerned, the only matter of regret is that he was so little exacting in his claims, and so forbearing as to the enforcement of his own rights—that by reason of this now the serious question in this case arises, namely, whether the assignees have not now a right conferred by the 313th section, which must prevail against the title of Mr. Kernaghan under this bill of sale, even treating it as I have done, as a transaction of June, 1860, when the agreement to give it was entered into. I wish to add here, in passing, that no objection was alluded to in argument by reason of the present bill of sale differing in some respects from the bill of sale agreed on, or by reason of the stay until November, introduced in the agreement of 3rd of August, 1861. The bill of sale was not questioned on any such grounds, but was treated as pursuant to that agreement, if that agreement was established in evidence; and I merely now allude to this as a matter worth mentioning, though unneces-

sary for my consideration and not alluded to in argument. But I come to the principal question in this case—namely, taking the bill of sale as a transaction of June, 1860, were the chattels in the possession, order, or disposition of the bankrupt, after he became a bankrupt, with the consent and permission of the true owner, treating Mr. Kernaghan, by virtue of the title he has established, as such true owner? This is often a very harsh clause, and often, as administered in individual instances, works plain hardship; but it is a provision of the law made for public usefulness, and which, being for a general object, cannot yield in particular instances to a peculiar hardship in its application. Several courts and several judges have stated the hard rule established in some particular cases, but all have yielded to the plain terms of the enactment, which were intended to secure a reality of possession in a trader commensurate with his visible property, so that credit should not be obtained on a false appearance of a trader's possession. This was the reason of the enactment, but was not made the limit of its application, and therefore in the application of the law it is never regarded as a question whether in fact credit was obtained by reason of the possession being left with the permission of the true owner. The questions solely are, whether after he became bankrupt, the bankrupt had the goods or chattels in his possession, order, or disposition; and then, secondly, whether same was with the consent and permission of the true owner. In this case, the only question now is, were these goods in the possession of the bankrupt with the consent of Mr. Kernaghan? Mr. Kernaghan's case is, that on the 6th of August—three days after the bill of sale was executed—he made such a demand of possession as, within the authority of the cases of *Smith v. Topping* (5 B. & A. 674) and others, rendered the possession of them by the bankrupt as not being with his consent. The assignees, however, as to this, insist on three matters: first, that the bill of sale of the 3rd of August, 1861, was a dealing which gave to the bankrupt a right to retain the possession until the day of default—that is, the 2nd of November—and that no demand could avail which was inconsistent with the existing rights of the parties; secondly, that in this case the demand made by Mr. Kernaghan was not in effect the demand required to displace the effect of the possession having being left with the bankrupt; and thirdly, that at the time of the demand Mr. Kernaghan had notice of a previous act of bankruptcy on the 3rd of August. The bill of sale in this case is an assignment by way of mortgage, and nothing more, and does not give Mr. Kernaghan the full power to deal with this property until after the 2nd of November, 1862; and in my opinion this case is substantially within the authority of the cases of *Treshney v. Carrick* (1 H. & N. 653); *Hornby v. Miller* (1 El. & El. 192); and *In Re Murray* (9 Ir. Chan. Rep. 281); even although in each of these cases there was an express clause giving the bankrupt a right to retain the possession until default was made on the day of repayment. But were this even doubtful, as a matter of fact, was such a demand made by Mr. Kernaghan, as rendered the possession of the goods by the bankrupt as no longer with his consent? Now this is

a matter of fact to be found by me on the evidence in the case, and the only evidence to which I refer is that of Mr. Kernaghan himself, to whom I yield the fullest confidence, even when testifying to matters in which he had the greatest personal interest. Referring, then, to Mr. Kernaghan's evidence, and principally to his answers to questions 93 and 99, I find in fact "that Mr. Kernaghan did, on the 3rd of August, *bona fide* make a demand of possession, in order to perfect his title to the articles assigned; but that finding (which he had forgotten) that the bill of sale was by way of mortgage, and that the bankrupt had until the 2nd of November to repay the advances, he acquiesced in the refusal of possession on that ground by the bankrupt, and so left him in possession." Such being my finding in fact, I must hold that the bankrupt's possession was by the consent of Mr. Kernaghan; for he then yielded to the bankrupt's construction of the bill of sale—namely, that it gave him a right to hold the goods until the 2nd of November, and by so acquiescing he put the case exactly on the same ground as existed in the cases where an express clause was introduced giving such right to the bankrupt. On these grounds, therefore, I must hold that the assignees have title to these goods under the 313th section. The further point raised it is unnecessary for me to decide—namely, whether an act of bankruptcy was committed on the 3rd of August, of which Mr. Kernaghan had notice. The transaction of the 3rd of August, it is admitted, would have been an act of bankruptcy, but for the relationship back of the bill of sale to June, 1860. Now, this would save the transaction, as far as the bill of sale is concerned; but, as respects the bond and warrant, it has no such protection, and I do not see how it is saved from being an act of bankruptcy by reason of one instrument covering part of the property, being attached by an existing equity. The two instruments together were an assignment of all his property to defeat and delay his creditors, and the plain intention that day was to give to Mr. Kernaghan, in discharge of the debts he owed to him, every particle of property of any value over which he had a disposing power. Therefore, in my opinion, as I said, the title of the assignees must prevail here—but this title prevails on a strict construction of a law for the general protection of trade respecting a transaction in which Mr. Kernaghan acted throughout *bona fide*, liberally and unexactly towards the bankrupt, and this loss falls on him by reason of his too great forbearance in securing his own rights; and Mr. Kernaghan having consented to come in here to the saving of expense and time to all parties, and his claim being in my judgment a meritorious one, though failing on legal grounds, I give no costs against Mr. Kernaghan, but the assignees to have their costs out of the estate. As this case is necessarily one of mixed law and fact, and as this court hears the evidence, and its findings in fact must of course have weight upon appeal, I wish to say that I have found on the disputed facts generally in favour of Mr. Kernaghan, and I have unhesitatingly acted on his testimony given here; and in case an appeal be brought, which I shall be well pleased at, if there is thought to be grounds for it, I will certify, if so desired, express findings—

as to the agreement in June, 1860—as to Mr. Kernaghan not then knowing that Sim was in insolvent circumstances—as to the *bona fides* of Mr. Kernaghan in the whole dealings—as to the reality of the demand made on the 6th of August, but adding thereto, necessarily, the acquiescence of Mr. Kernaghan in the construction put by the bankrupt on the bill of sale; and adding also, as I should, that on the 3rd of August bankrupt was in insolvent circumstances, and that Hetherington's tenements were substantially the only property of the bankrupt in addition to the goods in the bill of sale. If special findings by me on these facts can be of any use towards bringing the case before the Court of Appeal, I will assist the parties as far as I can; for it is my greatest pleasure to feel in deciding the important cases now so often arising in this court, that the parties have in all the power to appeal from my decisions if so advised.

Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF AMADEE DE MORIN.—May 16.

Administration bonds—Assignment of—Substantial breach of condition—Laches on part of applicant.

The Court will order an assignment of an administration bond in order to be put in suit against sureties when satisfied that a substantial breach of the condition has occurred, but will not require such evidence thereof as would be required to satisfy a jury. Laches on the part of applicant in not enforcing against the principal his rights will not disentitle him to an assignment.

Dr. Townsend moved on behalf of Charles Baury, a petitioner in a cause petition in Chancery, to make absolute a conditional order for the assignment of the administration bond (see *ante* 205) notwithstanding cause shown. Charlotte de Morin had, in August, 1858, obtained letters of administration of the goods of the deceased, and a bond had then been executed to the judge by the administratrix and two sureties in £6000 on condition that the administratrix would exhibit an inventory when required, and duly administer the assets according to law. A cause petition was in November, 1859, filed in Chancery by Charles Baury, a simple contract creditor of the deceased for £1800, for the administration of the assets of the deceased, and it prayed an injunction and also a receiver. The matter was duly referred to Master Murphy, and a discharge was filed by the administratrix in January, 1859, which disputed the petitioner's claim; but it did not give any of the accounts directed by the master's order. The petitioner's claim was established in December, 1859, on an issue sent to the Common Pleas. The respondent, Charlotte de Morin, left the country before May, 1860, in which month

a draft final order was lodged in the Master's office; and on 13th May, 1860, the Master by his rulings decided that, as no account of the assets or of the debts, &c., had been taken, he could not make a final order, and directed a supplemental charge to be filed by the petitioner setting out such accounts as well as he could. And by his final order signed in December, 1861, the Master found that so far as he could ascertain, assets of the deceased, to the amount of £3000, had reached the hands of the administratrix, and that £882 was due by her, and that £463 5s. 7d. was due to the petitioner. The solicitor for the applicant had filed an affidavit stating the above facts.

Dr. Walsh, Q.C. (with him *Fraser*) for the surety, *contra*, showed cause and contended that as against the surety there was no evidence to show that the condition of the bond was broken pursuant to the 88th section of the Probate Act. The affidavit states, only on hearsay and belief, that the administratrix got possession of the assets and left the country to avoid payment of liabilities, and is out of the jurisdiction; but she may, notwithstanding, have duly administered; and the surety should know the precise breach of the condition of the bond intended to be relied on, in order that he may, if so advised, come in and satisfy the demand without litigation and expense. And besides, the laches of the petitioner disentitle him to the order now sought, as no attempt was made when the administratrix was here to get an injunction, or a receiver, or to take an account. No steps were taken to get any account until after the draft final order was lodged and the Master had made his rulings on it. The administratrix never was called on to file an inventory; that was held a sufficient objection in *Murray v. McInerhony* (1 Curt., 576).

KEATINGE, J.—Before the Probate Act, 1857, administration bonds were made to the Primate; and proceedings on them should have been had in his name, or, in case of his death, in the name of his executor. As the bonds were not assignable at law this created great difficulty, as the Judge of the Prerogative Court was obliged to see that the Primate or his executor was indemnified against costs. But the Probate Act, 1857, remedied that; and by the 96th section the bond is directed to be made to the judge of this court; and by the 88th section he is enabled to get rid of it; and when "satisfied that the condition of any such bond has been broken, to order one of the registrars of the court to assign the same to some person to be named in such order; and such person, his executors, or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at law and in equity as if the same had been originally given to him instead of to the judge of the court, and shall be entitled to recover thereon as trustees for all persons interested the full amount recoverable in respect of any breach of the condition of the bond." So that the assignee stands just as if the bond had been passed to himself. The only question then is, am I satisfied within those words of the 88th section, that the condition of this bond has been broken? It cannot be the true construction of that clause that this court should have fully before it all the facts which would enable it to decide beyond doubt on such

evidence as would satisfy a judge and jury, that the condition was broken; but only that the court must be satisfied that there is a proper case for inquiry, that the condition has been *substantially* broken, and that it is not such a case as that nominal damages only could be recovered, in which case I would be slow to allow the assignment. But here it is clear that in a matter in Chancery it appeared a very large amount of assets did exist, and that the administratrix got the possession of them. The precise amount has not and cannot be ascertained. Why? By reason of the default of the principal in absconding and not filing her discharge. The decree in Chancery satisfies me that a case is made out, that a substantial breach of the condition has occurred, and I therefore am bound to direct an assignment of the bond. As to the laches of the petitioner in Chancery in not applying for a receiver, &c., no case goes so far as that thereby a surety would be exonerated. If indulgence were given to a principal, in many cases the remedy is lost; but the mere giving of time will not do so. The question is, did you *contract* to give time? I do not consider how far it might have been prudent for the petitioner to have demanded an inventory and account, I only consider that there has been a substantial breach of the condition. The petitioner will have his costs out of the assets.

IN THE GOODS OF MARY COLLINS, DECEASED—May 27.

Practice—Administration Bond—Assignment of—Security for costs.

A next of kin of the deceased, applying under an order of a Master in Chancery, for an assignment of an administration bond to put it in suit against a surety, the administrator having made default, is not liable to the surety to give security for costs, on an allegation that he is a pauper. Laches on the part of applicants will not prevent the assignment of the bond.

Walter Bourke, Q.C., moved to make absolute a conditional order to have the administration bond assigned by the registrar to him, to have it put in suit against Mr. Roach, a surety. The conditional order was had on an affidavit stating the default of the principal, and the proceedings in Chancery, and the Master's order to make the application in this court. The surety filed an affidavit as cause, relying on the laches of the applicant, and also of his want of means to pay costs if defeated in the action; but it did not make any case of merits.

M. Morris, for the surety, relied on the laches, and asked that, if the order was made absolute, the court would order security for costs, as was the practice with the Masters in Chancery when their names were used in actions, and also in the Prerogative Court, where the bonds were made in the name of the Primate.

Walter Bourke, Q.C., contra.—The Probate Act does not prescribe any such security to be given.

KEATINGE, J.—This motion is to make absolute a conditional order for the assignment of the administration bond to put same in suit against a surety named Roach. The application is made under the 88th section of the Probate Act, the object of which was to avoid the inconvenience of using the name of the judge. The administrator, it appears, is in default, and a petition matter is pending in Chancery respecting his accounts, and this motion has been made with the sanction of the Master; but even so, it is open to the court to use its discretion, and if a case were made out of solvent parties putting forward for their own purposes an insolvent pauper, I would be slow to make the order, or if I had the power would require security for costs, but no machinery is provided for such security being given, but here the applicant is one of the next-of-kin, interested in the assets, and no cause has been shown against the order; for as to laches I have already decided (*ante p. 267*), that mere laches on the part of the applicant will not protect the surety from the assignment of the bond. The cause shown must be disallowed with costs.

MASSEY V. PENNEFATHER—May 31.

Deaf and dumb testator—Proofs necessary—Heir at law, a defendant, of unsound mind—No inquisition.

The court will require the clearest evidence, to establish the will of a deaf and dumb testator, of his perfect capacity, due instructions for, and proper execution of his will. When a defendant, the heir-at-law, is of unsound mind, but not found so by inquisition, and no appearance has been had for him, though the citation and notice of hearing had been served on his mother and the proprietor of the asylum in which he was living pursuant to order, the court will, on a hearing to prove the will, require the evidence to be taken down by a short hand writer, and to be verified by him, and his copy of the evidence so verified to be lodged in the Registry, together with all the documents given in evidence, to be preserved there and not given out. Semble, the court has power to bind the rights of insane persons, though not found so by inquisition.

THE testator in this case was deaf and dumb, and the executors desired to prove his will and codicil in special form of law, and there being considerable real estates, cited besides the several next of kin, also the heir-at-law (who was of unsound mind, but not found so by inquisition) as directed by the order of the 19th February, 1862 (see *ante p. 205*.) The notice of setting down the cause for trial had been also served in like manner, viz., by serving the lunatic himself, and also his mother and Dr. Winslowe, the proprietor of the asylum. No appearance was had, and the cause was now heard before the court itself. The witnesses to the will were examined, and proved perfect capacity, and the drawer also proved it, as well as the instructions for the will; and a number of letters of the testator were read to show his general

intelligence and his specific instructions for the will, besides several papers containing the questions of the drawer and the deceased's answers to him on the occasion of the preparation and execution of the will.

Dr. Walsh, Q.C. and Dr. Lindsay for the plaintiff.

No one appeared for any of the defendants.

KEATINGE, J.—This is a suit to establish the will and codicil of D. F. Pennefather, who was both deaf and dumb, and though a person deaf and dumb can make a will, if all the requisites of the law of wills be complied with as to capacity, due instructions, and proper execution, yet there is great difficulty in such cases generally to establish those matters, but in this case the evidence respecting them could not be clearer. The deceased appears from the parol evidence to have been a gentleman of great intelligence, considering the infirmity under which he laboured, but there are a series of some 30 or 40 documents under his hand, showing great capacity in conducting business, and more particularly in the actual preparation and instructions for the will and codicil in the case—some of them showing the communications which passed between him and the drawer, being a series of questions put by the drawer, and his, the deceased's, answers, and the draft of the will and codicil are also produced and proved, and it appears that they were read by the deceased, and some alterations appear to have been made in them, in pursuance of the deceased's directions, as appears by some of the communications I have referred to of question and answer. So that unless this will could be established, no will of a deaf and dumb testator could be admitted to probate; but in addition to the difficulty arising from the fact of the testator having been deaf and dumb, another peculiarity in the case is, that (the deceased having died seised of real estates) his heir-at-law is a lunatic, though not found so by inquisition. On a previous occasion, on the motion of the plaintiff, I directed the citation to be served on him and on his mother, and on Dr. Winslowe, the proprietor of the asylum in which the lunatic lives; and I also ordered all notices in the cause to be served in the same way; that order I made at the peril of the plaintiff. There is no special provision in the Probate Act as to the mode of serving lunatics or infants, and I consider that the court has power to give a decree against insane persons to bind their rights, giving notice of the proceedings to those who are most interested in the protection of their rights; but the plaintiff takes my decree at his peril, and may hereafter have to show that it is binding. I now decree in favour of the will and codicil, but I have directed that the evidence which has been given be taken down and transcribed by a short-hand writer, in order that such evidence be preserved in the fullest manner, and therefore the short-hand writer will verify his copy of the evidence, and the same, with all the documents given in evidence, will be lodged and be kept in the Registry, to which those representing the heir-at-law can at all times have access, and thus have the opportunity of knowing the evidence on which the will and codicil were established. The plaintiff to have his costs out of the estate.

House of Lords.

RICHARDSON v. ROBERTSON—Feb. 14.

Legacy—Vesting—Gift to a class and survivors—Meaning of word “vest”—General rules of construction.

Where a testator gives a life-estate in his funds, and at the expiration thereof gives the principal to be divided among several, and if any die then to the survivors, without specifying the time of survivorship, he is held to mean the contingency to extend over the whole period which elapses before the time of distribution or expiration of the life-estate, unless the context points out another time; in other words, the legacy does not vest till the death of the tenant for life.

Therefore, where A., by will, gave a life estate to B., and at B.'s death to six persons equally, declaring that “if any die without issue before his share vests, the same shall belong equally to the survivors,” there was nothing in the word “vest” to prevent the application of the above rule.

The word “vest” means prima facie “come into possession,” and not “accrue in point of interest.”

THIS was an appeal from a decree of the Court of Session in Scotland as to the vesting of certain legacies. The testator, James Donaldson, merchant, in Glasgow, by his will dated 1841 gave and conveyed his whole estate, real and personal, to certain trustees for certain purposes. 1. The first purpose was to pay all his just and lawful debts, sick-bed, and funeral expenses, with the expense of executing the trust and likewise all such sums or legacies not exceeding in all £2000 sterling, and interest thereon, as his widow should leave or bequeath by any will she should make under a power in her marriage settlement. 2. To account for, pay and deliver to his widow, or suffer, permit, authorize, and empower her to draw, enjoy, and possess during all the days of her life, after his death, the whole rents, interests, dividends and annual profits of the free residue of the property. 3. To convey to Charles Herbert Scott and the heirs of his body certain real estate described, on condition of the said C. H. Scott requiring such conveyance within six months after testator's death, and paying or giving satisfactory real security to the trustees for the sum of £8000 as the price thereof; and in case of the said C. H. Scott's non-acceptance of such conveyance on the conditions before mentioned, the said real estate to be applied to the purposes of the trust, and in lieu thereof a legacy of £2000 to be paid to the said C. H. Scott, “at the term of Whitsunday or Martinmas that shall first occur after the death of the longest liver of the testator and his said wife.” 4. To pay certain legacies named. 5. The fifth purpose was as follows: “I will and direct the said trustees or trustee to account for, pay, and divide (under the exception of so much, if any, of the aforesaid £2000 as may be bequeathed by my said wife in manner aforesaid) the whole residue and remainder of my property, subjects, means, and estate, heritable and

moveable, real or personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among John Macdougall, lieutenant in the Hon. East India Company's service at Madras; William Macdougall, indigo planter, at or near Calcutta, sons of my late niece, Mrs. Catherine Macdougall; Mrs. Thompson, wife of Dr. Thompson, physician in Perth; Mrs. Richardson, wife of Dr. Richardson, physician or surgeon in the Hon. East India Company's service at Bengal; and Eliza Cuthbertson, late residing in Peth, now wife of Allan Cuthbertson, accountant, in Glasgow, all children of the late Mrs. Elizabeth Young, equally or share and share alike, and to their respective heirs or assignees, declaring that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally or share and share alike among the survivors of my said grandnephews and grandnieces equally.” The testator, by a codicil dated 1843 also said: “And further, I do hereby name and appoint my grandnephew, Thomas Young, officer in the Bengal Native Infantry, to be one of my residuary legatees, and as such entitled to an equal and eventual share with any other of the residuary legatees within named of the whole free residue or remainder of my property, means; and estate, or proceeds thereof, which share I hereby leave and bequeath to him and his heirs and assignees as within provided, and authorize, instruct, and appoint my said trustees and executors to account to him and his heirs accordingly.” The testator died on 15th March, 1844, leaving estates of great value. The widow survived till 3rd December, 1857. Wm. Macdougall, one of the six residuary legatees, died in 1847; and Thomas Young, another of them, died in 1852; that is, both died after the testator, but before the tenant for life. The present suit was instituted for the purpose of having it declared that the residuary legacies had vested in the residuary legatees at the death of the testator, in which case the appellants, who represented the two legatees who died before the tenant for life, claimed their shares. The defendants (the now respondents) contended that the residuary legacies vested only at the death of the tenant for life, and therefore that the appellants were entitled to nothing. The Court of Session, by a majority of ten to three, held, that the legacies had vested at the testator's death; whereupon the present appeal was brought.

Rolt, Q.C. and Anderson, Q.C., for the appellants contended that the rule of construction was the same in Scotland as in England, viz: that where there is no other time mentioned, the word survivors referred to the period of distribution; and, as here, the period of distribution was the death of the tenant for life, the legacies of those who died before that event lapsed—*Wordsworth v. Wood* (1 H. L. C., 129); *Cripps v. Woodcott* (4 Madd. 11); *Sillick v. Booth* (1 Y. and C., 117, 121, 739); *Taylor v. Frobisher* (5 De G. & Sm., 191); *Pearson v. Casamajor* (8 Cl. and F., 74, n.); and other cases cited in 2 Jarman on Wills, 684.

The Solicitor General (Palmer) and *Sir H. Cairns, Q.C.*, for the respondents.

The LORD CHANCELLOR (Westbury).—My Lords, I

think upon a matter of this kind it is desirable, if possible, to consider, in the first place, what are the reasonable, and I may say the established, rules of construction; and in speaking of what I regard to be the established rules of construction, I refer to the jurisprudence of both England and Scotland; for, although we are here to construe this settlement entirely with reference to Scotch rules, yet it is desirable, no doubt, to ascertain that, in the construction of ordinary words in the English language, there is no difference between the view which is taken of them in the one country and in the other. Now, I apprehend it to be a settled rule of construction, and in itself a very reasonable and natural rule, that words of survivorship occurring in a settlement (that is a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject matter of the gift; that undoubtedly is the rule that is now finally established in this country; and I apprehend that it has been ascertained, from the authorities which have been cited at the bar, that that rule was established in Scotland, in fact, even before it was finally recognised and settled in this country. Now here the application of that rule would lead to this determination in two sets of events. If a testator gives a sum of money, or the residue of his estate, to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, in that simple form of gift where the gift is to take effect immediately on the death of the testator; the period of distribution is the period of death, and accordingly the event of the death upon which that contingency is to take place is necessarily to be referred to the interval of time between the date of the will and the death of the testator. In such a case then the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator. Then, by parity of reasoning, or rather as a necessary consequence of the same principle, if a testator gives a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying without specifying the time, and directs in that event the payment to be made, or the distribution to be made among the survivors, it is understood and regarded by the law that he means the contingency to extend over the whole period of time that must elapse before the payment is made or the distribution takes place. The result, therefore, is that, in the event of such a gift, the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, namely, the expiration of the life estate. Now, these are, as I have already observed, in my judgment, natural and reasonable rules of interpretation. Let us now apply them generally, in the first place, to the construction of the settlement that we have before us, and then consider whether there are any particular words to be found in that settlement which of necessity compel us to depart from this natural rule of interpretation, and to adopt another and different mode of construction. Now, the testator or trustee in this

particular settlement has directed the residue of his estate to be applied in the first place for the benefit of the widow during her lifetime, provided that she survived himself, and at the expiration of that interest, whether it was prevented by the wife predeceasing the testator, or whether she survived the testator, and afterwards died; on that event happening he directs, in the first place legacies to be paid, and then he directs his trustees "to account for, pay and divide, or convey the residue and remainder of my property, after the death of the last liver of me and my said wife, equally" among certain persons who are named, "equally or share and share alike, and to their respective heirs or assignees." Then follow the words of the clause of survivorship, declaring "that if any of said residuary legatees shall die without leaving lawful issue, before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally, or share and share alike among the survivors of my said grandnephews and grandnieces equally." I apprehend, that on the first consideration of the words that I have read, no one could arrive at any other conclusion than that the clause which commences with the word "before" is nothing in the world more than an expression *à extenso* of that which is involved in point of fact in the expression of the word "survivors." It declares fully the contingency on which the survivors are to become entitled. But here legal ingenuity comes in, and detects in some of the words employed a more recondite sense and a different meaning from that which would at first strike the mind, and particularly a mind previously imbued with a knowledge of the general principles or interpretation. Legal ingenuity suggests that the word "vest" admits of a double meaning; or rather that the word "vest" is a word of art, and therefore ought here to receive a technical, artificial, and legal meaning; and the interpretation accordingly which is contended for is this—that these words, "before his or her share vest, must be intended to mean and be taken to be a conclusion of law with regard to the right or interest of the individuals named as the residuary legatees, and that if that conclusion of law takes place immediately on the death of the testator, then it must of necessity follow that no subsequent decease without issue after that legal rule has come into operation can have the effect of carrying over the share of any one of the parties named to the survivors living at a subsequent time. In reality, therefore, the discussion is reduced to a very short and narrow point or question, namely, the meaning of the word "vest." Say the respondents the word "vest" must be taken to mean "become absolute." Well, let us adopt that construction, and substituting those words for the word "vest" they will come to signify "before his or her share becomes absolute." Well, but that is a form of expression and of language which grammatically and strictly conveys no meaning unless you take the word "share" in a different sense from that which obviously and naturally belongs to it. If you take the word "share" in that sense which logicians call the abstract sense, in opposition to its ordinary meaning in the concrete form, then the words, will be found, according to the respondents, in reality to run thus—"before the right to his or her share becomes abso-

late." And the whole of the argument that we have heard from the respondents resolves itself in reality into this, that you are to depart from the meaning that you would give to the rest of the sentence, and you are to abandon the ordinary conclusion which the collocation of the whole sentence would naturally suggest, in order to arrive at a different conclusion by adopting the legal, technical, and artificial sense of these words, instead of giving them their natural and ordinary meaning. Therefore it is that the respondents would have us, in point of fact, interpret the words in such a sense as would, in reality, require us to substitute other words for those which really occur; and we should, by our interpretation, make the language in effect speak as if it had originally been, "before the right to his or her share become absolute in the party or parties so deceasing." Now, the whole of this contention is nothing more than an involved and legal ingenuity; it is the result of knowledge of law and of legal refinements applied to the interpretation of plain and simple language. The appellants, on the other hand, say that these words, "before his or her share vests," are of necessity relative or referential words; that they describe something that he who used them considered to have been previously directed, and to be ascertainable from the antecedent part of his bequest or his directions, and they accordingly contend that the words are to be read thus, "before his or her share comes into possession—before his or her share is received or comes to the hands of the party or parties so deceasing." The first inquiry, therefore, that I make as to these two interpretations is, which of them consists best and is most consonant to and most in accordance with the antecedent part of this settlement, to which of necessity there is a reference here? Now, the antecedent part of this settlement is that which constitutes the gift, and the gift consists in a direction, on the death of the tenant for life, to pay and divide, or convey the property to those residuary legatees. I cannot but think that any man of plain understanding of language, and whose mind was divested of legal ideas, and was not wedded to a vocabulary of legal terms, would have had no difficulty whatever in arriving at the conclusion, that the words "before his or her share vests" of necessity mean "before that which has been previously directed happens." That which has been previously directed has been payment on the death of the widow. The natural meaning of the words therefore is before that period of payment arrives, or before that payment has actually been made. This I apprehend to be the natural, plain and ordinary meaning of the words. And your Lordships will observe that the word "share" is there taken according to its natural sense—namely, as meaning a portion of the residue. The word "vested" is taken in accordance also with its natural meaning in the vocabulary of ordinary life, namely, when a thing is received or comes into possession. I therefore consider that these particular words introduced into the clause do not give to it any different meaning from that which in reality it would have in legal interpretation without those words; for it is perfectly clear that if the clause had run, "if any of the residuary legatees shall die without leaving lawful issue, the same shall belong to

the survivors," the word "survivors" would have been referred to the period of distribution—the period of payment; that is, the expiration of the previous life-estate. But then, if that is distinctly involved in the expression, these particular words are nothing more than an expression of that which is so involved, and they are to be construed in a manner consistent with, and consonant to, the rest of the sentence. Whereas, if you give them the interpretation for which the respondents contend, then of necessity you strip the word "survivor" of that meaning which it would have had without those particular words; and the expression "if any of the said residuary legatees shall die," which is in general form, and has no time annexed to it, you limit it to the event of their dying during the lifetime of the testator. On the particular words themselves, therefore, without the general indication of intention afforded by the rest of the sentence in immediate collocation, I should undoubtedly have been prepared to advise your Lordships to come to a different conclusion from that which has been arrived at by the majority of the judges in the court below. But I think this conclusion is still further confirmed by that which is the best of all possible confirmations, namely, the general intention which is to be collected from the whole collocation and arrangement of the sentence. Now, the natural order of things which is indicated is this, that at the death of the tenant for life, the duty of the trustees in the matter of division arises. They are then to convene and call together the persons who are to be entitled to share. But the words in question, namely, the clause beginning with the word "declaring," are part of the words which are descriptive of the objects to take, and the trustees, therefore, are called upon at the time of distribution to ascertain what those words mean, and to give effect to them. But as they are words of futurity, the contingency that is contained in those words is, I apprehend, by natural consequence a contingency of futurity that must be held to cover the whole period of time that will elapse before the time when the trustees are called upon to determine who are entitled under these words. They are to ascertain the objects at the death of the tenant for life, and they are then to give a meaning to these particular words. That is the conclusion which is suggested by the primary and natural and ordinary meaning of the words, and which you arrive at without substituting the secondary and artificial meaning of the words for their primary, natural, and ordinary meaning, which I hold in all cases it is the duty of a court of construction not to do, for the primary duty of a court of construction in the interpretation of wills is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not give to such words any artificial secondary and technical meaning.

LORD CRANWORTH.—My Lords, after the very elaborate manner in which my noble and learned friend, the Lord Chancellor, has gone through this case, I do not think it necessary for me to detain your Lordships with many observations. I take it that the rule is well established upon the authorities as well as upon principle, both in Scotland and in England, that where there is a clause of survivorship, *prima facie*

survivorship means the time at which the property to be divided comes into enjoyment; that is to say, if there be no previous life estate at the death of the testator, if there be a previous life estate, then at the termination of that life estate. If, therefore, the language of this settlement had been simply declaring that "if any of the said residuary legatees shall die without leaving lawful issue, the same shall belong to and be divided equally or share and share alike, among the survivors of my said grandnephews and grandnieces"—if, I say, the clause had stood so, there would have been no doubt that the "survivors" meant the survivors at the death of the tenant for life. And the simple question, although this case has occupied, and I will not say improperly occupied, a very long time in discussion, is whether that *prima facie* construction is varied by the insertion of the words "before his or her share vests" in the party or parties so deceasing. Now, that being the question, it is contended on the part of the respondents that these words do materially alter the general rule, by pointing out another period to which survivorship shall refer, namely, the vesting of the legacy. The first observation that occurs is this, that the word "vest" is a word, at least, of ambiguous import. *Prima facie* "vesting" in possession is the more natural meaning. The expressions "investiture"—"clothing"—and whatever else be the explanation as to the origin of the word, point *prima facie* rather to the enjoyment than to the obtaining of a right. But I am willing to accede to the argument that was pressed at the bar, that by long usage "vesting" ordinarily means the having obtained an absolute and indefeasible right, as contradistinguished from the not having so obtained it. But it cannot be disputed that the word "vesting" may mean, and often does mean, that which is its primary etymological signification, namely, vesting in possession. In my opinion that is its meaning here—"before his or her share vest in the party or parties so deceasing." In the first place, if you do not so construe it, you must understand the testator to have made a most extraordinary circumlocution to express such a very simple idea, as "before the time of my own death," by saying before the time when his or her share vest in the party or parties so deceasing. It is scarcely possible to suppose that a person making a will, or a trust-deed in the nature of a will, and meaning to refer to events that might or might not have occurred before his own death, should have expressed it by such an extraordinary circumlocution as that. Then, is there anything on the face of the instrument to show that "vest" does not, in this case, mean that which I admit in the view which I take of the case would be its ordinary meaning? I think there is. What is it that the testator is here speaking of as vesting? Why, the share of the residuary legacy—that is, in point of fact, the legacy. Now, although it is quite true, as was urged at the bar, that, in making a will in this country, or a trust-deed in Scotland, you may speak of a share or a legacy, although it is something which does not become, strictly speaking, a share or a legacy till the death of the testator; that is, you may say, "I give a legacy of £1,000 to A., but if a certain event happens, B. shall take A.'s legacy;" which only means that B.

shall take that which, if there had not been a subsequent disposition, A. would have taken; yet, when I am speaking, in a will or a trust-deed, of a share that might or might not vest, I cannot be speaking of something which can only come into existence at my own death. There can be no possibility of its vesting in the lifetime of the testator; therefore it is clear to me that the testator, in speaking here of the share vesting, must have alluded to something which had existence at the time to which this reference was to apply, and that it must therefore be something that was to happen after his decease. Therefore, his or her share would be an inaccurate expression. What ought to have been said would have been, "his or her right to the share." That, however, would have been a refinement which I should not have felt it safe to rely upon, if the rest of the context had not led me exactly to the same conclusion. Now, here there is no doubt from these words that the survivorship would have been survivorship at the death of the tenant for life. But why? Because the law presumes that that is the intention of the testator. Now, would it not be an extraordinary construction to put upon these words if the word "vest" may be consistent with that which the law assumes to be the ordinary intention of the testator, that you are to put upon it a refined and technical meaning, when, if you give to it its more ordinary and natural, and more etymological meaning, you give it a meaning which, according to your own rule of construction, is the probable intention of the testator. Upon these short grounds I entirely concur in the judgment which has been given by my noble and learned friend, and in the view which he has taken as to the form of order which it will be proper to make.

LORD CHELMSFORD.—My Lords, my mind has fluctuated a good deal under the influence of the very able arguments which have been addressed to your Lordships, but it has at last settled in the conclusion at which my noble and learned friends have arrived. They have gone so very fully (particularly my noble and learned friend on the woolsack) into the whole question, that it will be unnecessary for me to trespass for any length of time upon your Lordships' attention in explaining the view at which I have ultimately arrived. The question depends upon a single clause in the deed of settlement, or it may be said upon a few words in that clause. It is a question purely of intention, and we have to gather from the language used whether the meaning of the testator was that the share or interest in his residuary property should vest at the time of his death, or that it should not vest until the death of the tenant for life, him surviving. Now the clause directs the trustees to account for, pay and divide the residue and remainder of his property after the death of the last liver of him and his wife amongst five persons named, a sixth being subsequently added by a codicil, all children of Mrs. Elizabeth Donaldson or Yeung, equally, or share and share alike, and to their respective heirs or assignees, with a survivorship clause on which the whole difficulty arises. The respondents contend that this clause is to be broken into parts, and to be read as containing—first, an absolute gift of the residue, and then a qualification of that gift under certain cir-

cumstances, and they say that effect is to be given, if possible, to every word in a will or testamentary deed, and that the construction which the appellants contend for renders wholly nugatory the words "heirs and assignees." Now I confess I am not disposed to lay very great stress upon the use of words of this common description, which are so likely to fall from the pen of the framer of a deed without any precise or definite object, where they cannot stand together with words in the same deed indicating a different intention; nor am I disposed to lay great stress upon the supposition which has been made at the bar of the event occurring of all the residuary legatees dying without issue in the lifetime of the life-rentrix, out of which supposition it is endeavoured to extract the meaning of the testator. A testator must be taken to have in his mind circumstances which are likely to occur, and not improbable possibilities of that description. And whether, therefore, in that event the word "heirs" would have no effect whatever, and therefore there would be an intestacy, or whether, as has been suggested, it would amount to a conditional institution, it is quite immaterial for us to consider. I think that it is absolutely necessary to read this clause as an entirety. The trustees are directed to pay and divide, and the mind cannot rest until it arrives at the conclusion of the clause, by which it is ascertained what is the duty of the trustees, and amongst whom the division is to take place. And it appears that that division is to be made amongst the survivors of the grandnephews and grandnieces who have survived such of them as shall have died without issue. Now, supposing that the words rested there, there would be no difficulty at all in coming to the conclusion that the time of vesting of the interests would be the death of the life-rentrix, because, until that period arrived, it would not be known who were the persons who were the survivors, and who were therefore entitled to share the residue. But it is said that a different meaning must be given to this clause in consequence of the words, "if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing;" and it is contended that the testator, by the use of these words, is pointing to a different period than the time of division, and that if he is pointing to a different period, no other period can be assigned than the time of the death of the testator. Now, I confess that those words lead my mind in a totally opposite direction. When a person is making a disposition of his property to take effect after his death, it must be taken that he assumes that the persons, the objects of his bounty, will survive him. If he contemplates the possibility of their dying in his lifetime, there will be no difficulty in his using apt words to describe his intention; but I cannot conceive any words less applicable to an intention of that kind than these words, "the residuary legatees dying before his or her share vest in the party or parties so deceasing." With respect to the word "share," perhaps it may be said that it may be used popularly to describe the interest which would ultimately vest in the different parties; but how the words "the share vesting in the party or parties so deceasing" can apply to such an event happening in the lifetime of the testa-

tor, when nothing whatever can vest in his lifetime, I think it is very difficult indeed to understand. Then, if these words cannot be applicable to a time during the life of the testator, we must look to another period, and the only other period to which they can be applicable is the period when the residue is to be divided, namely, at the time of the death of the life-rentrix. For these short reasons I have arrived at the same conclusion as my noble and learned friends and the minority of the judges in the court below, and I agree with my two noble and learned friends that the interlocutor must be reversed.

Decree reversed.

Rolls Court.

[Reported by William Woodcock, Esq., Barrister-at-law.]

IN THE MATTER OF THE 11 & 12 VIC., c. 68, AND OF THE TRUSTS OF THE BEQUEST OF CERTAIN FARMING STOCK IN THE LANDS OF LOUGHANT, IN THE COUNTY OF KILKENNY, FOR PIOUS PURPOSES, CONTAINED IN THE WILL OF MARTIN KELLY, DECEASED.—February 12, 1862.

Charity—Petition—St. 11 & 12 Vic., c. 68, and St. 52 Geo. III., 101.

Where an executor had lodged the amount of a charitable legacy in court, under the Trustee Relief Act, and presented a petition praying for a reference to the Master to approve of a scheme, Held that the petition so presented ought to be entitled, under Sir Samuel Romilly's Act 52 Geo. III., c. 101, and ought to be sent to the Attorney-General.

THIS was a petition presented by Patrick Kelly, the executor of the deceased, praying for a reference to one of the Masters to settle and approve of a scheme for the distribution and management of the charitable trust fund in the petition mentioned, and that in so doing, he might have regard to the scheme set forth in the petition in relation thereto, and that said trust fund might be applied in accordance with the scheme so to be settled, and that all proper directions might be given for effectuating the purposes aforesaid, and that the petitioner might be declared entitled to his costs, out of the trust fund, of the petition and proceedings therein, and incidental to the lodgment of the trust fund. Martin Kelly, by his will, devised and bequeathed a farm, therein mentioned, together with the out-offices and stock thereon, to his executors, by them to be disposed of for pious purposes, according to their discretion. He died on the day after the making of his will, and, after a protracted litigation, probate was granted to the petitioner. The devise of the farm became void, in consequence of the short period which elapsed between the making of the will and the testator's death, but the stock was sold by the petitioner after the grant of probate to him, and produced a sum of £709 18s. After deducting the expenses alleged by him to have been incurred by him, in keeping the stock until the sale, and which expenses he stated to amount to £176 11s. 10½d; the petitioner, on the 17th of December, 1861, lodged in court, under the Trustee Relief Act, 11 & 12 Vic., c. 68, the balance of this sum amounting

to £536 6s. 2d. He then presented the present petition, entitled as stated in the head-note, proposing that a portion of the fund should be given for masses for the soul of the deceased, who had been a strict Roman Catholic; that another portion should be given to the poor of the parish in which he had resided; and that a third portion should be distributed among certain relatives of the deceased, who were in a state of great poverty, and whom the petitioner considered to be deserving objects of charity.

Dames for the petitioner.

Waters, for the Attorney-General, contended that this was not a case for the Trustee Relief Act, and that the petition ought to have been entitled under Romilly's Act, 52 Geo. III., c. 101, and that the Attorney-General's fiat to it ought to have been obtained. He cited *Rolls' Charity* (10 Hare, App. xxxviii. and 5 De G., M'N. and G., 159); *In re St. Giles and St. George, Bloomsbury* (4 Jur., N.S., 297); *St. 7 & 8 Vic.*, c. 57, s. 16.

Dames, in reply, argued that the petition might be sustained under the 2nd section of the Trustee Act. He cited *Trowers' Trusts* (1st L. T., N.S., 54).

THE MASTER OF THE ROLLS said that it was evident that this was exactly the case which ought to be carried on under the control of the Attorney-General. One difficulty in the present case was, that he thought it had been decided in England that, under the Trustee Act, the court had no jurisdiction to enter into the inquiry, whether the trustee had lodged too much or too little. All that the court could do was to administer the fund which had been brought in. Under *Sir Samuel Romilly's Act* he would have jurisdiction to frame an order that the Master should inquire whether the fund brought in was the entire fund, or whether the trustee had other funds in his hands. He would have to look into the authorities, but he apprehended that the order he would make would be, that the petition should be amended by entitling it under *Sir John Romilly's Act*, and that it should then be sent to the Attorney-General.

Ultimately his Honor gave the direction so stated.

PRILE v. BIRMINGHAM.—June 2, 1862.

Practice—Letting lands—Disclosing title.

Order made that the Master should let certain lands unless the parties in possession should shew good cause to the contrary; and that on shewing such cause those parties should state how they held the lands.

Exham, on behalf of the receiver, applied for a conditional order that the lands might be let unless the parties in possession disclosed how they held the same. It appeared that by lease dated the 3rd May, 1841, certain lands of Cloondargan were let by Master Townsend to Theobald B. Donnelly for seven years pending the cause. That lease terminated in November, 1847, but the then receiver took no steps either to recover the lands or to make the tenant take out a new lease. Donnelly died in 1859, and the rent being in arrear, and the land is in possession of squatters who had been placed there by Donnelly, the present receiver brought the case before the Master, and by his

directions, in May, 1860, brought an ejectment against the parties in possession. Seven of those parties took separate defences, each alleging "that they did not hold the lands as alleged." The receiver caused an application to be made to the Court of Exchequer, in which the action was brought, to have the defences set aside as embarrassing. The motion was refused. The receiver then caused a demurrer to the defences to be filed. That demurrer was overruled. He now comes to the court alleging that he was greatly embarrassed in the conducting of the ejectment, inasmuch as he did not know how the defendants held the lands, and could not safely go to trial in the ejectment; and he asked for the order, which we have stated.

Exham, for the receiver, cited *Kenny v. Jessop* (7 Ir. Eq. Rep. 494); *Peyton v. M'Dermott* (1 Ir. Eq. Rep. 1326); *Acheson v. Hodges* (3 Ir. Eq. 522.)

THE MASTER OF THE ROLLS—The course of practice always has been to serve a notice on the tenants calling upon them to disclose what their title is. You may take a conditional order, but I have some doubt whether you ought not to have separate orders against the several tenants. You may perhaps have an order that they and each of them do disclose their title. The form is quite settled.

The order made directed that the Master should let the lands unless good cause was shewn within ten days by the parties in possession; and that those parties, when shewing cause, should state upon affidavit how they held their lands, and the dates of their leases or agreements.

MARTIN v. BUNBURY.—June 11.

Practice—Security for Costs—Dismissing Petition.

Where an order has been obtained that a petitioner should give security for costs, which has not been complied with, the proper application for the respondent to make is, not to have the petition at once dismissed with costs, but for an order that the security be given within a limited time, and that, in default, the petition do stand dismissed with costs.

E. Johnstone, on behalf of one of the respondents, moved that the cause petition should be dismissed with costs. An order had been obtained, upwards of a year ago, to stay the proceedings until the petitioner, who resided out of the jurisdiction, should give security for costs.

THE MASTER OF THE ROLLS said, that the proper form of application in cases of this kind was, for an order that security should be given within a limited time, or, in default, that the petition should stand dismissed. He would, accordingly, in this case, order that the petitioner should, within one month, give the security which had been directed by the previous order, and that, in default of his so doing, the petition should stand dismissed with costs, including the costs of the present motion.

WILLIAMSON v. TUCKEY.—June 20.

Practice—Notice—Leave to file Petition of Review.
Liberty to file a petition merely of review may be obtained on motion of course; but notice ought to be

served where it is sought to file a petition of revivor and supplement.

W. M. Johnson applied for liberty to serve a notice. The object of the notice was to obtain liberty to file a petition of revivor.

THE MASTER OF THE ROLLS.—I apprehend that you are entitled to make that motion as of course, without any notice. When it is sought to obtain liberty to file a petition of revivor and supplement, it is necessary to serve a notice; but leave to file a petition of revivor merely, may be obtained on a motion of course.

Court of Queen's Bench.

[Reported by Walter Bourke, Esq., Barrister-at-Law.]

[EASTER TERM, 1862.]

PEARSON v. SMITH.

Practice—Setting aside defence—Common Law Amendment Act 1853, s. 83.

ACTION for £100 damages for libel. The libel was—You are a rogue and a robber, &c. (innuendo that plaintiff had been guilty of an indictable offence); and your wife stole my butter, &c. Defence: first, as to first paragraph traverse; secondly, that defendant did not mean, &c. And as to residue of summons and plaint, that it does not disclose, &c.; and that if it did, this was an action in which the plaintiff's wife should have been joined with him as co plaintiff; that it is a matter of which the plaintiff has not a right solely to make complaint, not having thereby sustained damage specially affecting himself.

W. Sidney moved that the second defence be set aside as embarrassing, and not tending to raise any material or proper issue; and that the defendant do amend his appearance and defence by making same an appearance and defence to the whole cause of action in the plaint mentioned.

J. Byrne, contra.—The summons and plaint contains two material allegations; one of them has been traversed, and nothing done by Mr. Whiteside has cut down the common law right of a defendant in an action for slander asking judgment as to whether the words spoken were spoken in the meaning attributed to them. [*Chief Justice.*—In an innuendo of this kind the meaning of the defendant is to be collected from the words he uses according to their ordinary acceptance, not his mental intention; and this is a question altogether for the jury.] The following were referred to by counsel in support of the defences—*Ie Fann v. Malcomson* (1 House of Lords Cases, 637); *Roberts v. Camden* (9 East, 92); *Sybley v. Tomlins* (Cooke on Defamation, 10); *Oldham v. Peake* (2 W. Blackstone's Rep. 959).

Liberty given to amend.

Attorney for plaintiff—W. T. Rogers.

Attorney for defendant—D. Thorp.

[EASTER TERM, 1862.]

REDMOND v. BROE—April 16.

Practice—Particulars of demand—Common Law Procedure Act, 1853, s. 11.

THIS was an action for £192 18s. 4d. for wages due to

plaintiff for services performed by him for defendant, from 1853 to 1861. It appeared from the affidavit of the defendant that the plaintiff had been in the employment of the defendant's late wife from 1854 to 1861, and that his wages were £12 per annum, and were so entered in a pass-book at the time of his hiring in 1853; that these wages were paid to him till 1858, when they were increased to £15, which was paid to him in advance by cash payments and goods. At his dismissal plaintiff made no demand; and when plaintiff made the above demand, defendant searched for his late wife's account-books, but could only find the one above referred to; and that all the leaves except two appeared to have been cut out, and the remaining entries tampered with; and that the plaintiff had access to the said books; and that it is necessary for the plaintiff to furnish to defendant dates and particulars of all credit to which he is entitled, but which he has hitherto declined to do; and defendant further stated he owed nothing to the plaintiff.

Hilliard moved that the plaintiff do within four days furnish the detailed particulars of all credits to which the defendant is entitled as against the plaintiff's demand, setting forth the dates and the items of such credits; and that further proceedings in this action be stayed in the meantime. Particulars should be explicit and full, and not illusory. The dates and items, and not merely the year, should be given—*Martin v. M'Hugh* (6 Ir. Jur. 279); *Mahoney v. Falvey* (7 Ir. Jur. 131); *Neville v. Gollock* (6 Ir. Jur. 232); *Smith v. Hornsby* (1 Ir. Jur. N. S. 184); *Abbott v. Woodroffe* (7 Ir. Jur. 50).

Sidney opposed the motion on the grounds that the endorsement on the summons and plaint was ample under the 11th section of the Common Law Procedure Act of 1853, and distinguished the present case from *Abbott v. Woodroffe*.

PER CURIAM.—We make no rule on this motion, but we give the defendant liberty to plead (if he be so advised) payment to the remainder of the plaintiff's demand, doing so on or before this day week, and taking short notice if necessary.

Attorney for plaintiff—Charles Fitzgerald.

Attorney for defendant—James Moran.

EASTER TERM, 1862.

TROUSDALE v. SHEPHERD—April 26.

Bill of Sale—17 and 18 Vict., c. 65—Affidavit to be filed with Master of the Court.

The affidavit filed with the Master of the Court, pursuant to the statute, omitted to give a description of the occupation of the attesting witness as required by the Act. Held—That the affidavit was invalid, as not complying with the requirements of the Act in this particular.

It appeared that the premises known as the Hotel Building in the town of Newcastle, with stables, &c., the property of the Earl of Annesley, were to be let, and Mr. J. Lloyd was commissioned by Mr. G. Shaw, Earl Annesley's agent, to procure a tenant therefor, whereupon Mr. Scott applied to Mr. Lloyd to recommend him, and was referred to Mr. Shaw with whom he entered into an agreement, dated May

12, 1860, to take the hotel on certain terms, informing him at same time that he wanted the hotel for his nieces, and not for himself. In pursuance of the agreement, Mr. Scott entered into possession, his nieces, the Misses Julia and Anne Trousdale, managing it exclusively, £100 security having been lodged by Mr. Scott, and a receipt having been passed to him for the amount of prices of certain furniture handed over to him by Mr. Shaw. On the 7th of June, 1861, a bill of sale was executed between Thomas Scott and his nieces, the plaintiffs, with the view of carrying out his original intentions, whereby the said premises, &c., were assigned over to said plaintiffs for £1000, in payment whereof they entered into their joint and several bond for £500, Mr. Scott allowing them £350, money previously received by him from them, and out of which he had paid the security, and purchased the furniture, and £150 for their previous services. A warrant for confessing judgment on the bond was given, and the bond was duly registered. The attesting witness to the bill of sale was described as William Tweeddale Millar, of No. 21 Kensington-street, Islington, in the County of Middlesex, aged 47 years, and upwards. On the 1st November, 1860, J. B., by his bill of exchange, drew on Mr. Thomas Scott for £50, at three months, Mr. Scott accepted, and J. B. endorsed same to the plaintiffs. The bill fell due and was dishonored; judgment was obtained against Mr. Scott, and execution issued. The goods sold to the Misses Trousdale were seized thereunder, and an interpleader issue as to the ownership of the goods was directed to be tried, the Misses Trousdale being plaintiffs, and Mr. the endorsee of the bill, defendant. The case was tried at the after sittings after last Michaelmas Term, and a verdict was had for the plaintiff. A conditional order had been obtained that the verdict had for the plaintiff be turned into a verdict for the defendants, or a new trial had for misdirection.

Lowry, Q.C. (with him *R. Douse*) shewed cause against setting aside the conditional order. By the 17 & 18 Vict., c. 55, an Act passed for the registration of bills of sale in Ireland, it was enacted, that the affidavit to be filed, together with the bill of sale, with the Master of the Queen's Bench, must contain the description of the attesting witnesses to such bill of sale, together with other matters, and nothing more is required by this enactment than that the identity of the witnesses may be ascertained. Extreme accuracy is not necessary. *Morewood v. South Yorkshire Railway and River Dun Company* (3 Hur. & Ho., 798); *Blackwell v. England* (8 Ellis & Black, 541); *Sutton v. Bath* (1 Foster & Finalson, 152.)

Armstrong Serjeant (and *M'Donagh, Q.C.*, contra. —In order to the validity of any bill of sale under the 17 and 18 Vict., c. 55, the affidavit to be filed must contain a description of the residence and occupation of the person making the same, and of every attesting witness thereto, for the purpose of enabling the parties to such bill of sale to be identified without delay. A very great evil was tried to be guarded against in this way, giving to creditors and assignees the power of referring at once to the parties by means of their residence and occupation. Having regard, therefore, to the spirit and object of the Act, it

will not be competent for the grantor to select witnesses who have not both residence and occupation. [*O'Brien, J.*—Then you go to prove that if the grantor have no occupation, he cannot execute a bill of sale]. This is an accident that cannot be guarded against, but he has the power of selecting witnesses. The statute would be rendered nugatory by enabling persons without an occupation to be selected as witnesses, and no hardship is imposed on the person executing the bill of sale.

LEFROY, C.J.—If the party whose residence is to be given have two residences, the most frequent one must be given, for no fraud is to be committed on the statute, the object of the statute being to provide a means of identifying the party. The statute requires the occupation to be given, that is the means or calling in life whereby anyone obtains a livelihood, or gains wealth, and it was established by *Hatton v. English* (7 El. & Bl., 94), that nothing less than such a description of both residence and occupation, having been filed along with the bill of sale, would render it valid; and this decision is confirmed by the cases of *Tuton v. Sannoner* (3 El. & Bl., 280); *Sutton v. Bath* (3 El. & Bl., 382); and *Pichard v. Brad* (5 H. & N., 9. Occupation is a larger word than addition. The words of the Act are, that a description of the residence and occupation of every person making or giving the affidavit required, and of every attesting witness to such bill of sale, be filed with the Master of the Court. The intention of these words was to guard against secrecy, and both residence and occupation must be given. The affidavit required by the Act is absolutely necessary, and the Act requires that this affidavit shall contain a description of the residence and occupation of the party executing the bill of sale, and of the attesting witnesses, and we are of opinion that the requirements of the statute have not been complied with in this case. The question is important, and turns on the construction of the statute. What may have been the object of the Legislature in passing this statute? Can it have been anything more than that the public should have an opportunity of knowing all that passed with respect to a bill of sale as fully as the parties to it. The statute does not require any qualification for the witnesses, but it does require that the public shall have an opportunity of knowing everything that appears on the deed itself, if, therefore, the occupation of the witness be required by the statute to be given, the public should have it. But this statute abridges the common law right of every person to dispose of their property as they like, and we are to carry it out only by doing what is absolutely necessary to enforce it. The principle of law is that a statute abridging the common law right of any persons should be construed strictly. On the principle, therefore, of the common law I do not inquire whether it may be necessary for the witness to possess a qualification or not, but when the occupation is required it must be given, and nothing beyond this need be given; that is whatever occupation is given in the deed shall be transferred to the record. *Fonblanque v. Lee* (7 Ir. Com. Law, 550.) *Lex non cogit ad impossibilia*. If the witnesses had no occupation what was to be done? I desired the jury to ascer-

tain whether it were possible to insert the fact of there having been occupation or not. They did not think it possible to do so. If the party had an occupation and that it were not fully given and transferred to the file in the Master's Office, it would be a valid objection; but where nothing of the kind existed, and that we imposed any further restrictions on the common law right of all persons, we would be making a decision on a principle on which the Legislature did not act. These are the grounds on which I decide in this case. The cases which have been referred to do not interfere with this principle; nothing of the sort. The tendency of all the cases is to give effect to the principle, i. e., that a statute restricting the common law right of any person is not to be construed beyond what its mere words distinctly imply.

O'BRIEN, J.—In this case the statute was not complied with, for the affidavit withheld what did appear on the bill of sale. We decide this case independently of authority, without reference to any other decided case, and not resting our judgment on the opinions of the judges in such cases, though the opinions of the judges in the cases referred to are in favor of the decision we come to. The sensible construction of the Act is that the occupation is to be given if there be any; but even if the provisions of the Act of Parliament were so stringent that a compliance with them would throw no light upon the matter, yet it should be construed strictly.

The other members of the court concurred. Cause allowed with costs.

Attorney for plaintiff—Thomas M. Egan.
Attorney for defendant—John T. Hinds.

[EASTER TERM, 1862.]

REDMOND v. MOONEY.—April 30.

Practice—Security for costs—Common Law Procedure Act, 1853, section 52.

Where the plaintiff had resided for fourteen years in the United States of America, and took lodgings in Ireland, and the defendant applied for a rule that he should give security for costs—Held (Lefroy, C.J., dissentiente) that these grounds were not sufficient to compel the plaintiff to give security for costs. (Hayes, J., absente.)

This was a motion that the plaintiffs should stop further proceedings until they give security for costs, on the grounds that both the plaintiffs reside permanently beyond the jurisdiction of this court, and that one of them had taken temporary lodgings within the jurisdiction to avoid giving the required security, that neither of the defendants have property within the jurisdiction of the court, &c. No defences were filed to the summons and plaint. The plaintiff put in an adverse affidavit that he had been resident as alleged, but returned to this country for the purposes of this action, and other business, and did not mean to leave until they were concluded, and that plaintiffs had considerable property within the jurisdiction, inasmuch as they were entitled to more property than would be enough to satisfy the amount of any costs incurred in this action.

T. Whyte in support of the application.—The plaintiff will not swear that he will stay here till judgment is obtained. The application is made on the authority of *Drummond v. Tillinghast* (16 Q.B. 740), and *Naylor v. Joseph* (10 Moore, 522).

R. DOWSE resisted the application.—Where there are two plaintiffs, and one is resident within the jurisdiction, security for costs will not be required by the court. The fact of a party being a resident within the jurisdiction, is all the court requires to be shewn. It is no matter where he came from, or where he means to go.—*Dowling v. Harman* (6 Meeson & Welsby, 131); *Tambisco v. Pacifico* (7 Ex. 816). [Chief Justice.—There are few things you may not cite a case in support of, but we can only regard the common sense meaning of the word "residence."] The plaintiff has property in this country, and it is not, therefore, necessary that he should give security for costs.—Archibald's Practice by Chitty, 1054.

LEFROY, C.J.—This is an application to the court to compel the plaintiff to give security for costs, on the grounds of his not residing within the jurisdiction, or having property within the jurisdiction of the court. I confess I never can arrive at the conclusion that a party, who has a domicile abroad, and has resided there for fourteen years, and takes up his abode here for a time, is, on that account, to be exempted from giving security for costs, and I confess I do not consider it is enough to prevent a plaintiff from being obliged to give security. Having a residence in this country, means having a domicile in this country, and a permanent one, and I must confess it seems to me that even when a party has a foreign domicile, but is resident permanently here, that is a residence here within the meaning of the Act. The plaintiff here must give security for costs.

O'BRIEN, J.—The principle on which I give my judgment, was not what guided the court in the case reported in 5 Barnwell and Alderson, but it was adhered to by the Court of Common Pleas in England, and as it was there held, it goes much farther than the plaintiff here requires.

FITZGERALD, J.—I think this motion ought to be refused. As I understand the defendant, there is no person within the jurisdiction against whom the orders of the court could be enforced, and that if the plaintiff leaves the jurisdiction, and goes back to his own country, the defendant will have no security for his costs in case judgment is given for him, but we have here the plaintiff residing within the jurisdiction, and there is no necessity, on this ground, for his giving security for costs. If there were, a plaintiff who had not abandoned his own country, and repaired here, though he may reside here for years, cannot have a domicile here until he has abandoned his former residence, and the former residence would be held to be his present residence, because not abandoned.

HAYES, J., *absente*.

LEFROY, C.J.—Immediate execution would remedy the evil complained of.

Motion refused with costs.

Plaintiff's attorney—Henry Coldclough.
Defendant's attorney—John Hayes.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

LYNOTT v. GREENE.—April 16, 26, 1862.

Practice—Solicitor's authority.

Where an attorney signs a consent for judgment in an action in which the writ of summons and plaint was never served on the defendant, it lies on the plaintiff to prove that he had the authority of the defendant to do so.

Under the above circumstances, and the plaintiff failing to prove the attorney's authority, the court will set aside the judgment as irregular.

Ball, Q.C., for the defendant, moved that the judgment in this case and all the proceedings be set aside, and that the defendant be allowed to plead to the action on the ground of surprise. The motion was made before Deasy, B., and the present is an appeal from his decision. The defendant's affidavit states that he was never served with process; further, that he was never served with notice of the dishonor of the bill of exchange, upon foot of which the action was brought; further, that his acceptance on the said bill is a forgery. The consent for judgment was signed on the 30th Jan. last, and execution has been since levied, the defendant serving the usual protest on the sheriff. [Christian, J.—I understand you to move on three grounds,—that the writ never was served; that no authority to sign the consent was given; and that the bill was a forgery?] Yes, on three grounds. The consent was signed by the town agent of the solicitor, who professed to be acting for the defendant in the matter. [Monahan, C.J., having called for the town agent's authority, a letter from the solicitor was produced, which ran in these terms:—"Do anything; even give a consent for judgment rather than that Greene should hear of it."] In *Bayley v. Buckland* (1 Excheq. 1), *Rolfe, B.*, in delivering the judgment of the court, says,—“We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. When, therefore, a defendant has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority; because in that case the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney if he had any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. On the other hand, if the plaintiff without serving the defendant, accepts the appearance of an unauthorised attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and upon the same principle on which we before proceeded we must set aside the judgment as irregular, with costs.”

Serjeant Armstrong (with him *Exham*), for the plaintiff, contended that the defendant should pay the costs

of the motion if the judgment were set aside.—The plaintiff's affidavit used before *Deasy, B.*, in chamber charged the defendant with having got notice of dishonor, and with having given authority to sign the consent; and the defendant made no affidavit contradicting this, but a third person made an affidavit stating the defendant was ill. There was no other course for *Deasy, B.* to adopt. [Monahan, C.J.—Had the attention of *Deasy, B.*, been called to *Bayley v. Buckland*, I conceive he would have called for the town agent, who was an attorney and an officer of the court, and asked him for the authority by which he signed the consent. When once it appears a writ has not been served, the onus to show authority is on the plaintiff.] The court has entire jurisdiction as to costs; and had the defendant denied his liability in proper time, this motion would never have been heard of. An attorney generally employed has a right to defend an action without a special retainer though he has no right to commence one (*Chitty's Archbold*, 73). [Ball, J.—If at the time the attorney is acting in other matters; but that is not shown here.]

MONAHAN, C. J.—This is a hard case, in which a number of affidavits have been made; but we cannot help it. The onus was on the plaintiff to prove authority, because the writ was not served. It is clear Mr. Greene did not give authority to sign this consent. He also denies that he accepted the bill. We think it was a case in which the judge should have called for the authority of the town agent, and should have set aside the judgment. We give no costs on either side. The judgment must be set aside, and the money, the fruit of the execution, be refunded. The last part of the order we might not make if any doubt as to the solvency of the defendant were suggested; but as there is none, we order the money to be refunded. The plaintiff can bring his action if he likes.

Rule accordingly.

WHALEY v. MASSARENE AND OTHERS.
April 16, 26, 1862.

Quare impedit—Bill of exceptions—Pleading—Registration.

In an action of quare impedit the memorial of a deed registered after action brought is inadmissible to support an issue of whether the said deed was duly registered on a given date, which issue has been joined upon a plea pleaded in bar of the action generally.

The first count of the declaration which was filed on the 1st of November, 1859, alleged that on the 17th of February, 1778, Clotworthy, Earl of Massarene, being seised of the advowson of Killead, in the county of Antrim, presented John C. Skeffington as clerk thereto. That on the 12th of June, 1793, said earl by a certain indenture made between him and one William Whaley, the one part of which indenture sealed with the seal of the said Earl of Massarene, and bearing date the day and year last mentioned, the plaintiff brought into court for the consideration therein mentioned, granted, &c., unto the said William Whaley, his heirs and assigns, all that the advowson, right of patronage, and presentation, &c., to the said

rectory of the church of Killead with all, &c. That on the 9th of August, 1793, the said William Whaley being so seised conveyed to one Bernard Ward, who reconveyed on the 1st of April, 1801; that the two latter deeds were lost by lapse of time; that on the 8th of July, 1801, John Earl of Massareene, upon the death of the incumbent, usurped the right and presented Bernard O'Doran; that on the 9th of November, 1815, Chichester, Earl of Massareene usurped the right and presented William George Macartney; that on the 20th of July, 1843, the said William Whaley died seised of said advowson, and demised same to the plaintiff in fee; that on the 12th of November, 1858, the church became vacant by the death of the said William George Macartney; and that defendants hinder plaintiff from presenting thereto. The defendants pleaded with other pleas, firstly, that Chichester, Earl of Massareene, being seised in fee of the said advowson on the 25th November, 1815, presented William George Macartney thereto; that the said earl died so seised, whereupon Harriet, his only daughter and heiress-at-law, became seised of said advowson; that on the 2nd of January, 1831, said Harriet died so seised, whereupon Lord Viscount Massareene, the defendant, became seised; that on the 16th of May, 1855, the said defendant, Viscount Massareene, conveyed to defendant, John Carlisle, the right of nomination to the next vacancy; that on the 12th of November, 1858, upon the death of the said William George Macartney, the said Lord Massareene and John Carlisle presented the defendant, Roger Bickerstaffe thereto, with a special traverse that Clotworthy, Earl of Massareene conveyed the said advowson to said William Whaley by said supposed indenture of the 12th of June, 1793. The eighth plea averred that Roger Bickerstaffe was parson of the said church, canonically impanelled in the same upon the presentation of the defendants; and that the plaintiff ought not to have or maintain his action against them, because they, admitting that the said Earl of Massareene was seised of the said advowson as of fee say that the said indenture of 1793 was executed after the passing of an Act of Parliament made in the sixth year of her late majesty Queen Anne, being an Act for the public registry of deeds, &c., in Ireland; and also after certain other Acts to amend same, to wit, an Act passed in the eighth year of her said Majesty, and a certain other Act passed in the eighth year of the reign of King George the First, and a certain other Act to amend the aforesaid Acts, passed in the twenty-fifth year of the reign of King George the Third; and further, that no memorial of the said indenture was ever registered pursuant to the provisions of the said statute, or of the several Acts amending the same; that the advowson of the said church descended to the defendant, Viscount Massareene; and that he, on the 16th of May, 1855, in consideration of the sum of £1400, granted by deed unto the said John Carlisle all that the first or next presentation, &c., to the vicarage of said church, provided a vacancy should occur during the life-time of the said Viscount Massareene; and that a memorial of said last-mentioned indenture was duly registered on the 9th of January, 1860, in the office for registering deeds in Ireland, pursuant to the statute, &c.; and that by reason of

the premises the said indenture of the 12th of June, 1793, was void as against the said indenture of the 16th May, 1855. The plaintiff replied to the eighth plea that the deed of the 16th of May, 1855, was not duly registered. On the 4th of November, 1860 (*vide* 6 Ir. Jur. N. S. 19), the defendants applied to the court to amend the eighth plea, by averring that the deed had been duly registered since action brought, but the court refused the motion. At the trial of the action at the assizes for the county of Antrim, before Hughes, B., the jury found for the plaintiff on all the issues except the fifth, which was in these terms:—"Was the indenture of the 16th of May, 1855, made between the defendant, Viscount Massareene, and the defendant, John Carlisle, duly registered on the 9th of January, 1860?" This issue they found in the affirmative, and consequently a general verdict for the defendants. The plaintiff excepted to the admission in evidence of a memorial of the deed of the 16th of May, 1855, from which it appeared that the deed in question was registered after action brought, and required the judge to tell the jury that there was no evidence to support the affirmative of the fifth issue. The plaintiff's points were the following:—1. That the memorial of the deed of the 16th day of May, 1855, which was registered on the 9th day of January, 1860, was inadmissible in evidence in support of the fifth issue, being the issue joined on the eighth plea pleaded in bar to all the counts of the declaration, on the grounds that same was registered after the commencement of the action, and after the filing of the declaration. 2. That inasmuch as the said plea is pleaded in bar of the action generally, the memorial of the deed of the 16th day of May, 1855, was inadmissible in support of the issue joined on said plea, inasmuch as same was not registered until after action brought and after declaration filed. 3. That the registration of said memorial cannot be taken to operate retrospectively, and therefore was inadmissible in evidence on said issue. 4. That the said memorial having been registered after the avoidance of said living and church in the declaration mentioned had occurred by the death of W. G. Macartney, was inadmissible in evidence to alter the rights of the parties to this action. 5. That the date of the registry of said memorial was material, and that there was a variance between the date of said memorial and the date of same as alleged in the said plea. 6. That the learned judge misdirected the jury, and should have directed the jury that there was no evidence in support of the 5th issue. 7. That illegal evidence was received on said trial as stated in said exceptions. The defendant's points were these:—1. That the evidence offered by the defendants of the registration of the deed of the 16th of May, 1855, ought not to have been rejected by the judge; and that his direction to the jury upon the issue as to the registration of that deed was a proper direction. 2. That in any case the court should now enter a judgment that the plaintiff should not further maintain his action against the defendants as if the 8th plea alleging the registration of the said deed had been pleaded to the further maintenance of the said action.

Harrison (with him *McCauley, Q. C.*), in support of the exceptions.—This plea is not pleaded *puis*

darrein continuance, and therefore the memorial registered after the filing of the declaration is inadmissible to support it. In 1 Chitty on Pleading, 578, we have the distinction—"When the matter of defence arose before the commencement of the suit, *actio non*, &c., was generally the proper commencement; but matter of defence arising after action brought must have been specially pleaded in bar of the further maintenance of the suit." So Stephen on Pleading, 2nd ed. p. 442,—"When a plea in bar is pleaded *prie darrein continuance*, it has instead of the ordinary *actio non* a commencement and conclusion of *actio non ulterius*. So if a plea in bar be founded on any matter arising after the commencement of the action, though it be not pleaded after a previous plea, and therefore not *prie darrein continuance*, yet it pursues in that case also, in its commencement and conclusion, the same form of *actio non ulterius*, instead of *actio non* generally; for the *actio non* is taken to refer in point of time to the commencement of the suit and not to the time of plea pleaded, and would therefore in the case supposed be improper." [Christian, J., referred to the 72nd section of the Common Law Procedure Act, relating to matter arising after the commencement of the action.] This section confirms what was the law before. The defendants applied to have this plea so pleaded in this very case. (6 Ir. Jur. N. S. 19). The registration of this memorial cannot operate retrospectively. "A question which has been in several Irish cases noticed but never decided is, whether the registration of a deed operates retrospectively so as to authorize the grantee under it proceeding by ejectment against a grantee under a prior unregistered deed to lay his demise before the registration"—Molesworth on Registration, p. 101; *Lawless v. Kenny* (1 Hudson & Brooke, 403); *Fury v. Smith* (1 Hudson & Brooke, 753); *Warburton v. Loveland d. Ivis* (Hudson & Brooke, 717); *Jack, lessee of Johnston v. Stewart* (Smith & Batty, 369). If this registration was good, it is clear that the defendants might bring an action for mesne profits—*Ryan v. Landers* (9 Ir. Com. Law Rep. 489); *Butler & Baker's case* (3 Coke's Rep. 285). See also *Rennell v. Bishop of Lincoln* (7 B. & C. 113); *Mirehouse v. Rennell* (1 Moore & Scott, 683). There is also a variance between the real date of the registry and that alleged in the plea. In 2 Wils. Saunders, 291b, the authorities on such a variance as this are collected.

May (with him *Joy, Q.C.*) *contra*.—The only question is, whether this memorial was admissible to sustain this fifth issue. The deed of 1793 was voluntary. The plea is as ambiguous as the one in *Allen v. Hopkins* (13 M. & W. 94). It does not appear from it whether it is a plea to the maintenance or to the further maintenance of the action—*Le Bret v. Papillon* (4 East, 502). In *Cobbett v. Grey* (4 Excheq. Rep. 729), the defendant relied on a statute passed after the action was brought. [Monahan, C. J.—But which statute affected action pending.] Where there is a conflict between an unregistered and a subsequently registered deed the registration of the latter always relates to the date of the instrument itself; and that being so, this plea is rightly pleaded—*Vaughan v. Atkins* (5 Bar. 2787); *Le Neve v. Le*

Nave (3 Atk. 652). Suppose the case of a purchase of land from an apparent owner; suppose a prior unregistered grant of a rent-charge; and suppose the conveyance to be registered subsequently to its execution, will not the grant of the rent-charge be altogether avoided? We rely more upon the non-registration of the the plaintiff's deed than upon the registration of ours—*Doe dem. Robinson v. Alsop* (5 B. & Ald. 142). In considering the relation of this registration it is important to bear in mind that the party claiming was entirely out of possession of the advowson. There is no such variance as is contended for—*Fox v. Keeling* (2 A. & E. 670); *Roseoe's Nisi Prius*, 6th ed., p. 66; *Parkinson v. Whitehead* (2 Man. & Gr. 329). Unless the averment be one of description, or the date be material, there is no variance. [Ball, J.—The statute directs the date of registration to be the true date, and so makes it material.] The hour and the day must be stated; but it is nowhere directed that the registration must be on a particular day.

Joy, Q.C.—There were other courses open to the plaintiff. The plea might have been demurred to. [Monahan, C. J.—We think not, because the demurrer must have been special.] And that is possible under the old system of pleading. The plea in point of law is of a matter subsequent to action brought. The time at which the registry was effected is not the gist or point of the action under an Act of Parliament like this. The fact alone is material. No authority has been produced to show that the time is a material part of the averment. [Christian, J.—This is not a case for demurrer either general or special. The plaintiff's contention is that your plea is perfectly good, but that to support it certain facts were necessary, which were not proved.] The pleading must be taken most strongly against the pleader. This plea omits to add that the matter arose after action brought; but it means that, and the proper course would have been to demur—2 Chitty on Pleading, 4th ed. p. 926.

M'Causland, Q.C., in reply.—We might have taken issue upon the registry or upon other matters. In *Tower v. Cameron* (6 East, p. 413), Lord Ellenborough says,—“If upon looking at the memorandum of the record at Nisi Prius, and at the certificate given in evidence, I should see that the defence did not arise till after the action brought, I should say that the certificate did not apply to the plea so pleaded.” That case is identical with the present in principle. The marginal note is as follows:—“The general plea of bankruptcy and the certificate given by Act 5 Geo. II., c. 30, s. 7, may be pleaded without averring that the bankruptcy happened before the commencement of the suit; but if it appeared at Nisi Prius that it happened after the action brought, it seems that the defendant could not avail himself of the defence under such a general plea.” *Doe dem. Robinson v. Alsop*, did not raise the present point at all. The registry of the one deed does not make the other deed void *ab initio*, but only from the date of the registry.

MONAHAN, C. J.—The true construction of this plea we hold to be that the defendant's deed was registered before action brought. We must allow the exception and award a *Veniens de novo*.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

RE PATRICK PHELAN.—May, 1862.

Trust deed—Act of bankruptcy—Assignment for the benefit of creditors—Adjudication for the purpose of overreaching a trust deed.

Where a creditor procures an adjudication in bankruptcy for the purpose of overreaching a trust deed executed for the benefit of creditors; and where there are no assets, unless he succeeds in doing so, he will be compelled to lodge a sum of money to meet the costs.

A deed of assignment by a trader executed to trustees for the benefit of all his creditors, in which the forms prescribed by the 93rd section of the Bankruptcy and Insolvency Act are complied with is valid, although it contains a clause excluding creditors who should not come under it within a specified time from all benefit thereunder. Such deed will not be deemed an act of bankruptcy under the 92nd section of the Act, but will be protected by the 93rd section when more than three months elapse between its execution and the bankruptcy.

This case came before the court with a view to test the validity of a deed of assignment made in trust for the benefit of the bankrupt's creditors who choose to come in under it within a specified time. It appeared that a brother of the bankrupt claimed to be a creditor, but refused or neglected to execute the deed within the time specified; and with a view to have the property conveyed under it brought into bankruptcy, he induced his brother to sign a declaration of insolvency, upon which he was adjudicated bankrupt upon his petition as petitioning creditor. The court seeing that there was no estate, directed the petitioning creditor to lodge a sum to meet the costs. The case now came before the court upon charge and discharge.

Kernan, Q. C., and Heron, Q. C., appeared for the assignees to sustain the bankruptcy and level the deed. They cited *Leonard v. Sheares* (5 Jur. N. S. 1050); 28 L. J., Q. B. 283; *Whitmore v. Turquand* (7 Jur. N. S. 377); 4 L. T., N. S. 38; *Gardner v. Chapman* (8 O. B., N. S. 317); 6 Jur. N. S. 1254.

Mr. Wilson appeared for the trustees of the deed. He cited *Biron v. Mount* (24 Beav. 642).

LYNCH, J., delivered judgment. He said,—This case is brought before me nominally on the charge of the assignees, but really on the charge of Patrick Phelan, the brother of the bankrupt, and the petitioning creditor in the matter. The object of the charge and of the adjudication is to set aside the deed of the 23rd of May, 1861; and I believe that Patrick Phelan does not honestly represent the creditors of the bankrupt, but that he uses the court for the sinister purpose of interfering with his brother's assets. In my opinion the arrangement made by that deed was a fair one, and is at the present time in the course of being honestly carried out; and Patrick Phelan, who

has had recourse to bankruptcy, had a full opportunity of establishing any claim he had against his brother's assets. It is alleged by him that he was refused an opportunity to come in under that deed, but I think the correspondences relied on establishes the contrary. In fact the whole circumstances of his alleged debt is calculated to create suspicion; the bill or note which is the foundation of his claim could not have been paid by him when he first made the demand. The existence of any such debt was concealed from the creditors by the bankrupt; and so late as the 9th of September last a formal demand was made on the trustees by the several parties to the note; and unless the trustees were ready, without proof or investigation, to admit the existence of this alleged debt they could have taken no other course in the correspondence forced on them than the one they have taken, namely, admitting him fully to make his claim as a creditor, and offering to account with him or any party interested in the matter. This, however, did not satisfy Patrick Phelan; and with a full knowledge that he could only waste the assets if he succeeded in his intention to level the deed, he filed his petition in bankruptcy and obtained adjudication. The object of this bankruptcy is to set aside the deed of the 23rd May, 1861; for without doing so there are no assets to be administered, save the sum ordered to be lodged for costs, and which I believe will not be adequate for that purpose. But Patrick Phelan brings forward a case independent of merits. He says he has a strict legal right to have the deed of the 23rd May, 1861, set aside; and if he can establish that proposition, no matter what his merits may be, is entitled to any legal right he may have. He says that the deed in question has a right to be treated as coming under the 92nd section of the Bankrupt Act, which says that "if any trader shall make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels," "it shall be deemed an act of bankruptcy." And he says that the case does not come under the 93rd section, which relates altogether to conveyances made for the benefit of creditors, and which is clearly an act of bankruptcy if a petition be presented within three months from its execution. The question admittedly resolves itself into this,—is the deed of the 23rd May, 1861, within the protection given by the 93rd section? The case is one, therefore, of some general importance, as it may rule a great number of cases applicable to those sections. The 93rd section provides that "if such trader shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy unless a petition of bankruptcy be filed within three months from the execution thereof." Then follow provisions for the mode of its execution and other acts required for its publicity. Admittedly in this case all the forms required by the Act have been complied with, and the question is,—is the deed substantially such a deed as the section contemplates. To be valid within this section the deed must be one for the benefit of all the creditors; and this deed is questioned as not complying with this enactment on the following grounds:—First, that it is not for the

benefit of all the creditors, but only for such creditors as shall execute a deed within three months; secondly, that the deed contains special provisions as to the proving of debts, and in limitation necessarily of the general rights of creditors. These are very important questions undoubtedly, and have been very forcibly argued by Mr. Heron and Mr. Kernan, and not less so by Mr. Wilson. Now, I should remark that this deed is in a very ordinary form, and all its provisions are those usually contained in such deeds. Under its provisions all the creditors may, if they please, come in; and in my opinion all the provisions and limitations are in furtherance of the purpose for which the deed was executed, and in fact for the benefit of all the creditors. The first proviso objected to, namely, that requiring the creditors to come in and execute it within three months or the further time to be allowed, seems to me a very reasonable provision, as without it no arrangement by deed could be well carried out. Were it otherwise an unreasonable duty would be cast on the trustees; and to hold such a proviso as limiting the operation of the deed to a particular class of creditors in opposition to the requirements of the statute that it should be for the benefit of all the creditors, would be in effect to render nugatory the provisions of the Act. I think the limit as to the time for executing the deed may fairly enter into the consideration of the court in dealing with this point; for, no doubt, the time might be limited as to show that it could not be for the benefit of all the creditors; but when the limitation is reasonable and proper for the ascertainment of the trust to be performed, I think I am entitled to say that what has been done has been for the benefit of all the creditors. But it is insisted that this point has been already ruled in the cases which have been cited in argument; but all those cases come under a totally different section of the Act, and do not apply to a case like this. The case of *Biron v. Mount* (24 Beav. 642), cited by Mr. Wilson, is in my opinion rightly interpreted by him, although ingeniously dealt with by Mr. Heron; for the passage in the judgment at page 650, relied upon, appears to me to only make plain the distinction between deeds of the class now before me and those referred in the cases cited against the validity of this deed. But since the argument Mr. Heron has referred me to a case in point; it is reported in the 3 Law Times, N. S. 634. That was the case of a disputed adjudication, where it is held that a deed of assignment executed by a trader to a trustee for the benefit of all his creditors, and advertised in the form prescribed by the statute, was not the less valid by reason of its containing a clause excluding all creditors who would not come in under the deed in three months from all benefit thereunder, and that it was not therefore an act of bankruptcy after the expiration of the three months specified in the statute. That case was greatly in point in support of the deed. In the case of *Turquand v. Whitmore*, cited in that case, it was held that the validity of a deed containing a clause similar must be judged at the time of its execution. The case of *Turquand v. Whitmore* is subsequently reported in 4 L. T., N. S. 38, and 7 Jur. N. S. 377. My opinion was pretty clearly shewn before I had seen these cases; and it is satisfactory to find that they fully bear out

the views I had previously taken. I therefore feel that I am justified in saying that this charge cannot be supported by any legal right no more than by any real merits in the case; and I accordingly rule that the deed of the 23rd May, 1861, which is relied on here as an act of bankruptcy, is within the protection of the 93rd section of the statute; and that the title of the trustee under it cannot be displaced by me; and I allow the discharge with costs to the trustees under the deed.

Attorney for the bankruptcy—Mr. Greaves.
Attorney for the trustees—Mr. Findlater.

[BEFORE BERWICK, J.]

RE ALEXANDER SIM.

Partnership accounts—Litigation between partners sought to be continued by assignees—Conduct of bankrupt as a trader, both as regards his creditors and his partner.

Where a bankrupt has stated and settled an account with his partner, and where afterwards there is a decree of the Court of Chancery deciding that such account ought not to be re-opened, the Bankrupt Court will not, under the circumstances, give its sanction to the bankrupt or his assignees to continue litigation by way of appeal, for the purpose of going behind the decision of the Court of Chancery, except it can be shown that there is manifest error on the face of the account that was not discovered during the Chancery proceedings; or unless it can be shown that some substantial benefit will result to creditors. But, as the Master in Chancery was of opinion that the account ought to be opened, although the Court of Appeal was of a different opinion, the Bankrupt Court will not hold that the bankrupt, who filed a bill for an account, was guilty of wanton litigation.

Where a trader disposes of partnership property for his own use, unknown to his partner, his certificate will be suspended for eighteen months.

Heron, Q.C., was for the assignees. Hemphill, Q.C., and Purcell were for A. Sim, sen., the bankrupt's late partner. They cited Stewart v. Hunter (8 Jur. N.S.).

Armstrong, Sergt., Kernan Q.C., and F. Walsh, Q.C., were for the bankrupt. They cited Darthez v. Les (Exchqr. 2 Young & Col. 5); Summer v. Thorp (2 Atkins. 1); Tickel v. Short (2 Ves. 289); Stupert v. Arrownell (3 Jonl. Gittow, 176).

BERWICK, J., in delivering judgment, said—In this case, two questions of very considerable importance to the parties have come before me for my decision. The first arises in consequence of the opposition of certain creditors to the passing of the final examination of the bankrupt, and I am called upon to decide whether the conduct of the bankrupt, as a trader, has been such as to entitle him to pass his final examination, and to obtain his certificate of conformity. The second is, whether the bankrupt has made out such a case as to induce this court to believe that it would be for the benefit of his creditors and of the estate, which this

court has to administer, to yield to the application made by the notice of 6th May, and authorise proceedings to be taken, by or on the part of the assignees, to continue the litigation in which the bankrupt was engaged with his uncle at the time he was declared a bankrupt. On the first point, the conduct of the bankrupt has been distinctly impugned, both on the part of the assignees and also by several of the creditors, the principal of whom is Mr. Alexander Sim, the elder, as rendering him unfit to obtain a certificate from this court, or, at least, calling for the censure of this court, by the suspension of his certificate. The grounds on which this opposition is founded are set forth in two notices of objection on the files of the court. The grounds of the second subject of consideration are set forth in a notice of the 6th of May, now before the court, and also in the opinion of counsel for the assignees, which has been incidentally referred to, as the principal matters relied on to ground the opposition to the passing the final examination of the bankrupt, are either directly connected with, or incidental to, his litigation with his uncle; and, as the second question necessarily involves an inquiry into the nature of that litigation, the circumstances under which it was instituted, and the reasonable hopes of success therein, I have thought it right to have both subjects discussed before me prior to my giving my decision on either, and I have now heard at length all that the ingenuity and research of counsel can suggest on the different questions raised before me; I have also had the advantage of the opinion of the official assignee, after a careful examination by him of the accounts of the bankrupt; and also the assistance of Mr. Brown, an eminent accountant, who has been employed by the bankrupt to make a report on his partnership accounts with his uncle; and I have myself made an examination of the book and accounts in the possession of the parties both in court and in my chamber, and given all the attention in my power to the case for the purpose of making myself acquainted with the whole dealing of the parties, so as not merely to decide the points forced on my attention, but to form a general opinion of the merits of the case, and to satisfy my own mind as to the general conduct and claims of the bankrupt in every view of his case—in the result to which I have arrived on all the points to be decided I may be mistaken, but it certainly is not for the want of an anxious and careful scrutiny of every part of the case. It appears that the bankrupt and his cousin, William Sim, had been in partnership with Mr. Alexander Sim, the elder, who was uncle to the bankrupt, for several years prior and up to 1843. Mr. Sim, sen., was possessed of extensive mills at Collooney, in the county of Sligo, and this partnership appears to have been conversant with a large flour and corn trade connected therewith. The terms of the co-partnership do not appear to have been very accurately defined, and never to have been reduced to writing, but it is a conceded fact, that the books and accounts of that co-partnership were duly balanced and finally closed up to the 4th November, 1843. Wm. Sim then retired from the business, and from that day the bankrupt and his uncle continued to carry on the self-same business in co-partnership, there being no change whatever in its nature or char-

acter, or in the terms on which it was conducted, save that Mr. Sim, the elder, was entitled to five-sixths of the profit, he being the party to whom the capital stock of the firm belonged, and the bankrupt was entitled to the remaining one-sixth. The business, however, became so extended in its character, that Mr. Sim, the elder, went over to Glasgow to superintend that portion of the business which was conducted in Scotland; the bankrupt remaining at Collooney. Two sets of books were kept—one at Glasgow, kept in part by a clerk named Thom; the other set at Collooney, kept by the bankrupt, who appears, both from the manner the books were kept and what has occurred before me in this court, to have been conversant with the system and principles of book-keeping. In September, 1848, the terms of the partnership were varied, but only to the extent of increasing the share to which the bankrupt was entitled to one-third, instead of one-sixth. The reason for this change is variously stated by the parties, and it is of little consequence now to inquire which version is the most correct; but in September, 1849 the partnership was dissolved, and up to that time no settlement had been made or asked for by either party since the settlement made in 1843. Previous to the dissolution—namely, in August, 1849—Mr. Sim, sen., came over from Glasgow to Collooney, and Thom, the Glasgow clerk, came over also, and brought with him the Glasgow books; and after an examination of both sets of books, and with the assistance of Thom, the bankrupt made out, in his own handwriting, an account which purported to contain a statement of the affairs of the partnership from 1843 to 1849, and to ascertain the shares of the said co-partnership to which each of the said partners was entitled. One part of that account being made up to September, 1848, showing the bankrupt's share, calculated at one-sixth, to amount to £3,219 9s. 6d.; and the other part made up for the year 1849, in which his share was calculated as one third, and amounted to £581 1s. 5d. Appended to this was the private account of the bankrupt with his uncle, in which he takes credit for the above shares. This account is obviously made out from an inspection and comparison of the two sets of books with the Glasgow and Collooney books, there being a separate column for reference to each. It is not affected to say that the elder Mr. Sim interfered in its preparation, or suggested any particular form or principle according to which it should be made out. He appears to have left the preparation of the accounts and ascertainment of the balances entirely to the bankrupt and Thom; a balance of £3613 6s. 1d. appeared by the result of these accounts to be due to the bankrupt. This account was furnished by him to his uncle, and he thereupon entered into a partnership in the milling business with a person of the name of Hosie; and the new firm having rented some mills in Sligo from the elder Mr. Sim, at the rent of £240 per annum, opened an account with him, commencing with the credit to the amount of £2000, as against the balance so found due to the younger Mr. Sim. Two letters of Mr. Sim, sen., are referred to to show that was not considered by him to be a settled account, in the first of which (17th September, 1849,) he engaged to have all the books connected with the busi-

ness brought up and balanced, with the least possible delay—the other (of the 21st December, 1849,) in which he says,—“Any claim your Mr. Sim (meaning the bankrupt) may have upon me will be better known when the affairs in which he was interested are wound up.” Different interpretations have been given to these letters. On the one side it was alleged that they show that the account furnished neither was, nor was intended to be, any statement of the account at all, nor did it show, or profess to show, the profits of said partnership. On the other side it is alleged that the several debts due to the firm having been unascertained, or the amount recoverable still in doubt, &c., &c., the balance could not be finally ascertained till these matters were wound up. However, it must now be taken that neither party considered the balance as finally ascertained, as there are several letters from the new firm of Sim and Hosie, calling on Mr. Sim, sen., to fix a time to go into the account, and one from Mr. Sim the elder, dated 27th August, 1852, in which he says, “Your Mr. Sim cannot come one hour too soon to settle his account.” It is alleged by the bankrupt that Mr. Sim, sen., did in fact object to this account in respect to a variety of items, and that such his objections were furnished to the bankrupt by the said John Thom; but that such objections were never in fact discussed between the bankrupt and said Sim, or made the subject matter of any accounts. Now, I have only to say that the bankrupt has not produced or offered evidence of this document. And it certainly leads me to think that the account of 1849 was treated by the elder Mr. Sim as purporting to be a settlement of accounts. The parties appear to have had subsequently various bill transactions, and Mr. Sim, the younger, to have drawn out or claimed credit for the whole amount of the balance which appeared to his credit in the account of one thousand eight hundred and forty-nine. In the year 1857 or 1858, as admitted by the bankrupt, another account was made out by him in a book marked No. 2, all in his own handwriting, adopting the general principle, and containing in great part the same items as in the former, but correcting, in several instances, the balances of the accounts introduced therein, and ascertaining in like manner the shares to which the bankrupt and his uncle were entitled, and the sum that was divisible between them as less than in the account of 1849. Annexed thereto thereto was the private account of the bankrupt with his uncle, in which he takes credit by name for his “profits” for the several seasons, commencing 1844 and ending 1849; and after charging himself with the moneys drawn out as against these credits, he strikes a balance of £35 5s. 9d., as due by him on foot of his accounts—this latter account is so circumstantially prepared that there is a column for the interest calculated on each different item therein; the whole in his own handwriting, and this was furnished to his uncle, and no suggestion that he was refused the inspection of any book of accounts, or that his uncle interfered with or controlled the preparation of this account; and there is no reservation of matters of doubt, nor does either party appear to have made the smallest objection thereto. Subsequently, the bankrupt raises various sums of money through the assistance of his uncle—sells to

him an estate in order to raise money, is plainly in embarrassed circumstances, and yet makes no suggestion of any error in principle or detail to his prejudice. Nay, more, in 1857 he enters into a limited partnership in some wheat speculation with his uncle, and the accounts thereof were settled without dispute. I have only to add that, although the bankrupt says this account of 1857 was merely intended as a copy of that of 1849, which he was asked for by his uncle, there is not only no evidence to sustain, but the examination of the account itself abundantly refutes the suggestion. In 1859, we find them engaging in a new transaction which, in its inception at least, was plainly intended by the elder Mr. Sim to be a partnership of a limited nature, and certainly to have been suggested by no unfriendly feeling. It is alleged by the bankrupt that a partnership was then entered into in relation to the purchase of the cargo of wheat of the *Egeria*, or at least that he had good grounds to believe such to have been the case. That a very large cargo of wheat was purchased by the elder Mr. Sim and sent to Sligo, is beyond doubt; and this branch of the case terminates with the admitted abstraction by the bankrupt from the stores at Sligo, on the 10th of April, 1860, of the whole residue of this cargo of wheat, then deposited therein, consisting of about seventy tons, valued at £850; and in six days after this act of spoliation, the cause petition—which has been the ground-work of so much litigation—was filed by the bankrupt against his uncle, and this is the litigation I am called on to direct the assignees to prosecute, either in the present or some amended form. The petition prays for an account of all partnership dealings with his uncle since 1843, a dissolution of the alleged partnership of 1859, and omits all allusion to the accounts of 1849 or 1857; and the dependency of this suit is used to defeat a trader debtor's summons issued on 26th April by Mr. Sim, the elder, to recover the value of his property thus made away with. Mr. Sim, senior, then files his answering affidavit, and sets up the accounts of 1849 and 1857 as stated and settled accounts. Master Litton, by his order of 14th November, 1860, decides that these accounts are neither stated nor settled accounts, or purport to be partnership accounts at all. By the judgment of the Master of the Rolls, on appeal from this decision, after a luminous review of the whole case and authorities, he decides, reversing Master Litton's judgment, that the account of 1857 was a stated and settled account. He further reverses Master Litton's judgment, which directed an account of the partnership of 1859, the evidence in the case not having, in his opinion, established any such partnership. No application was made to the Master of the Rolls for liberty to amend the partition for the purpose of our charging or falsifying the account of 1857, the petitioner having been advised to appeal from the judgment of the Master of the Rolls on the general grounds that there was no evidence of any stated and settled account between him and his uncle. The appeal, however, did not seek to quarrel with that part of the order which declares that there was no evidence to establish a partnership in 1859; and the bankrupt's mouth is now closed from setting up any such partnership, or impugning the case of his uncle in relation

thereto. On the 18th June, 1861, the decision of the Court of Ultimate Jurisdiction in this country was pronounced on this appeal, and the order of the Master of the Rolls was fully confirmed, and the opinion of the court was expressed in no measured terms on the merits of the case and the conduct of the bankrupt; so far, therefore, the accounts of the partnership between the parties must be taken to be closed, and the balance ascertained on the foot of these accounts, subject to such alterations as may be made therein by the account still pending in the Master's office, which has been submitted to by the elder Mr. Sim. I may here add, that on this part of the case what I am asked to do is, to permit the bankrupt, through the intervention of the assignees, either to appeal to the House of Lords from this order or submitting thereto, to apply to the court for liberty to file a supplemental cause petition, setting up the account of 1857, and seeking to surcharge and falsify it. As a consequence, probably of the decision of the Court of Appeal, the elder Mr. Sim instituted an action against his nephew, the bankrupt, to recover large sums of money due to him on foot of various dealings between them subsequent to 1849, including the sum of £2,997 12s. 4d. on foot of the transactions connected with the alleged partnership of 1859. To this action the bankrupt pleaded a most voluminous defence; and notwithstanding the decision on the appeal, he again set up the pendency of the partnership of 1859; and this question was, with all his other defences, left to the jury who tried the case under the direction of a judge who is peculiarly conversant with both commercial law and the principles of commercial dealings, and the verdict was that no such partnership existed; that the other pleas were false in fact; and that the sum of £4,195 6s. 6d. was due by the bankrupt to his uncle. If ever there was a case concluded between any parties to a litigation, this question of partnership in 1859 was closed and settled for ever. In three days after the verdict was found the bankrupt, who now takes upon himself to swear that he was not aware what was the effect of this verdict, assigns by way of bill of sale to his own attorney, Mr. Kernaghan, all his chattel property for a bygone debt, composed partly of money advances and partly of costs, and by a further security by way of bond and judgment executed on the same day, and which was immediately afterwards registered as a mortgage. He purports, further, to secure the amount due to Mr. Kernaghan by charging therewith the only remaining property in his power, which was a small freehold estate, which was neither included nor intended to be so by the agreement on which the bill of sale was founded; and thus all his property, both real and personal, was placed out of the reach of any execution to be issued by his uncle on foot of this judgment. And on the 30th of August following, the petition of bankruptcy on which the present adjudication was made was filed by the bankrupt himself, the act of bankruptcy being a declaration of insolvency. In this petition he claims a debt due by his uncle of £10,382 0s. 9d., after allowing him credit for the verdict; and it is in the proceedings under this bankruptcy that the questions on which my opinion is required have arisen. I believe I have gone through, accurately, the general

history of the case, and I have only to add that the accounts connected with all the dealings of the parties, and the different matters in controversy at any time between them, have been permitted by me to be investigated, and in many respects re-opened at a length and with a minuteness which would have been wholly unjustifiable were it not that, feeling myself called upon to give my opinion on the whole conduct of the bankrupt in his dealings with his creditors, and in particular in his litigation with his uncle, I was indisposed, in any such inquiry, to cut short any evidence or suggestion which the party whose conduct is impugned may consider calculated to explain his motives and his conduct. I now come to consider the matters alleged against the bankrupt as disqualifying him from his certificate; and I first begin with two, which, though last in the chronology of the case, are yet free from all legal difficulty, and not sought to be re-opened on any legal ground—I mean his conduct in reference to the cargo of the *Egeria*, and the alleged fraudulent preference in the dealings with Mr. Kernaghan; and first as to the *Egeria*—on foot of which there is now established a debt to his uncle of upwards of £2000. The defence of the bankrupt for his conduct in this matter is, that he was partner with his uncle in this transaction. Now, this question of alleged partnership has been decided by the Master of the Rolls and afterwards by a jury, and their decision acquiesced in by the bankrupt by his not having made any attempt to reverse or set aside these several decisions; and the only possible extenuation for the case, thus pertinaciously insisted on by the bankrupt, is founded on the expressed intention of his uncle, in the original inception of the case, to enter into a partnership, and arrangements for that purpose having been partially carried out; but I have several letters of the bankrupt, particularly that of 3rd August, 1859, the books of account kept between them, the insurance effected for Mr. Sim the elder's benefit, and his sworn evidence, all corroborating the finding of the jury, all tending to show that the bankrupt was well aware that no partnership was finally agreed to, and that he was merely the agent of his uncle to grind and sell the wheat entrusted to his care. Every grain of wheat was paid for by the elder Mr. Sim; but, supposing I could believe that the delusion actually existed in his mind of a subsisting partnership, I have heard no defence, or excuse, or even extenuation for the wholesale spoilation of the partnership property, now admitted to the extent of several hundred pounds. What right had one partner to make away with the capital of the partnership for his own private ends, and dispose of it against the terms of the partnership and the express directions of his partner, more particularly when, by his own admission, even had a partnership existed, he was largely indebted at the time to his partner on foot of that dealing? In every point of view, his conduct in this transaction calls for reprobation. Whether I consider the wholesale sweeping away of his uncle's property or the wanton and vexatious litigation respecting this most defenceless transaction, I conceive that I should abandon all my duties to the public and the creditors, if I did not mark my sense of his misconduct in this respect. I shall not refer to his own

private account books, on which so much comment has been made, and not made without ground for suspicion, as calling for any expression of opinion on my part. They have been most properly excluded from the case as evidence against his uncle. I have examined them with a view of discovering whether the accusation of having been fraudulently tampered with is sustained, and though the entries therein are not wholly free from comment, my mind has not been satisfied that this serious charge is established. And, now, as to the bill of sale and warrant to enter judgment, given to his own attorney three days after the verdict. Judge Lynch has decided that, under the circumstances of the case and the evidence before him, there was no moral blame to be attached to Mr. Kernaghan, so far as the bill of sale was concerned; and I, certainly, see no reason to doubt the complete propriety of this decision, and I think I ought, in accordance with that opinion, to say, that as the circumstances of the previous arrangement to that effect, and the moneys advanced on the faith thereof, warranted Mr. Kernaghan in taking, so the bankrupt should, so far, at least, as his moral conduct is concerned, be exonerated from blame, in giving that bill of sale. I, therefore, free him, to that extent, from any censure of the court. But what right had he, as an honest trader, without any previous agreement or obligation, to sign the warrant of attorney, whereby his freehold estate was secured against his uncle's debt? Can I doubt that this was a fraudulent preference; that it was designed to deprive his uncle of all fruits of his verdict? and that, having put him to all the delay and expense of his most unrighteous defence, he was determined to consummate his injustice by stripping himself of every particle of property which could be made available towards the discharge of his debt? In every point of view, these two premeditated and deliberate acts of misconduct disqualify him from, at least, the immediate certificate of the court. With reference to the opposition made by Mr. William Sim, and, through him, by Messrs. Holmes, Middleton, and Raeburn, to the passing of the final examination of the bankrupt, I have only to say that I have not sufficient evidence before me to come to any clear decision as to their conflicting statements; and I do not think Mr. William Sim comes before the court under circumstances to call for much consideration. I now come to that part of the case which involves not merely the conduct of the bankrupt, but the important question of the effect of the proceedings hitherto taken in relation to the partnership which ended in 1849; the nature of the claims of the bankrupt, in reference thereto, and the propriety of this court's binding itself to any further prosecution of these claims, if such a course be possible in the present state of the proceedings. Now, in the first place, it must be borne in mind, that unless an appeal be successfully brought to the House of Lords to reverse the decision of the Court of Chancery Appeal, it is conclusively decided that the account of 1857 is a stated and settled account, and that unless the Court of Chancery can, in consistence with its practice, allow the suit now to be remodelled by setting up the account of 1857, and surcharging and falsifying it, and also that it can, as a matter of fact,

successfully surcharge and falsify in substantial matters, every penny spent in further litigation will be so much squandered in merely gratifying the personal and vindictive feelings of the bankrupt. Of course, if it be for the interest of the creditors, it is the duty of the court to take any proper steps which may enable it to realise the greatest available assets; but it must be borne in mind, that the assignees cannot be in a better position than the bankrupt himself, and that they are bound exactly as he is, both by the decisions already made, and by his dealings with his partner. Now, in the first place, is there any just ground for supposing the decision of the Court of Chancery Appeal would be varied by the House of Lords? Any opinion of mine on this subject, where so eminent a judge as Master Litton has decided that these accounts are no partnership accounts at all, must be given with that diffidence which my respect for him requires; but I protest I know not the meaning of the words "a stated and settled account," either in legal or mercantile phraseology, if both these accounts, at least that of 1857, be not stated and settled, and very carefully prepared accounts—prepared on a most intelligible and, in my opinion, not on an unsatisfactory principle. There is one view of the case on this point which does not appear to have been hitherto suggested, but which strikes me as deserving of great weight. When we discuss the propriety of the principle on which this account was taken—for, whether it be satisfactory or not, the accounts are not the result of a scrambling or indefinite extract from the books, but framed on a fixed principle, and, as I shall show, after a most careful revision of the books and accounts; it must be borne in mind that, before 1843, a partnership, identical in its object, extent, and terms to that which is the subject of these accounts, was for years carried on between Mr. Sim, senior, and his nephew, the bankrupt, with only this difference—that Mr. William Sim was a co-partner therein; and, in truth, no variation whatsoever is suggested as having been made therein in 1843, save by the retirement of Mr. William Sim therefrom. The bankrupt, in his cause petition, admits, that at that time "the books and accounts of the said co-partnership were duly balanced and finally closed up to the 4th November, 1843." Now, the bankrupt, who himself prepared the accounts of 1849 and 1857, was a party to, and interested in, the settlement which, he admits, was "duly made," and must have been fully aware of the principle on which these accounts were "duly balanced and closed;" and can we doubt that, when he made out with the book-keeper of the firm, without the interference or objection of the elder Mr. Sim, the accounts of this continuing partnership up to its close in 1849, he made out those accounts on the self-same principle, and in the manner in which the previous partnership accounts, which he admits were "duly balanced and closed," were prepared. We must bear in mind that the terms or extent of the co-partnership are nowhere set out, nor, indeed, even clearly defined; and have we not the strongest grounds for believing that the former accounts were made out exactly on the same principle as these latter accounts, and if so, what right has the bankrupt, who adopted, and was perfectly satisfied and content with the manner of

making out the shares of the profits of his partnership for the first period, to call for an account on another and different principle at the close of the second period? It is alleged now by him, at the end of 13 years, that the document prepared in 1849 was merely intended to show the capital stock of the concern, and was not intended to ascertain, nor did it, in fact, ascertain the profits of the partnership, and that the document of 1857 was merely a copy of the former account, made at the request of Mr. Sim the elder. Now the documents themselves give the most distinct answer to these suggestions. In the account of 1849, it is true, that he came to ascertain what each was entitled to. "The term shares" is used, but on the preparation of the accounts of 1857, after a delay of eight years, he introduces the shares of each as their "profits" of the partnership, showing how totally untrue it is that the ascertainment of the profits is not that which he then intended. It is, however, worthy here of remark that there is strong evidence in these accounts, when compared with the books, of the great care with which they are made out. On examining the ledger to see whether in fact the balances brought out into these accounts were merely taken as they stand in the ledgers without care or scrutiny, what turns out to be the case? I find that in several instances the balances brought out into these accounts differ from those appearing in the ledger; and it is only by a careful examination of the books that items are discovered which have not been posted into the accounts, but which we must conclude were practically known to the parties at the time they took the accounts which, being brought into their proper place in the ledger, makes the balance correspond with that stated in these accounts, and this has been ascertained by me, with the aid and by the research of Mr. Brown, who has investigated these accounts most fully, and who has thus assisted in demonstrating that the ascertainment of the balances was the subject of deliberation. On the plainest grounds both of law and justice, I conceive that it would be wrong to sanction the outlay of one farthing of the money of the creditors in an attempt to impeach the decree of the Master of the Rolls, that the account of 1857 was a stated and settled account. Well, then, is the court to sanction any attempt to surcharge and falsify this account, which is the only other alternative. Now, supposing it possible to file a new bill for that purpose, are the errors (if they exist at all) so palpable that this court could permit an outlay of the money of the creditors for that purpose. Now, I confess that after giving very great attention to the whole of this part of the case, with a view of seeing whether this account could be satisfactorily impeached, and after attentively reading the opinion of Mr. Heron thereon, which, whether I consider it coming from the counsel for assignees or merely with the weight which every opinion of his is entitled to receive, I am not satisfied that the account of 1857 is either incorrect in principle or substantially wrong in detail; and, although some errors may be detected which might alter the balance in favour of the bankrupt, yet they are in themselves doubtful, and, at any rate, would not in the result warrant the further continuance of this pro-

tracted litigation. In the first place, I have procured the opinions of both the official and trade assignees, and they both disapprove of the attempt, and the official assignee, who has given great consideration and attention to the accounts of the bankrupt, and whose opinion, as a practical accountant of great experience, good sense, and judgment, I most gladly admit to be justly deserving of great weight and consideration, has reported to me that, after having considered the reports of Messrs. Brown and Craig, and the matters referred to by them, with the exception of two items to which he refers, he sees no ground for concluding that the account of 1857 is incorrect, or could be varied. One of these items is the sum of 1000*l.*, received from Mrs. Baird, which plainly should have been charged against Mr. Sim, senior's, private account, having been received by him for his own personal purposes; the other is the loss by the schooner *Lucy End* of 1,300*l.* Now, with respect to the first, it is a manifest error, and, if not explained, must be surcharged and credited to the extent of one-sixth (or 166*l.* 13*s.* 4*d.*) to the bankrupt's share of profits; but, just to exemplify how delicate a thing it is to interfere at such a length of time with an account stated and settled when all the parties were familiar with all these dealings, and after the death of the principal book-keeper, and without meaning to say that it is necessarily an answer to this claim of surcharge, I just state here that a sum of 1000*l.*, which is suggested to be the repayment of this loan of Mrs. Baird's is credited to the mill's account on the 15th May, 1849, as received from Mr. Sim, the elder, without any corresponding entry whatever to explain it, and for anything we now know when the bankrupt with Mr. Thom, the bookkeeper, were settling the accounts, they may have left the charge of Mrs. Baird's money uncorrected by finding that there is, in fact, this corresponding sum which thus squared this transaction. As to the item lost by the schooner *Lucy End*, which is admittedly a private speculation of Mr. Sim, the elder, I am of opinion that it does not, in fact, appear in the account of 1857, and that the view of the official assignee is in this respect incorrect. I have further to observe that I cannot help saying here that much of the weight which Mr. Heron's opinion deserves is removed when I find that in one important matter he is clearly under a mistake. He appears to have considered the accounts of 1849 and 1857 as prepared on a wholly unintelligible principle, because the account is conversant with the capital of the partnership, which was exclusively the property of Mr. Sim, the elder, and he says he cannot understand why the assets which belonged exclusively to one partner should be brought into partnership accounts to be divided between them. Why? The answer to that is this, the capital stock is introduced for the purpose of shewing, by a comparison of its value, at the beginning and end of the partnership, how much it had increased in value at the time, and the parties seem to have considered that this increase in value which is all that they in fact divide, represents, as I think it fairly does, the profits of the trading, and when the accounts are looked at, it will be seen that, whether it has been rightly or wrongly carried out, this is the principle, and in my mind, intelligible

principle, on which all these accounts are framed. I must here add that I conceive it my duty, under circumstances of the case, not to overlook the hardship to which Mr. Sim, senior, would be exposed, if the accounts so acquiesced in are now to be re-opened, recollecting that the only man who could protect his rights and explain the accounts is dead, and all means of explanation on his part are completely lost. Although I have arrived at the conclusion that Mr. Sim, the elder, is an extremely shrewd man of business, well able to protect his own interests, yet I have satisfied myself that he is no accountant, and is wholly unable now to give any explanation of the accounts as appearing in the books, and that he is in fact wholly at the mercy of any ingenious accountant, who may mould them according to his fancy or speculation, and when I find that Messrs. Brown and Craig, have, according to their views, brought him in as debtor to the bankrupt on the partnership, which ended in 1849, to the extent of £14,577, or, as stated in the notice in this case, profess to shew that the profits of the partnership were £64,676, instead of the sum of £16,166 1s. 1d., as ascertained by the accounts hitherto made out. I certainly ought, in common justice to him, to pause before I subject him to such a frightful ordeal. Now, on this part of the case, I have the advantage of having heard very fully the views of Messrs. Brown, the eminent accountants employed by the bankrupt, to examine and report on these accounts, and whose talent and ingenuity no one will dispute. He, of course, is not responsible for acting according to the suggestion and instruction of his client, but before I analyze the principle he has adopted, I will just observe that, in applying abstract principles to the ascertainment of matters of complicated account, it is always of importance to call in a little common sense to the consideration of the result of such speculation, and when I find that on the basis on which these gentlemen, whom the bankrupt has now got to prepare their accounts, they show that his profit in the partnership, ending in September 1849, should have been £14,577 17s. 3d., while he himself, who knew everything about the nature of his dealings, and with all the books of account before him, and while he was a struggling needy man, rested for nearly twelve years satisfied with the sum of £3,099 9s. 8d., it certainly does stagger the senses of a plain common sense man to understand how this can be. Although, a man of sense engaged in corn speculations of this kind cannot without accounts being made out ascertain to a nicety what are his profits or losses, yet he can make a reasonable guess at them, and can any man believe that while the dealings in which these parties were concerned were producing such enormous profits the needy man could have shut his eyes to the fact, and been satisfied to claim against his co-partner no more than the moderate amount twice claimed, and ascertained by himself at an interval of eight years; but has there ever been an attempt made to make out the account? In the only way that they really can be satisfactorily taken, namely, by confining them to the actual accounts and transactions of the partnership, taking at one side an account of the cargoes purchased, and at the other side the sales made for the partner-

ship, and then striking a balance between them. Had such an analysis of the accounts been laid before me I could have formed some conclusion as to the real merits of the case, but no such thing has been done, or attempted to be done, and the only deductions laid before me appear to me too speculative in their nature to warrant the taking any steps thereon. Messrs. Brown & Craig, acting on the instructions of their client, appear to have worked out their view of the case by taking an account of all the accounts of Mr. Sim, the elder, both those of his own personal speculations, and also those confessedly partnership accounts; and from the result of all these they deduce as a speculation which they say is a matter of necessary inference, that as the losses which they have thus ascertained to have occurred in Mr. Sim's private speculations must have been made good out of some fund or other, and as no other sources appear from which they could have been derived, they must have been made good out of the profits of the partnership concerns; and therefore they set down all their losses to represent as a matter of necessary inference the partnership gains. Now, independent of my opinion, that this is too speculative and fallacious a principle to apply to the taking of these accounts, let me just mention two matters which demonstrate the utter futility of such groping in the dark, as this would involve. A great part of the conclusion to which Mr. Brown has arrived in this course of reasoning is based on the instructions he has received that the dealings with Denny & Co. are not partnership dealings, and therefore that the partnership should not be charged with any portion of the loss. In my view of the case, it is not in fact, charged with one penny of the loss at all; but I say, as matter of law and justice, that in my opinion the bankrupt and his assignee are now estopped from saying that the dealings with Denny & Co. are not partnership transactions. The bankrupt has himself, in the two accounts of 1849 and 1857, knowingly and with deliberation claimed and received credit for the dividends received out of the estate of Denny & Co.; and am I to be told now that the man who has claimed and put into his pocket, thirteen years ago, his share of the dividends on that estate, is now to turn round and say it was all a mistake, and that he had nothing whatever to say to it? and here I must observe, in reference to Mr. Heron's opinion, that I do not think it now lies in the mouth of the assignee, who represents the bankrupt in this particular, to suggest that this item was introduced fraudulently into the accounts of 1849 and 1857. If there was any fraud, of which I see no evidence, it was the fraud of the bankrupt himself, who prepared these accounts in his own handwriting the latter five years after the death of the clerk Thom; and it would be a novelty, certainly, if a court were to listen to such a suggestion made by the only party who was responsible for the act; but, again, I am at a loss to know what right the bankrupt or his accountant has to enter into an examination of the accounts of the private speculations of Mr. Sim, sen., at all. The accounts in which the partnership were interested are, of course, for them to make what they can out of, and I should have been much more enlightened in this case had the eminent accountant, Mr.

Brown, been employed to make his deductions from the partnership accounts merely, but I know no principle which would entitle the bankrupt to deduce any conclusion whatever from the private accounts of Mr. Sim, and, therefore, I must reject these speculations from my consideration altogether, and I merely now refer to the second item, to which I have been referred by the official assignee—namely, by the loss of the Lucy End—to say, in the first place, that I do not conceive it to enter into the account of 1857 at all; but, at any rate, that his speculation therein is not supported by any legal evidence. In my opinion, therefore, no case has been yet made before me to satisfy me that the accounts already taken are beyond all doubt incorrect to such an extent as would warrant the court spending (I do not say wasting) the assets of the bankrupt in any further litigation, and I decline to make any order to that effect. On the contrary, I will, as at present advised, set my face against any such proceeding, being of opinion that it would be reckless, vexatious, and unjust. Of course, if the creditors, or any of them, choose to embark in any such voyage of discovery, I conceive that I have no right to interfere further than to say that the name of the official assignee shall not be used with my consent until a sufficient sum be deposited in his hands to indemnify him and the estate against all costs and losses to which the estate may be subjected in consequence, and I have written out this my judgment that it may be laid before a meeting of the creditors who may feel anxious on the subjects, to suggest for their reflection the difficulties in their way, and the grounds on which I have arrived at this deliberate opinion. With respect to this part of the case, however, although I have a suspicion that originally the attempt to set up these claims on foot of the partnership of 1849 was more to embarrass his uncle and stave off his claim than from an honest belief that he had been wronged; yet, as Master Litton is of opinion that the bankrupt was right in his view of these accounts, and as such excellent accountants as Messrs. Brown and Craig have come to the conclusion shown on the accounts which have been laid before me, I cannot hold that the litigation, so far as it relates to these accounts, has been so wanton and vexatious as to call for special censure by withholding the certificate on that ground. On the grounds hitherto stated, however, I cannot, in consistency with my own view of the case, and of the duties which I owe to the commercial world, put a shorter stay on the certificate than eighteen months from the date of the petition in this case.

Court of Appeal in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND MR. JUSTICE CHRISTIAN.]

IN RE BROWNE'S ESTATE, EX PARTE BILLING.

April 28–30; May 15; June 7.

Marriage settlement—Limitation to husband for life—Purchase for valuable consideration.

A being seised in fee of lands, by the marriage settlement made in contemplation of his marriage, settled

them upon himself for life, remainder to his first and other sons in tail. Held (the Lord Chancellor dissentiente) that A was not a purchaser for valuable consideration of the life estate limited to him by his marriage settlement.

THIS was an appeal from an order made by Judge Dobbs on the 4th of December, 1861. The following were the circumstances of the case:—In the year 1789, George Brown, sen., who was then in possession of certain estates in the Co. Mayo, and George Browne, jun., executed a bond and warrant of attorney to John Lynch, for the penal sum of £1200, to secure the principal sum of £600, with interest. Judgment was entered upon that bond in the Court of Common Pleas, as of Michaelmas Term, 1789, and by mesne assignments became on the 13th of June, 1861, duly vested in Theobald Billing. The judgment was several times revived; the last revival being on the 21st of May, 1844. It was also redocketed on the 26th of October, 1844; and on the 12th of July, 1860, it was duly registered, pursuant to the 7 & 8 Vict. cap. 90. In the year 1836 the estates of George Browne, sen., became vested in John Joseph Browne, a minor, and ward of the Court of Chancery. And by articles executed upon the 15th of November, 1836, pursuant to an order made by the Lord Chancellor, upon the marriage of John J. Browne with Miss Eakins, it was provided, that the estates in question should, so soon as J. J. Browne should attain his age of twenty-one years, be settled and assured free from incumbrances, save and except those which then affected the same, to the use of John Joseph Browne and his assigns for life, and after his decease to the use of his first and other sons in tail. By a deed dated the 20th of November, 1839, J. J. Browne having attained his majority confirmed the articles of agreement of November, 1836. John J. Browne died, and George E. Browne having attained his majority disentailed the estates and became owner in fee thereof. By the settlement dated 11th of November, 1858, and made upon the marriage of George Eakins Browne, the estates in question were settled upon Geo. E. Browne for life, the remainder to his first and other sons in tail, subject to a jointure of £200 per ann. to Mrs. Browne. George E. Browne also covenanted with the trustees of his settlement that they should hold the estates so settled discharged from all incumbrances created by him or his ancestors. The fortune of Mrs. G. E. Browne was not put in settlement. Interest was regularly paid upon the judgment of 1789 by the respective owners of the Browne estates; it was paid during George E. Browne's minority by a receiver, who was discharged upon George E. Browne attaining his majority, subsequent to which George E. Browne paid it personally up to March, 1859. On the 18th of June, 1860, Theobald Billing filed a petition in the Landed Estates Court, praying a sale of the life estate of George Eakins Browne in the lands put in settlement upon his marriage in 1859, inasmuch as those lands were part of the estates of which George Browne, sen., was seised. A conditional order for the sale of George E. Browne's life estate made by Judge Dobbs on the 28th of June, 1861, was made absolute on the 4th of December, in the same

year. From that order George Eakins Browne now appealed. The principal grounds of appeal (amongst others, which were not dwelt much upon) were, that George E. Browne was a purchaser for valuable consideration under the articles executed upon the marriage of his father in November, 1836, and the subsequent settlement of 1839; and was also a purchaser for valuable consideration of his own life estate, in the lands ordered to be sold under his own marriage settlement of the 11th of November, 1858. Consequently that he was not affected by the judgment of 1789, which had not been re-registered pursuant to the 13 & 14 Vict. cap. 29, sec. 4, within five years preceding the date of his marriage settlement. The case was argued on the 28th of April, 1862, before the Lord Chancellor and the Lord Justice of Appeal. Upon the 30th of April the Lord Chancellor stated, that, as the question involved was one of so much importance, and one upon which the authorities were conflicting, he and the Lord Justice of Appeal wished that the case should be re-argued by one counsel on each side in the presence of one of the judges of the Court of Common Pleas, wherein the case of *Massy v. Travers* (10 Ir. Com. Law Rep. 459) had been decided; as the latter case involved almost the same principle as the present. His lordship added that neither he nor the Lord Justice of Appeal entertained any doubt upon the effect of the articles of 1836 and the settlement of 1839. They were clearly of opinion that the judgment was not ousted by those instruments, and that they were made subject to and not in derogation of the existing incumbrances upon the estates, and came within the principle laid down in *Vandeleur v. Vandeleur* (3 Cl. & Fin. 82), and *Houston v. Barry* (5 Ir. Eq. Rep. 294). On the 15th of May, 1862, the case came again before the Court of Appeal, assisted by Mr. Justice Christian.

A. Brewster, Q.C. for T. Billing, the petitioner.*—G. E. Browne, the appellant, is not a purchaser for valuable consideration within the meaning of the 13 & 14 Vict. cap. 29, sec. 4.† The Legislature contemplated the case of a man conveying an estate to another for a consideration moving from that other to the vendor or settlor. Browne's wife and children are admittedly purchasers under the settlement of 1839. But it was never intended that a debtor, in contemplation of marriage, by the conversion of his estate in

fee into a life estate, could, as is contended for by the appellant, defeat his creditors. The Legislature must have intended that the *bona fides* of the transaction, and not the form of the conveyance, was to be considered. There is no change of possession here. The appellant is in the same position as if he had conveyed his estate to trustees to hold for himself for life, then for 100 years to secure a jointure to his wife, remainder to his children. If the trustees of this settlement had covenanted to stand seised, &c., to such uses as the appellant should appoint, still the latter would be in lieu of his old estate. If G. Browne had executed a mortgage to a creditor in fee, the mortgagee need not look back farther than five years to protect himself against judgment creditors; but the mortgagee does not get the equity of redemption, which would remain subject to the incumbrance, neither do the wife and children of the appellant get his life estate. The appellant will rely principally upon the cases of *Massy v. Travers* (10 Ir. Com. Law Rep. 459), and *Dilkes v. Broadmead* (6 Jur. N. S. on appeal; 7 Jur. N. S. 56); and 29 Law J. Rep. (Chan.) N. S. 310 on appeal; 30 Law J. (Chan.) 268. Now, in *Dilkes v. Broadmead* there were two distinct contracting parties and every element of contract, therefore there is no analogy between that case and this. There was a necessity for a contract in that case between the husband and the wife. Vice-Chancellor Stuart held rightly that there was a contract for value, and that the husband's life estate in his wife's fortune was protected; he did so on the authority of *Spackman v. Timbrell* (8 Sim. 260). Suppose the settlement of 1839 had contained a recital to this effect: "and whereas to shut out Mr. G. Browne's creditors it has been agreed that the lands, &c., shall be conveyed in manner following," &c., would the settlement stand for one moment? But Vice Chancellor Stuart says that in *Dilkes v. Broadmead* (6 Jur. N. S. 290), "there was no imputation as to the honesty with which the assets were dealt with; and he thought it was clear that they might have been reached if they had passed into the hands of a volunteer." Although Lord Campbell's judgment in that case, when it came before him on appeal (7 Jur. N. S. 56), is right, he must have forgotten a great deal of good law when he stated the grounds of his judgments, which are seven in number. First, the execution of the settlement antecedent to the contracting of the plaintiff's debt. Secondly, the *bona fides* of the alienation of the settlor's assets. The third ground, which is founded on *Spackman v. Timbrell* (*sup.*), is put in very inaccurate and ambiguous language; *Spackman v. Timbrell* did not decide what Lord Campbell supposed it did, but merely that, as against his wife and children, the assets of a deceased settlor, settled *bona fide* in consideration of marriage, are protected from creditors. Fourthly, there is no distinction between real and personal property as regards the protection by the consideration of marriage. Fifthly, he could find no authority for severing any of the limitations or covenants in a marriage settlement, and for holding that they shall not all operate as being supported by the consideration of marriage. Upon the sixth reason Lord Campbell lays great stress, viz.,—the relief of the husband from pin-

* G. E. Browne having appealed from the whole of the order of the court below, the petitioner in the court below commenced.

† The 13 & 14 Vict. cap. 29, sec. 4, enacts "That no judgment deed which after the passing of this Act shall be registered or re-registered under the said Act,"—7 & 8 Vic. cap. 9—"shall, after the expiration of five years from the date of such registry or re-registry thereof, affect lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a like memorandum or minute as was required in the first instance be again left with such officer as aforesaid within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued and so *toties quoties* at the expiration of every succeeding five years."

money, in consequence of portion of his wife's fortune having been settled to her separate use. His lordship's reasonings are not applicable to this case, for if the husband's life estate was upon his bankruptcy to go over to his wife and children, the limitation would be simply void. The seventh ground, viz., that the husband is a purchaser of his wife's fortune, *jure mariti*, is utterly groundless. The *jus mariti* is not a purchase, it is an ordination of the law—*Fitzgerald v. Falconberge* (Fitzgibbon's Rep. 207–212). Be the value of *Dilkes v. Broadmead* what it may, there is the express decision to the contrary of what is contended for by the appellant. *Doe d. Richards v. Lewis* (11 Com. B. 1035); at page 1057 Jervis, C. J., says,—"It seems to have been decided in *Douglasse v. Wood* (1 Cas. in Chan. 99), that an ante-nuptial settlement avoids a former voluntary deed. But there is no case which establishes that the husband acquiring an estate merely by marriage takes as a purchaser within the meaning of the statute (27 Eliz. cap. 4). The husband in *Dilkes v. Broadmead* had an inchoate right to his wife's money; she contracted that he should not have it, but that she should have the control over it. Therefore in that case there was every element of a contract for valuable consideration. If the settlement of 1859 was intended to defraud creditors it will be set aside, although the wife and children be benefitted solely—*Colombine v. Penhall* (1 Sm. & Giff. 228).

Sergeant Sullivan for George E. Browne, the appellant.—There has been considerable confusion introduced into this case by treating the appellant as a purchaser of his life estate from himself, when in reality it was purchased by others, viz., his wife and her friends, for valuable consideration. That every husband is a purchaser for value under his marriage settlement has been law from the case of *Pulverloft v. Pulverloft* (18 Ves. 92) down to *Heap v. Tonge* (9 Hare, 90). The husband here is not in possession of his old estate—Burton on Real Property (ed. 1850), parags. 158, 159, 160. His new estate is one of the limitations for which his wife must be assumed to have contracted by her person and fortune; and although the husband can dispose of it, yet is a limitation for valuable consideration. Had the friends of Mrs. G. E. Browne been aware of the existence of this judgment, very probably they would have insisted on that the whole estate should have been settled upon her. One limitation in a marriage settlement cannot be struck out; all are supported by the consideration of the marriage—*Nairn v. Prowse* (6 Ves. 752), and *Dilkes v. Broadbent*, (*sup.*) in which case the wife was rightly held to have been a purchaser for value under the marriage settlement. Here Mr. Browne bought his own life estate from himself as the wife bought from herself in *Dilkes v. Broadbent*; in that case even as the portion of the wife's fortune not settled upon herself the husband was held to be a purchaser for value. If the limitation of the husband's life estate is not valid against a judgment creditor all the limitations of the settlement fall to the ground. [*The Lord Chancellor*—Suppose that a father settled all his estates upon his son and then married again, could he bring an ejectment against his son for the estates he had settled?]. Yes. No case has gone so far as *Dickenson v. Wright* (5 Hurl.

& Nor, 401) affirmed in the Exchequer Chamber; as *Clarke v. Wright* (6 Hurl. & Nor., 849), and 30 Law J., N. S. Exch. 113. A wife can stipulate for her relations; why, then, can she not stipulate for her own husband? She has done so here—*Massy v. Travers* (*sup.*); *Barham v. Earl of Clarendon* (10 Hare, 126), were concerned with the ultimate reversion of the husband. In *Spackman v. Timbrell*, there was no life estate given to the husband, therefore there is no case decided against the appellant, whose wife purchased his life estate for him.

June 7.—CHRISTIAN, J.—This case comes before us upon an appeal from a decision of one of the judges of the Landed Estates Court. The question in dispute is, whether a judgment now vested in Mr. Billing is a subsisting charge upon the lands included within the marriage settlement executed in the year 1858, upon the marriage of Mr. Browne. That judgment was duly redocketed, and was registered under the provisions of the 7th & 8th Vict. c. 90. The following is the position of the parties before us. Mr. Brewster, on behalf of the owner of the judgment, the respondent, so to say, in this court, contended that the appellant was not a purchaser for value within the meaning of the judgment statutes; that the judgment was not displaced by the marriage settlement, but is still a subsisting charge upon the lands. He also laid great stress upon the antecedent dealings with the lands, and upon the minority of the appellant at the time of this marriage; but I do not think that anything turns upon that. If it is sought to prove that the appellant here has any defence in equity ultra his marriage settlement, the case of *Beere v. Head* (3 Jon. & Lat. 340) is a clear authority to the contrary. We have here no implication of what were the intentions of the intended husband and the intended wife by terms of the settlement; we have no extraneous evidence of any stipulation between the parties; nor has any case of fraud been made. The question is presented for our consideration in the most absolute form possible, and that is, whether a man who is seised of an estate in fee simple, by becoming a tenant for life under his marriage settlement, becomes thereby a purchaser for valuable consideration, in the sense attached to that phrase by the 13 & 14 Vict. cap. 29. The arguments advanced on behalf of the appellant are peculiar. The only party resisting the payment of this claim is the owner of the lands himself. It is not his wife nor the trustees of the marriage settlement who dispute the claim; and the case made is, that the appellant under the marriage settlement of 1858, became a purchaser of a life estate in the lands, which he might have sold or dealt with as he chose; and that the judgment, notwithstanding that it has been redocketed and registered, is void as against the lands. Mr. Serjt. Sullivan, for the appellant, based his arguments on different grounds. Considering that the intention of the parties was, that the husband should purchase from himself, as well as his wife and children, he contended that all the estates of both husband and wife were in the first place conveyed or purchased to the uses of the marriage generally, and were then parcelled out to separate successive limitations, viz., to the husband for life, to the wife for life, remainder to the children. In support of this novel proposition

the cases of *Nairn v. Prowse* (6 Ves. 751); *Dilkes v. Broadmead* (29 L. Jour. Chan. 310); and on appeal, 30 L. Jour. Chan. 268.) were relied on. Now, let us look at the case of *Nairn v. Prowse*, and let us see whether it supports the argument of the appellant. In that case Maurice Lloyd executed upon the marriage of his stepson, William Palmer, with Emily Glubb, two bonds to trustees. The amount of one of them was settled upon the ordinary uses, viz.,—to Palmer for life, subject to a proviso, determining his interest upon the event of his surviving his intended wife and having no issue by her; remainder to his wife for life, remainder to their children. The other bond was to secure a joint annuity of £130 to Palmer for the latter's life, or until Lloyd should procure him an appointment producing that income. Lloyd was embarrassed at the time of his son's marriage; and after his death a question arose as to whether Palmer could rank as a purchaser against Lloyd's creditors; the right of Palmer's children to do was not disputed. Sir William Grant, in my opinion, laid great stress upon the provision made for Palmer; and he plainly considered that the husband was a purchaser in consideration of his wife's income and the provision he was thereby enabled to make for his children, unless he obtained which he might not have married at all. Sir William Grant's observations must, however, be construed with reference to the facts of the case before him. If Palmer had been the obligor in the bond, and if there had been a conflict between Palmer and his *bona fide* creditors, that case would then resemble this before us; but looking at its facts, I do not think that *Nairn v. Prowse* advances the argument for the appellant. Let us now see whether the case of *Dilkes v. Broadmead* (29 Law. J. Chan. 310) supports the case made by the appellant. In that case Miss Bucknell, who was possessed of £17,000, settled two thirds thereof upon the marriage in the usual manner. One-third was settled upon trust during the joint lives of herself and husband for her sole and separate use; and in case her husband should die in her lifetime, for herself absolutely; and in case she should die in his lifetime, upon such trusts as she should by will appoint. A specialty creditor of Miss Bucknell filed his bill against the husband and wife and the trustees of the settlement. Vice-Chancellor Stuart was of opinion that the case came within the same class of cases as *Spackman v. Timbrell*, and dismissed the bill, considering the creditor to be clearly barred. The case came before Lord Campbell on appeal (30 L. J. Chan. 268). At first his lordship seems to have been doubtful about the case, upon the ground that a man cannot purchase from himself; but ultimately he affirmed the decree below. His reasons for doing so have been criticised severely, and, no doubt, they are not expressed in very distinct or formal language; but there is no difficulty in seeing the real ground upon which he went, viz.,—that the husband became a purchaser by this relinquishment of his marital right over one-third of his wife's fortune. If she had married without a settlement, her husband might have drawn the whole £17,000 out of the bank the day after the marriage; and once he had become possessed of the money, it would have been too late for her to seek to enforce her equity to a settlement. The

husband in *Dilkes v. Broadmead*, was a settlor upon his wife. She was a minor at the date of the marriage; but the settlement of an infant, while void as to realty, is valid as regards personalty, as it is the settlement of the husband—*Simson v. Jones* (2 Russ. & Myl. 365). The distinction between *Dilkes v. Broadmead* and this case is, that in the case before us the wife got by the settlement what she could not have got if there was no settlement. She is a purchaser for valuable consideration. But did her husband get anything by the settlement? If he had married without a settlement he would have been tenant in fee-simple; he is only tenant for life under the settlement. It was said that the wife would have had a right to dower; but since the year 1833, a wife's right to dower is at the mercy of her husband, and may be barred by a simple declaration. Has the husband got anything by the settlement which he had not before? The only effect of the settlement as regards him was to take from him the estate he had previously and to convert it into an estate for life. What Lord Campbell meant to say in *Dilkes v. Broadmead* was, that the withdrawal of part of the wife's fortune from the husband's control was a purchase by the wife and children. That is sufficiently clear from the following passage in his lordship's judgment:—"I do not find any authority for severing any of the limitations or covenants in a marriage settlement which substantially formed part of the contract entered into between those who execute the deed, and for holding that they shall not all operate as being supported by the consideration of marriage. In this case the settlement of the £5000 to the wife's separate use without power of anticipation, may have been an inducement to the husband to agree to the marriage. He derives advantages from the £5000 settled to the separate use of the wife; he is relieved from the provision he might otherwise have been required to make for her by way of pin-money. Her equity to a settlement out of property coming to her *aliunde* during the coverture is *pro tanto* diminished, and his own right to it proportionably increased." I quite agree with his conclusions. Then we have to consider, does the life estate retained by the husband in the case before us, make him a purchaser for valuable consideration. It was contended, that such was the cotemporaneous intention and stipulation of the parties to the settlement; and the cases of *Pulvertoff v. Pulvertoff* (18 Ves. 84), and *Heap v. Tonge* (9 Hare, 90), were cited in support of that view. But the doctrine laid down in those cases that third persons could purchase on behalf of others, never was doubted, and this case bears no resemblance to those cases. Here there is not merely an absence of evidence of intention, but there is an absence of authority. The absence is very striking; for a multitude of cases must have come before this court—cases of judgments and fraudulent conveyances, in which the proposition of the appellant would have been argued, if at all tenable. But there is not only an absence of authority in support of the appellant, but there is direct authority against him, viz.,—*Barham v. The Earl of Clarendon* (10 Hare, 126), and *Massy v. Travers* (10 Ir. Com. Law Rep. 459). Those cases differ from the present in this, that it was not the life

estate of the husband which it was contended that he purchased, but a remainder to him in fee after all his issue. *Barham v. The Earl of Clarendon* was a special case upon the will of a testator who devised his estates to trustees to raise £5000 for each of his four younger children, and subject thereto he devised his estates to his eldest son, John, absolutely. John, by his marriage settlement, covenanted to pay off the four sums of £5000 within six months after his marriage, and to release the estates therefrom, and to have them conveyed freed thereof to trustees, upon trust, after his decease, to his wife for life in case she survived him, with remainder to himself in fee. John died without issue, having only paid off one sum of £5000. One of the questions for the court was whether the plaintiff in the special case, as devisee of the heir of John, was a purchaser under the settlement; and Vice-Chancellor Page Wood held that he was not, observing, "I think that the plaintiff's claim to be considered as a purchaser under the settlement cannot be maintained. I do not think it could have been maintained if the ultimate limitation had been to the heirs of the husband; for the wife could hardly be considered to stipulate for the husband's heirs; but here the ultimate limitation is to the husband himself in fee, and surely the wife cannot be considered to stipulate for him. I am of opinion, therefore, that the case must be determined without reference to any claim of the plaintiff as purchaser." *Massey v. Travers* was a case of the same description. I do not wish to lay much stress upon that as I was a member of the court which decided it. But, be the value of that decision what it may, it was acquiesced in, although an estate worth £600 per annum was at stake. There was no appeal to either the Exchequer Chamber or the House of Lords. It was said rightly in the course of the argument, that the first ground upon which *Massey v. Travers* was decided had no application here, viz., that there was no acquisition by the husband of a new estate. But the second ground is the substantial one i.e., assuming that there was an acquisition of a new estate, was it for valuable consideration? Now, the wife must be considered to stipulate for herself and her issue; can they be said to stipulate for the estate of the husband to move from himself to himself? They cannot according to *Barham v. The Earl of Clarendon*, *sup.* Therefore if the argument of the appellant's counsel be right, *Barham v. The Earl of Clarendon*, and *Massey v. Travers*, ought to have been decided the opposite way. The case of *Phipps v. Lord Ennismore* (4 Russ. 131), which was not cited at the bar, is confirmatory of the view of the case which I entertain. There a man named Balders, a tenant for life of lands under his father's will, with a power of jointuring the settlement upon his marriage, conveyed the lands to trustees for ninety-nine years on trust, to secure a yearly sum as pin-money to his wife during his life, and a jointure after his death. He executed a contemporaneous instrument, by which he covenanted not to sell or incumber the lands comprised in the terms, with a proviso that, if he should incumber them, the trustees should receive the rents and profits, and apply them to the maintenance and support of the settlor's wife and children. The tenant for life granted two annuities for valuable consideration,

and these having fallen into arrear the annuitants filed their bill. Against them it was contended that the wife and children were purchasers for valuable consideration. The case came on appeal before Lord Lyndhurst, then Lord Chancellor, and was argued, on behalf of the children, by the present Lord St. Leonards, then Sir Edwd. Sugden. He contended that "Even if the proviso could not be sustained, so far as the trust which it raises might be for the benefit of Balders himself, on what ground can it be impeached, so far as it stipulates for a benefit to his wife and children? If the covenant had been merely that, in the event of alienation by Balders, the trustees should apply the rents to the maintenance of his wife and children, or accumulate them as a further provision for those individuals, it must unquestionably have been sustained." On the other side, it was contended that the proviso was vicious in its nature, and was fraudulent. Sir Edward Sugden, in reply, contended that the two deeds formed a reasonable settlement, and that "This court cannot strike out any of the stipulations which the wife and her father purchased for the benefit of herself and her children, and for which they paid not merely a sum of money, but the highest consideration known to the law." Lord Lyndhurst, when deciding that the trust created by the second deed was void against creditors, says, "The only question which admits of doubt is, whether the provision can be sustained against the incumbrancer so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands that the parties to the deed did not contemplate a fraud, but the transaction is in its very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation. In point of law the deed cannot be sustained." I do not say that case is directly analogous to the present, for there the contest was by the grantor's children against a subsequent incumbrancer. The present case is very different. We are here called upon to impart the character of a purchaser for valuable consideration to the very person, who seeks thereby to evade the payment of an incumbrance, created prior to his assumption of a life estate upon his marriage. But *Phipps v. Lord Ennismore* is valuable as showing that under no circumstances can the defrauding of the *bona fide* creditors of the husband be supposed to enter into the stipulations by a wife upon marriage. The reasons of the case shows that, in addition to being unsupported by authority, the argument of the appellant is unsustainable. Does the law assume that the whole estate contained in the settlement is purchased by the marriage, so that all the uses into which it is carried become purchases? When such is contended for, it appears to me, that, as in *Massey v. Travers*, so here, counsel forget the distinction between *consideration* and *contract*. Marriage is a sufficient *consideration* to validate all the limitations in a marriage settlement; but it is *contract* which calls that consideration in operation, and the union of both the latter constitutes *purchase*. Are all the persons then who come under the limitations of a marriage

settlement purchasers under that settlement? No; for each limitation is to be judged by its own exclusive merits. To illustrate that, we see that limitations of the husband's estate to his collateral relatives are void, as not being within the contract between the parties to marriage. But limitations of the husband's estate to the collateral relatives of the wife will be supported by the consideration of the marriage, for they must be presumed to have the subject of stipulation by the wife. I need only refer to the observations of Mr. Justice Knight Bruce in *Kekewick v. Manning* (1 De G. M. & G. 176), affirmed by *Clarke v. Wright* (6 Hurl. & N. 849), as establishing this doctrine. The case of *Clarke v. Wright* (*sup.*) is valuable, not so much as a decision, as for the arguments advanced by the judges in support of the various views they entertained. The facts of that case were these. A widow, possessed of considerable property, upon her second marriage limited the property to trustees upon trust for herself for life, with remainder as to part to her husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee; and as to the residue, to the plaintiff in fee, in case he should attain the age of twenty-one years. She and her husband mortgaged the property. Upon ejectment by the plaintiff against a person claiming title under the mortgage, it was held by the Exchequer Chamber affirming the Court of Exchequer, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void as against the mortgagee. The judges differed. The majority of the court decided the case upon the authority of *Newstead v. Searles* (1 Atk., 265), being of opinion that the limitation was supported by the consideration of the marriage. Mr. Justice Blackburn based his decision upon the relinquishment by the husband of his marital right over his wife's property. Mr. Justice Williams differed from his brethren, being of opinion that the limitation to the plaintiff was void as against the mortgagee. Many passages in the judgments of their lordships seem to me to bear upon the case before us, and to support the views which I have stated. At page 864, Mr. Justice Blackburn says, "There are some very sensible observations in Dart's *Vendors and Purchasers*, pp. 578 & 579, in which I thoroughly concur, and which I adopt as part of my judgment. It is there said,—"Unnecessary difficulty appears to have been thrown over the cases upon the subject by a confusion between the contract and the consideration for the contract. The common form of objection is, that collaterals are not within the consideration of the marriage. Now, this expression is, it is submitted, scarcely accurate. If A. agreed with B. to pay him £10,000 in consideration of his conveying his estate to the use of A. for life, with remainders over in favour of strangers; and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially or in trust for A. but subsequent purchasers from B. could hardly contend that the limitations in the settlement *ultra* A.'s life estate were void upon the ground of the remaindermen not being within the consideration of the £10,000. In the case of a marriage settlement the important question seems to be, first, whether the collaterals were within the contract;

and secondly, whether, if so, there was a sufficient consideration for such a contract."—As here, first, was the husband's life estate within the contract upon the marriage; and secondly, was there a sufficient consideration for it.—"Upon the first question, considered merely as one of principle, it is submitted, that where the limitations over are in favour of collateral relations or connections, not of the settlor but of the other contracting party (whether wife or husband), the settlement itself may be considered *prima facie*, evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations in derogation from the husband's marital right by survivorship (in case of personality), or as tenant by the curtesy (in case of realty). Where in any case other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary and void as against a subsequent *bona fide* purchaser." Mr. Dart states this only as his own opinion, without asserting that it is established by the authorities; but it seems to me that on the principles he thus states the different divisions can be reconciled, and that they cannot be reconciled in any other way." Chief Justice Cockburn first puts the distinction between a post nuptial settlement, which is void against a subsequent purchaser, and an ante-nuptial settlement, which is valid against a subsequent purchaser. "Why this distinction?" he says at page 871. "Simply because the estates and interests created by the settlement are acquired from the settlor for a valuable consideration, namely,—the marriage of the party for whose benefit, or the benefit of whose issue, the disposition of the property so made is to endure, either with the settlor or some near relative of the settlor, in which latter case the bargain may be said to be made with the settlor, just as much as if it had been made with an intended husband. In every such case it is manifest that, as to a disposition of property for the benefit of the opposite party or their issue, the consideration moves to the settlor. The disposition has been purchased by the marriage of the party by whom it may be assumed to have been stipulated for; and having been thus obtained for a valuable consideration it is good against the settlor and against any future disposition of the property which he or she may make, even to an innocent purchaser. On the other hand, a disposition made by a settlor in favour of his or her own relatives not being the issue of the marriage"—(Every word of this is applicable to a disposition by the settlor for himself)—"cannot, as it seems to me be said to be made for a consideration arising from the marriage. The settlor is only exercising a right which he or she had before. No additional right or power in this respect is derived from the marriage. No doubt, such a disposition would not be made without the knowledge and acquiescence of the other contracting party; but that acquiescence adds nothing to the previously existing right of the settlor. Nor, except under very special circumstances, can it be supposed

that a disposition in favour of the settlor's own relations would be stipulated for by the opposite party. Certainly such circumstances as being contrary to the ordinary courses of things would require to be specially shown." Every word of this passage is applicable to the present case; but the most apposite are the remarks of Mr. Justice Williams, who held that the case of *Newstead v. Searles* could not be treated as law. At page 877 he says, "Now in a settlement, in contemplation of marriage, of the estate of the husband or wife, he or she to whom the estate to be settled belongs, being the grantor of the estates created by the settlement, cannot, it should seem, be deemed to have thereby purchased any one of them; but the party to whom the estate does not belong may be regarded as having purchased by the marriage all those limitations of the estate for which he or she can be proved or fairly inferred to have stipulated, such as the limitations in favour of themselves respectively or their issue. And so with respect to limitations in favour of the collateral relations of the party to whom the estate does not belong; for it may well be presumed that such party stipulated, as part of the marriage bargain, for their insertion into the settlement, and so may be properly regarded as having purchased them on behalf of those who are to be benefitted thereby. But an intended wife cannot be inferred to have stipulated on the part of the relations of the intended husband, nor the intended husband for the relations of the intended wife." Can the court here infer that the wife stipulated for the life estate of her husband? What an intending wife may fairly be supposed to stipulate for in consideration of her fortune, is a provision for herself, and a remainder in tail to her children; all these estates are purchases for valuable consideration. But can the life estate of the husband, or the remainder to him in fee, come within the same category, i.e., be assumed to have been stipulated for by the wife? Surely not. Sergeant Sullivan relied upon the limitations to trustees to support contingent remainders to the issue of a marriage, as analogous to the life estate in the case before us. But the answer to that is, that, if the life estates given to the trustees be necessary for the support of the contingent remainders, they are valid, and a voluntary deed would be void as against them; but we are not now dealing with such estates, but with the tenant for life himself. The covenant, by Mr. Browne, against incumbrances, was also relied on in his behalf. But, assuming that that covenant was general, and not special against his own acts, the inference is the opposite way. The making of a covenant against incumbrances, assumes that there were or might be incumbrances. The effect of that covenant was to throw the duty of paying off the incumbrances upon the husband; in other words, the policy of the marriage settlement was, that his life estate should be the primary fund for the payment of the incumbrances. If, on the day after the marriage, the judgment creditor had applied to the husband for payment of his debt, it would have been difficult for the latter to shelter himself behind his wife and children, and say that she had stipulated that he should not be liable to the payment of his debt. The analogy sought to be drawn between the case before us and the case of a covenant to stand seised to uses, in no wise aids the appellant; therefore,

reading the settlement before us, and having no evidence of any bargain between the parties, the conclusion is, that the wife cannot be inferred to have bargained for anything else, but a jointure for herself and provision for her children; and that the marriage settlement was not founded on any other contract, and that the life estate of the husband was not purchased for valuable consideration. I will now test that doctrine. It was decided, in *Spackman v. Timbrell* (8 Sim., 259), and *Richardson v. Horton* (7 Beav., 112), that, so long as the real assets of the ancestor or settlor are in the hands of the heir or legatee, the Court of Chancery will sell the real estate at the suit of the special and simple contract creditors of the ancestor, but will not sell the lands when in the hands of purchasers for valuable consideration; as, the wife and children of the ancestor or settlor. Those cases are commented on in *Pimm v. Insall* (1 Hall. and Tw., 487); but the Courts of Equity have never held the wife was a purchaser for valuable consideration for her husband, so as to defeat his creditors. Take, then, the cases of *Higginbottom v. Holme* (19 Ves., 216); *ex parte Cooke* (8 Ves., 353); and *ex parte Meagher* (1 Sch. and Lef., 179). In that class of cases, there is a distinction laid down between the settlement of the husband's fortune and that of the wife, which appears to me to favour the view I entertain on the case before us. If a man, who is not a trader, at the time of his marriage settles the income of his property on himself for life, and promises that, if he becomes a bankrupt, his life estate shall cease, and that his wife shall receive all his income, that promise is void against his creditors. But, on the other hand, if it is the income of the wife's fortune which is to pass from the husband upon his bankruptcy, the proviso is good. How could that distinction be supported, if, in the case before us, the wife could contract for her husband, but in the other case could not? If the estates of the husband and wife are to be considered as thrown into a common stock, would not the wife's friends have a right to insist that the husband's life estate should cease upon his bankruptcy? The grounds of the decision in *Phipps v. Lord Ennismore* (4 Russ., 131) clearly shows why such a doctrine could not be entertained. Again, if a man, being seised of Blackacre and Whiteacre, upon his marriage, settles Blackacre upon himself for life, and Whiteacre upon himself, his heirs, and assigns, his wife is just as much a purchaser of Blackacre as Whiteacre; but, upon the argument of the appellant, she is a purchaser for valuable consideration of Blackacre, and Whiteacre alone is liable to the settlor's debts. Again, if a man be possessed of several sons, and several separate estates, and if, as each son arrives at manhood, he gives him an estate, by deed, those gifts are made for good consideration, but are voluntary. Suppose that, after the death of his first wife he married again, and put all his estates in settlement, and, on the day after his second marriage, brought an ejectment against his sons, can it be the law that he could succeed in his action? If so, *Massy v. Travers* ought to have been decided otherwise. If a man executes articles of agreement to sell an estate, and the purchaser pays the purchase-money, and does not register the articles of agreement, the vendee's rights are lost, at law, if the vendor settles

the estate, by his marriage settlement, upon himself for life. But, if the purchaser goes to the Court of Chancery, and says, let the vendor give me what he undertook to, or its value, can the vendor entrench himself behind his wife and children? These are the grounds upon which I am of opinion that the husband, in the case before us, is in possession of his life estate, as he was of his estate in fee; and is not a purchaser for valuable consideration, within the meaning of the 13 & 14 Vict. c. 29, s. 4.

THE LORD JUSTICE OF APPEAL.—I entertain the same opinion as my brother Christian upon this case. I might well be excused from giving my reasons in detail, as the subject has been exhausted in the elaborate and profound judgment which has just been delivered. But as one member of the court differs from us, I think it is incumbent upon me to state the grounds of my judgment. Mr. Browne, the appellant, is a tenant for life, under a marriage settlement executed in 1858. That estate was subject to a judgment which had been obtained against an ancestor of the appellant. Interest was paid upon that judgment during the minority of the appellant; and, after he obtained his majority, the appellant paid the interest himself. It is contended, by the petitioner here, that the judgment creditor has a right to have this debt discharged by the sale of the appellant's life estate. It is contended on the other side, that the appellant is a purchaser for valuable consideration. This is a defence which goes to the whole right of the creditor to recover his debt, which, it is acknowledged by the appellant, would be avoided by the appellant's own act. Such a defence must be very clearly established before we admit it. Whatever change of possession may take place in other forms of conveyancing, it is plain that there was no change of possession under the settlement of 1858. He retains part of his estate in fee, and in the same way as he held it before. By that settlement the estate was limited to the appellant and his assigns for life, remainder to the use of his first and other sons, in tail, with an ultimate reversion in his own right heirs. We have the authority of *Massy v. Travers* (10 Ir. Com. Law Rep., 459), that the appellant cannot be deemed a purchaser of that reversion. The reasons of that case seem to me to apply to the estate for life retained by the appellant here. That life estate is not fettered by any provision for his wife or children. As he has the same power over his life estate as he had over his estate in fee-simple, this case must be governed by *Massy v. Travers*. Some observations of Mr. Justice Christian, in that case, appear very applicable to the present. After stating that a settlor cannot make his own heirs or devisees purchasers under the settlement. He concludes by saying (page 470)—“I am of opinion that the ultimate limitation in the settlement of 1780 (to settlor's right heirs), does not constitute a purchase for valuable consideration, for two reasons; first, because it is inoperative to create any estate at all; secondly, because, even if an estate passed under it, that estate would not be clothed with a valuable consideration, inasmuch as it could not be considered as a part of what was stipulated in the treaty for the marriage.” In all those reasons I perfectly concur; and if we had no other authority but *Massy v. Travers*,

that case would warrant the opinion which I entertain. No case has been quoted to show that there is any distinction between an absolute and a limited estate: here there is a bare life estate, with an ultimate remainder in fee. According to the argument advanced by the counsel for the appellant, although the latter remains in possession of the estate which was charged with the judgment debt, yet, in consequence of his marriage, he is entitled thenceforth to hold that estate discharged of the judgment debt. In *Barham v. Earl of Clarendon* (10 Hare., 126), Vice-Chancellor Page Wood repudiates the argument that a wife can purchase for her husband. That case is a clear authority upon this case, as well as *Massy v. Travers*. I will only add a few observations upon *Clarke v. Wright* (6 Hurl. and Nor., 849), which was much relied on by the appellant. In that case, two of the judges decided the question on grounds different from their brother; one judge dissented, and the other judges based their judgments on *Newstead v. Searles*. In the case before us, I concur with my Brother Christian, that the appellant is in of his former estate, and that he is not a purchaser for valuable consideration.

THE LORD CHANCELLOR.—I regret that I cannot concur in the judgments pronounced by Mr. Justice Christian and the Lord Justice of Appeal. As they constitute a majority of the court, the order of Judge Dobbs must be affirmed; and, were this an ordinary case, it would be unnecessary for me to state the grounds of my opinion. But when this case came first before us, I considered it one of so much novelty and importance, that I wished to have it re-argued. I then was of the same opinion as now, and as I have the misfortune to differ from Mr. Justice Christian and the Lord Justice of Appeal, I wish to give a summary of the reasons upon which I have founded my opinion. I am of opinion that a contract between husband and wife must be implied; and that part of the consideration of that contract was the marriage, although there may have been other considerations; and that the consideration of marriage was sufficient to protect the life estate of either party, whichever of the two it may flow from. That opinion is founded on *Nairn v. Prowse* (6 Ves., 752). The settlement executed upon the marriage of the appellant is in the ordinary form; notwithstanding which, this case has been judged upon a supposition of what would have taken place if there had been no settlement. There must have been a contract entered into between the parties; the contract is even recited in the settlement. I then turn to the observations of Sir William Grant in *Nairn v. Prowse* (Sup.), and I find him stating, at page 758, “It is contended that, with regard to the provision made for the husband, *Mr. Palmer*, this is to be considered merely a voluntary settlement; and, therefore, *Glubb*, the trustee, is not entitled to claim, in respect of the annuity of £130 on the interest of the sum of £3,000 for the life of *Palmer*. There is no such distinction. The consideration runs through the whole settlement. It has been sometimes doubted whether the consideration of marriage would extend to objects unconnected with the marriage, as remainders to collateral relations. But every provision with regard to the husband and wife falls directly within the consideration; and the

wife is interested in the provision for the husband as well as that for herself. The marriage is consented to in consideration, not only of her interest, in the event of survivorship, but his income, and the provision he is thereby enabled to make for her and her children during his life. It is not material, that when the provision is made for the husband, it may be liable to his debts. She takes the chance of that, just as she does if she marries a man of fortune, supposing that, in the event of debts contracted, his creditors may take his fortune from him. But he has the means of providing for his family. When the provision is once made, as it has been by marriage, no event afterwards can alter it. The question is, whether, at the time, it was voluntary, or upon good consideration. It is immaterial, therefore, that in this instance the wife is dead. If it was necessary, it might be said the provision for the husband enables him to maintain the children. But the case would be the same, if there were no children; for, if a settlement is made, upon the marriage of a son, upon the husband and wife for their lives, and afterwards upon the children, and the wife dies without any issue, and, therefore, the husband is the only object, it could not be contended that the father's creditors could impeach that settlement, and take from the son the provision for his life; and if not in that case, it cannot be done in the case of a stranger; for it is not from the relation of father and son that the creditors are debarred. If it was a mere voluntary settlement of that sort, it could not be protected from creditors, but the consideration of marriage protects it." Lord St. Leonards quotes *Nairn v. Prowse* to show that the consideration of marriage runs through all the limitations of a settlement—Vend. and Purch. 11th edition, 931. I cannot see any difference between the wife purchasing for the husband from himself, and from a third party: the same consideration and principle runs through each class of purchases. Nor can the husband defeat the limitation of the settlement in the one case more than the other. This is no new doctrine, but it pervades a large class of cases; e. g., if an intended husband commit a fraud in concert with a third person, the husband will be protected from the consequences of his act, which will be declared void as against the settlement. That is the case in *Tarton v. Benson* (1 P. Wm., 495). So in the case of *Thompson v. Harrison* (1 Cox., 345), where a husband, pending his marriage, agreed to buy certain premises, but represented to the father of his intended wife that they belonged to him. After the marriage, a bill was filed against Harrison, the husband, for a reconveyance, or satisfaction, and the bill was dismissed; Lord Thurlow said—"With respect to the interest of Harrison, in the premises, it was a rule, in cases of frauds on marriage, that although the husband was a party to such fraud, yet his interest was not to be affected, since it was impossible to make him liable in respect thereof, without involving the wife and children and the family upon whom the deceit had been practised. If the wife had been actually dead without issue, the case would have been very different; but, as it stood at present, the bill must be dismissed." In that case, the distinction is taken, that so long as the wife and children are alive,

the life estate of the husband cannot be touched. A very similar case, that of *Tuohy v. Tuohy*, occurred in this Court in the year 1856; it is not reported, but Mr. Kennedy has kindly furnished me with a note of it. *Nairn v. Prowse* and all class of cases were then cited, and I was of opinion that the husband was protected by the marriage, and thereby enabled to get rid of the effect of a fraud to which he was a party. That being so, *Dilkes v. Broadbent* seems very applicable; for it was open to the intended wife there to say, that the intended husband should not have the benefit of the income of the thirds of the fortune, unless he allowed her to have the income of one-third of it, settled to her separate use. I concur entirely in the decisions, in *Barham v. Earl of Clarendon* (Sup.), *Mossy v. Travers* (Sup.), and *Houston v. Barry* (5 Ir. Eq., 294), that the ultimate reversion in fee to the husband is not within the consideration of the marriage. My views are strongly fortified by the observations of Mr. Justice Williams, in *Clarke v. Wright* (6 Hurl. and Nor., 876). He says:—"Now, in order that he who claims under any limitation may be deemed, as against subsequent purchasers, to take for a valuable consideration, and not as a volunteer, it is obviously necessary that he, or some one on his behalf, should have purchased the limitation in question. If he can support the limitation in his favour against a subsequent conveyance for valuable consideration, he must also be able to support it against a prior voluntary one, and avoid the latter under the statute, in the character of a purchaser for value, by reason of a purchase made by himself, or some one else for his benefit. Thus, Turner, V.C., in *Heap v. Tonge* (Sup.) speaking of the cases in which limitations to collaterals in marriage settlements of the husband's estate have been held void, says:—"These cases proceed on the ground that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is, therefore, no one who purchases anything for the benefit of those relations. If there be anyone purchasing on behalf of the collaterals, the limitations are supported. Now, in a settlement, in contemplation of marriage, of the estate of the husband and wife, he or she, to whom the estate to be settled belongs, being the grantor of the estates created by the settlement, cannot, it should seem, be deemed to have thereby purchased any one of them; but the party to whom the estate does not belong, may be regarded as having purchased, by the marriage, all those limitations of the estate for which he or she can be proved, or fairly inferred, to have stipulated, such as the limitations in favour of themselves respectively, or their issue." None of the cases cited, require any observations. This case is one of great difficulty, and I regret that I have been unable to agree with my learned brethren.

Order below affirmed, with costs.

Rolls Court.

[Reported by William Woodlock, Esq., Barrister-at-law.]

SHAW v. MAGILL.—June 20.

Legacy—Survivorship—Period of vesting.

Where a testator bequeaths a legacy to a tenant for life, and, after her death, to his (testator's) surviving children, the survivorship refers to the death of the tenant for life.

THIS was an appeal from an order of Master Murphy, dated the 14th February, 1862. The suit was one to carry into execution the trusts of the will of John Shaw, deceased, who died in December, 1820. That will was, in its material parts, as follows:—"I charge and incumber all my estates, real and personal, of which I shall die seised or possessed, or in any wise entitled unto, whether in possession, reversion, or expectancy, with the full and true fulfilment and performance of the provisions contained in a certain deed of settlement executed by me on my intermarriage with my present wife, Grace Shaw, otherwise Grace Green, and subject to such settlement, and after full satisfaction thereof, and after payment of all my just debts and funeral expenses, I give, devise, and bequeath all the property and estates, real and personal, of which I shall die seised and possessed, or entitled to in manner aforesaid, to and amongst all my children, male and female, share and share alike, the proportion to which each of my sons shall be entitled, to be paid on his or their attaining his or their age of 21 years, and the proportion to which each of my daughters shall be entitled to be paid on her or their attaining her or their age of 21 years or marriage, and my will is, that my executors hereinafter named shall, out of my said estates, real and personal, pay and apply a suitable annual sum to and for the maintenance and education of my said children, and also shall pay and apply such sum or sums of money to and for apprenticing any of my said sons to such business or profession, or for otherwise advancing them in life as my said executors shall judge fit, such apprentice fee, or other provision, to be deducted out of the sum to which such son, so apprenticed or provided for, shall, on his coming of age, be entitled to under this my will; and I further will and direct that the share and proportion of any or either of my said children, male or female, who shall happen to die before his or their attaining their respective ages of 21 years or marriage, as aforesaid, shall go to and be equally divided amongst the survivors of such children, share and share alike." To this will there were two codicils. The second, which was dated the 17th October, 1806, was in the form of a letter addressed to his executors, and was as follows:—"Edward Shaw and William Carroll—My dear friends, should it please God that you, or either of you, should survive me, I must beg your attention to my family, and to the disposal of my property, as I shall now point out. My wife's marriage settlement must be paid in any way she wishes, but it is my wish that it should remain at interest for her during her life, and that she should dispose of it at her death as she wishes, which I have no doubt will be fairly amongst her children; and in

addition to this, I must request of you to pay her £200 a year during such time as she may remain a widow, and no longer; and at her marriage or death, the sum vested to pay her this sum yearly, I request will be fairly divided amongst my surviving children; and I further request that all my household furniture may be given her, and that the rest of my property may be disposed of, and, with my property in trade, may be vested in such securities as you may think best, to obtain the highest interest you can, so as to be equally divided, share and share alike, amongst all the children I may leave behind me, to be paid to them on their being of age, or sooner, if you see it prudent so to do, and that each of these children shall, according to their age, be chargeable with such sums as will support or educate them. I mean by this that my wife shall, as well as any other, be allowed for any of the children that may be with her according to your judgment.—John Shaw." The testator's wife survived him, and died in February, 1861. Upon the present petition, a question arose as to the construction of John Shaw's will, and the Master decided that a sum of 5,000*l.*, which had been set apart as a fund for the payment of the 200*l.* a year to the testator's widow, became divisible upon the decease of the testator's said widow, which occurred in February, 1861, between the petitioner, John Shaw, and the respondent, Eliza Magill, in equal shares, they being the only children of the testator who survived the testator's widow. Against that order the present appeal was made by Richard Hayes, who represented the representatives of other children of the testator, who had died in the lifetime of the testator's widow. The appellant's contention was, that in lieu of the declaration in the Master's order, it should be declared that the trust funds, upon the death of the said testator, became vested in all his then surviving children, in equal shares, and that the said trust fund, upon the decease of the said Grace Shaw, became divisible in equal shares between the petitioner, John Shaw, the respondent, Eliza Magill, and the respective representatives of each of the testator's deceased children.

Warren, Q.C., and Echam, for the petitioner, in support of the Master's order.—The question in this case is concluded by authority. In limitations of this description the words of survivorship are always referred to the period of enjoyment. The period of division is the death of the tenant for life.—*Cripps v. Welcott* (4th Mad., 11); *Neathway v. Reed* (3 De G. M'N. & Gord., 18); *Thompson v. Thompson* (7 Jur., N.S., 1263); *Stephens v. Gunn* (18th Beav., 590); *Starr v. Newberry* (23 Beav., 436); *Caulfield v. Giles* (12 Ir. Eq., 427); *Wordsworth v. Wood* (1 H. of L., 153); *White v. Baker* (6 Jur., N.S., 591); *Taylor v. Beverley* (1 Coll., 108); *Spurrell v. Spurrell* (17 Jur., 755); *Richardson v. Robertson* (6 L.T., N.S., 75).

Chatterton, Q.C., and Crozier, for the appellant.—We cannot resist the general doctrine, but it is not applicable to the facts of the case. The question is one of intention. In this case the survivorship cannot refer to the death of the wife, because the fund is given to her only until she marries.—*Elliott v. Elliott* (11 Ir. Ch., 482); *Adams v. Roberts* (25 Beav., 658); *Re Bennett's Trusts* (3 K. & J., 280.)

THE MASTER OF THE ROLLS said that, if this was a new question, he thought there would be a great deal to be said on both sides. But *Cripps v. Wolcott* had established a principle which had been followed over and over again. Even previously to the case cited from the *Law Times*, it was said that, if the principle was ever to be questioned, it should be in some Court of Appeal. In the early part of the present case he had felt some difficulty, until he had looked into the case of *Neathway v. Reed*. But that case decided the question. He did not think that any length of consideration would induce him to overrule the Master's order, as he considered himself bound by authority, although if the point was now raised for the first time, he thought a great deal might be said upon it. He should take down upon his order that, on the authority of the cases, he would uphold the Master's decision, and refuse the present motion with costs.

Court of Queen's Bench.

[Reported by Walter Bourke, Esq., Barrister-at-Law.]

TRINITY TERM, 1862.

BRABAZON v. POTTS.—May 30.

Setting aside defence—Common Law Procedure Act, 1853, sec. 83.

THIS was an action for libel alleged by the first count in the summons and plaint to have been published by the defendant of the plaintiff, and in the second count to have been so published as a letter from a correspondent—damages, £2000. The defences, six in number, traversed and justified the allegations. Fifth defence, as further defence to the second count of summons and plaint, and as to so much of the words therein set forth, that is to say, the words following:—"I saw their (meaning the said evicted persons) receipts for the rent up to the 29th September last, two months and a half before they were turned out of house and home and their cabins pulled down" (meaning thereby that although the said evicted persons had paid their rent up to and for a period within two months and a half before the eviction, yet that the plaintiff wantonly, harshly, cruelly, and oppressively evicted them from their holdings and pulled down their cabins); that before the printing and publishing the said words by the said defendant, Henry Conlter, (the special correspondent of defendant) saw receipts purporting to be receipts for the rent payable by the said tenants to the said plaintiff up to the 29th September, 1861, and which receipts were duly signed by the agent of said plaintiff. And the said defendant avers that the said evicted persons did pay to the plaintiff before their eviction the rent payable to him up to the last gale day to which said plaintiff was entitled. And the said defendant avers that, under the circumstances aforesaid, the eviction of the said tenants from their holdings, and the pulling down of their cabins by the plaintiff, was wanton, harsh, cruel, and oppressive. And the defendant says that he did print and publish the said words in the second paragraph set forth, believing the same to be true, as it was lawful for him

to do for the cause aforesaid. The cause referred to was a justification of the publication in a previous defence, to the effect that the publication was true, and illustrated the condition of the people in that part of the west of Ireland as to the insecurity of the tenure of land in Erris.

Serjeant Sullivan (with him *E. Beytagh*) moved that the fifth defence be set aside, as being framed so as to prejudice, embarrass, and delay, on the grounds that it is uncertain, whether same is intended to apply to the whole or to a part only of the second count; also because the libel in said count avers that the author thereof saw the receipts of the evicted tenants, for the rent up to the 29th of September, 1861; yet said defence only alleged that the said author saw receipts purporting to be receipts for rent up to 29th September, 1861, or that they were only produced and alleged by the holders thereof to be such; and also that said defence alleges that said evicted persons paid to plaintiff before their eviction the rent payable to him up to the last gale day to which plaintiff was entitled, and said fifth defence is consistent with such averment; and the fact, as appears on the third and fourth defences, is that the evicted parties had ceased to be the tenants of the plaintiff on the 25th March, 1861. Said fifth defence is therefore ambiguous, as it is uncertain whether said averment means that said evicted parties had paid their rents up to the 25th of March, or the 29th of September; and for the reasons aforesaid the plaintiff cannot safely take issue on or demur to said fifth defence. The sting of the libel is, that parties were evicted who had paid their rent up to the last gale day.

Charles H. Todd argued *contra*.

LEFROY, C.J.—This defence must be amended. It is, I will not say as tricky, but certainly as embarrassing a defence as I have seen. Let the defendant amend, and let the costs of the motion be part of the plaintiff's costs in the cause.

The other members of the court concurred.

Attorneys for plaintiff—M'Nevin and Whitney.

Attorney for defendant—A. P. Todd.

ERRATA.—*Byrne v. Byrne*, ante page 221, should be *Burke v. Burke*. The reader will please correct the head note to *Blake v. Nanby*, ante page 231, by reading "liberty given to reply and demur;" and also the head-note to *Tronsdale v. Sheppard*, ante page 275, "The witness to a bill of sale was therein described as 'now of no occupation,' and this was repeated in the affidavit filed pursuant to the statute. The jury found that no better description of his occupation could have been given. Held—That the bill of sale was valid as complying with the requirements of the Act in this particular."

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BENNETT v. SCOTT.—April 30, May 30, 1862.

Diversion of a water-course—Jurisdiction—Costs.

Where, after the jury have been sworn, the subject-matter of the action has been by consent referred to a few of their number, with a condition that the finding of the majority of them should be conclusive of the questions pending between the plaintiff and

*defendant, and the award of the selected jurors has not been made until subsequently to the assizes, and when the judge before whom the case came is no longer sitting, the court, on the grounds that there has been no trial within the meaning of the 97th section of the Common Law Procedure Act, 1856, will entertain an application to have endorsed upon the record a certificate that the action was fit and proper to be tried in one of the superior courts (reluctantly following *M'Alister v. Callan* (4 Ir. Jur. N. S., 4.)*

Where the plaintiff substantially contends that he had a right to have the water of a stream flowing in one particular way, and the defendant claims a right to have the same water flowing in another particular way, and the number of witnesses examined is considerable, the court will grant a certificate that the case was fit and proper to be tried in one of the superior courts, the damages having been assessed at a sum not exceeding £5.

THIS case came before the court upon motion by the plaintiff for an order for a certificate to be endorsed upon the record that this action was not one which could be tried in the Civil Bill Court; or that, although within the jurisdiction of the Civil Bill Court, it nevertheless was a fit case to be tried in one of the superior courts; and that the Taxing Master be directed to reconsider his taxation, having regard to the order of the court on the motion. The first count of the summons and plaint complained that before and at the time of the committing of the grievances by the defendant hereafter named the plaintiff was, and from thence, and hitherto had been, and still was lawfully possessed of a certain mill and premises, with the appurtenances, near unto a certain stream of water running near the said mill and premises; and by the side and bank of which said stream there then was, and of right ought to have been, and still of right ought to be, a certain dam or barrier for the purpose of preventing the water of the said stream from running to the said mill. That the defendant well knowing the premises, but contriving and intending to injure and aggrieve the plaintiff theretofore, to wit, on the 1st day of December, 1858, and on divers other days between that and the commencement of this suit, cut open, destroyed, and removed the said dam or barrier, and thereby and otherwise on said days and times aforesaid caused and procured divers large quantities of the water in the said stream to flow to the said mill of the plaintiff which would otherwise have run and flowed away from the same; and also caused and procured quantities of the water of said stream to be penned and forced back against the wheel of the plaintiff's mill, and thereby the plaintiff was, on those several days and times hindered and prevented from working his said mill so extensively and advantageously as he otherwise would have done, and had lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the said mill to the plaintiff's damage of one hundred pounds. The second count alleged that the plaintiff, was, before and at the time of the committing of the grievances thereafter mentioned, and from thence thitherto had been and

still was possessed of a certain close and of a water-mill, with the appurtenances, situate respectively at Gortnaclea, in the Queen's County, in which mill he had used, exercised, and carried on, and still of right ought to use, exercise, and carry on the trade and business of a miller; that the water of a certain stream, from time immemorial, had flowed, and still of right ought to flow, in its usual and regular course, or its usual calm, moderate, and smooth manner into the mill of the plaintiff, and from thence in its usual channel; that the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, theretofore, to wit, on the 1st day of December, 1858, and on divers other days, between that day and the commencement of this suit, wrongfully widened, deepened, and enlarged the bed or channel of said river, and kept and continued the same widened, deepened, and enlarged for a long space of time, to wit, from thence, thitherto, and thereby, unlawfully and wrongfully prevented the water of the said stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner into and past the lands and premises of the plaintiff as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity into and against the banks and premises of the plaintiff and damaged same; and divers quantities of the water of said stream were penned and forced back and collected in great quantities against the wheel of the plaintiff's mill, whereby the plaintiff was prevented from working his mill to the plaintiff's damage of £100. The defendant pleaded, with other pleas, to the first count of the summons and plaint, that at the time in said plaint mentioned, or any part thereof, there was not of right, nor of right ought there to have been, nor of right ought there to be, the said dam or barrier in the plaint mentioned as alleged. The defendant pleaded, secondly, that he was during all the time in said plaint mentioned, and still is, seised in his demesne as of fee of and in certain closes of land on the bank of and down the opposite side of said stream from plaintiff's said premises, and next adjoining to the said stream in the plaint mentioned, and also entitled to one of the banks, to wit, the left bank and half the bed of said stream; and that the said dam or barrier in the plaint mentioned had been wrongfully erected and made, and was at said time standing and being in and across the said stream, and pent up the water of said stream, and hindered the said stream from running and flowing in its usual and regular course, and with its usual body and volume of water, and in manner as of right it ought to have done and still ought to do from and by the said lands of the defendant. Wherefore the defendant, in order to prevent the penning up and obstructing of the water of the said stream, and to allow it to run and flow in its usual and regular course, and with its usual body and volume of water, and in manner as of right it ought to do from and past the said lands of the defendant without any intention of injuring the said plaintiff, did cut open, destroy, and remove that portion of said dam or barrier which was so placed and rested upon the bank and bed of the stream

to which defendant was so entitled, doing no unnecessary damage thereby as he lawfully might for the causes aforesaid; and which said cutting off and removing, and no other, are the grievances and complaints in the 1st count of the said plaintiff mentioned. The defendant pleaded, thirdly, that he was before and at the time in plaintiff mentioned seised in his demesne as of fee of and in certain closes of land on the bank of and next adjoining to the stream in the plaintiff mentioned; and that the said dam or barrier in plaintiff mentioned had been wrongfully erected and placed in and across the said stream, and pent up and impeded the flow of the water of the said stream, and hindered the said stream from running and flowing in its proper and usual course and channel, and in its usual manner as of right it ought to have done by and past the said closes and lands of the defendant; and that by reason of the erection thereof the said water of the said stream was prevented from flowing by and past said closes and lands as it ought to have done, and flowed in upon and damaged the said adjoining lands of the said defendant. Whereupon the defendant, in order to relieve his said lands from said water so pent and thrown back, and to have the beneficial enjoyment of his said lands as he theretofore had and still of right ought to have, cut off and removed the said portion of the said dam or barrier which was placed upon that half of the bed of the said stream which belonged to the defendant, doing no unnecessary damage thereby, as he lawfully might, for the reasons aforesaid; and which said cutting off and removing, and no other, are the grievances complained of in the said first count of the said plaintiff. The defendant pleaded, fourthly, that, save as to so much of the first count as complained of the cutting off and removing said dam, and thereby causing said water to flow as therein mentioned, the defendant did not cause or procure large or any quantities of water in the said stream to flow to the said mill; nor did he cause or procure quantities of the water of the said stream to be prevented and forced back, as in the said first count alleged. The fifth defence was a traverse of the causes of action in the second count of the summons and plaintiff. The sixth defence stated that for his lawful purposes, and without any intention of injuring the plaintiff, in order to prevent the penning up of the water of the said river, and to allow of same running and flowing in its usual and regular course, and with its usual body and volume of water, and in manner as of right it ought to have done, and still of right ought to do from and by certain adjoining lands of the defendant, the defendant cut open and removed a certain dam, weeds, and stones and other obstructions which had been wrongfully placed in and across said river, and a portion of which were placed and erected upon the said lands of the defendant, and thereby necessarily somewhat widened, deepened, and enlarged the bed or channel of said river beyond the width and depth of said river at the time in said second count mentioned, but not beyond what had previously been, and still of right ought to be, the width and depth thereof, as he lawfully might, which said widening, deepening, and enlarging are the grievances complained of in the said second count. The following were the issues:—1.

Whether there was, and of right ought to have been, and still of right ought to be, the dam or barrier as in the first count is therein alleged? 2. Whether the second defence is true in substance and in fact? 3. Whether the third defence is true in substance and in fact? 4. Whether the defendant caused or procured large or any quantities of water of the stream to flow to the said mill, or penned or forced back the same as in first count alleged? 5. Whether the defendant widened, deepened or enlarged the bed or channel of said river as in the second count is alleged? 6. Whether the sixth defence is true in substance and in fact? At the trial at Maryborough, before Lefroy, C. J., it was agreed that the issues should be left to three of the jury, to be selected by lot; and that the opinion of the majority of the three should be taken to be the verdict of the jury. The first award made by them was not precise, and the case was remitted to the three jurors a second time. They ultimately found the three first issues in favor of the defendant, and the three last in the plaintiff's favor; and they assessed the plaintiff's damages at £2 10s.

Ball, Q.C. (with him *Levinge*), in support of the motion, relied on *M'Allister v. Callan* (4 Ir. Jur., N.S., 4). In the present case there was no opportunity for the judge to have certified; the facts were not opened to him.

M'Donogh, Q.C. (with him *Martin*) for the defendant, opposed the motion. This question has been formally decided in our favour over and over again. There is no affidavit of facts on the other side, but I will assume them to be as stated; and the sixth defence does not necessarily involve a question of right or title. Where there has been a trial, the judge must certify at the trial, and before verdict. [*Monahan, C.J.*—I never heard of the application being made before verdict.] The 97th section of the Common Law Procedure Act, 1856, is free from ambiguity. Was there a trial here? If so, it is the judge who must certify: *Brophy v. Jones* (8 Ir. Com. Law Rep., 240). *Pigot, C.B.*, in giving judgment, says—"The words of the statute are brief, simple, and clear; they are—'unless at the trial of such cause the judge shall certify.'" *Cooper v. Pegg* (16 C.B., 264) was an action upon the case for an injury to the plaintiff's reversion by making a drain into his premises, and was referred to an arbitrator, who was empowered to direct a verdict for the plaintiff or the defendant, as he should think proper, and who was to have all the same powers as the court, or a judge sitting at *nisi prius*; the costs of the suit were to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator determined all the issues in the plaintiff's favour, except the first, and as to so much of the first issue as related to the causing a certain opening and entrance to be made by the defendant into the drain or sewer mentioned in the declaration, he determined the same in the defendant's favour; and as to the residue of the first issue, he determined the same in the plaintiff's favour, and ordered that the verdict for the plaintiff should stand, but that the damages should be reduced to the sum of one farthing. The *postea* was made up in conformity with this, but it concluded thus—"and they

assess the claim of the plaintiff, over and above his costs of suit, to one farthing, and for those costs, to 40s." The arbitrator had not certified, and the court, on motion, expunged the words "and for those costs, to 40s." [*Christian, J.*—It does not appear, that if a certificate had been asked for in that case, it would not have been given.] It is a hard case when a defendant has a number of issues found in his favour, and only £2 10s. damages assessed against him, that he should have to pay the costs of this arbitration. [*Christian, J.*—The question appears to me to be this, had the Chief Justice the power to make the order at the trial? If he had, I think we have not; if he had not, I am clear we have.] That is answered by the way in which *Griffiths v. Thomas* (4 D. & L., 109) is distinguished, in the case last cited. At p. 274, Jervis, C.J., in giving judgment, says—"There the reference took place before the cause was at issue; here, the reference is to an arbitrator, in substitution for a jury. The plaintiff has recovered, if at all, one farthing by the verdict of a jury—by the direction of an arbitrator on behalf of the jury. The assessment of 40s. costs would be error, without a certificate. The defendant is entitled to have the *postea* set right." *Burgess v. The Guardians of the Mitchelstown Union* (4 Ir. Com. Law Rep., 566) decided that an application to set aside an award under the same circumstances as here, should be made within the first four days of the ensuing term, so treating it as a trial. *Reid v. Ashby* (13 C. B., 897); *Wigens v. Cook* (6 Com. Bench, N.S., 784), is the last case on the subject. In *M'Allister v. Callan*, it was urged, on both sides, that there had been no trial. The case was surrendered by the counsel. Where the trial is withdrawn from the judge, the power to do what is here asked for ought to be transferred to the arbitrators. [*Christian, J.*—I would test the question, was this a trial? by the other question, could the Chief Justice, in this instance, have given the certificate if asked for?] Undoubtedly he could. [*Keogh, J.*—It appears to me the judge had all the materials before him that we have. *Monahan, C.J.*—It is clear, that, if this was a trial within the meaning of the Act, we have not jurisdiction.]

At this stage of the argument, the Chief Justice's Registrar was sent for, and, on inquiry from him, it was ascertained that the issue paper had not been signed by the foreman of the jury.

Martin—When the sixth issue was found against us, it seemed immaterial how the findings were entered up; but upon the pleadings the question of title does not appear. The 22 & 23 Chas. II., c. 9, enacted, that in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause, shall not find and certify, under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto. That section governed *Ward v. Malinder* (5 East, 479). Can this jurisdiction be exer-

cised when the merits do not appear, save so far as the pleadings reveal them?—*Perry v. Dunn* (12 Law Journal, Q. B., N S., 351). And if the merits in this case were gone into, I am sure the court would not hold it to be a case for a certificate. [*Monahan, C.J.*—The serious question is, was there a trial here within the intent and meaning of this Act of Parliament? If there was, we have no power to make the order.] I will shortly refer to the record. [*Monahan, C.J.*—The record is with you, for it is made up as if the case was tried before the Chief Justice.]—*Armstrong v. Dwyer* (8 Ir. Jur., 296).

Levinge, in reply.—There was no trial here, and the judge could not have certified, nor could he do it now. The first count charges that we were entitled to a dam, and that the defendant took it down, and, because we were only entitled to a portion of the dam, the arbitrators, under the direction of Sergeant Sullivan, found against us on the first issue. But the three were unanimous that the defendant should restore eighteen inches of the dam. There was then a question of title. The present question relates to the construction of the Act, as to who shall give the certificate. In *Brophy v. Jones*, the whole process of a trial was gone through. In *Cooper v. Pegg*, and in *Wigens v. Cook*, the power to certify was reserved to the arbitrator. Similarly in *Reid v. Ashby*. There was no such power given to the arbitrators here, and the distinction is this, that the courts in England have no power to grant the certificate: 13 & 14 Vic., c. 61, ss. 11, 12; 15 & 16 Vic., c. 54, s. 4. [*Monahan, C.J.*—Was there power to give the certificate conferred by the Acts which governed the English cases cited by Mr. Macdonagh? In the Amended acts there was, but not in the original Acts. [*Christian, J.*—This is a question which can be more easily answered—was any such power suggested in the arguments?] There was not. In *M'Allister v. Callan* there was no trial. Nor was the case surrendered, as it has been represented. [*Monahan, C.J.*—Most likely the expression, "there was no trial," was used by the court, and not by the counsel.] The present case is stronger than *M'Allister v. Callan*, by reason of the delays in the award. When could the judge have given the certificate? It has been ruled that, "at the trial" must be construed most strictly. [*Christian, J.*—Where will you draw the line as to there being or not being a trial? Suppose a case partly heard and then referred, would you say there was no trial?] I would. [*Christian, J.*—We are open to question the propriety of the decision in the Queen's Bench.] How could three country gentlemen decide if this was a case fit to be tried in a superior court? The power of so deciding was most properly left out. [*Monahan, C.J.*—Most properly, if this court has the jurisdiction; if not, it is unfortunate that some arrangement was not made by consent.] [*Ball, J.*—I recollect trying two cross-actions, in which verdicts were had for the plaintiff in both, with a farthing damages; and, some days afterwards, I was applied to to certify in both; ultimately I declined to do it in either, on the grounds that I had no jurisdiction, no more than if I had been applied to two months afterwards. Whether I was right or wrong, the parties both acquiesced.] And for this reason, probably, because they set off the

costs of obtaining the one farthing against the costs of obtaining the other farthing.

Cur. adv. vult.

May 12.—MONAHAN, C.J.—The facts of this case, as they appear, partly on the pleadings, partly on order, and on the affidavit, and, indeed, partly from the statements made by the Chief Justice's Registrar in court, are these. An action was brought for the diversion of a water-course, and the jury having been sworn, the case was referred to three of the jurors, the names of all having been put in a hat, and three selected. The decision of two was to bind the third. The award first made was not precise, and the case was again remitted. What the exact terms of the first award were I have forgotten, but the result was a motion to this court, and the case again went before them. Some of the issues were found for the defendant, those so found being found by the entire three. Others were found for the plaintiff, and judgment was, at last, marked for £2 10s. The parties appear to have then gone before the taxing officer, who, of course, decided that he could not tax. The defendant's counsel have contended that the court has no jurisdiction to give the certificate sought for; that there has been, in fact, a trial, and, therefore, that none but the judge who tried the action is competent to give the certificate. The plaintiff's counsel contend that there has been virtually no trial. The first question is, whether this was a case in which the Chief Justice could, or ought to, have given the certificate. This turns on the 97th section of the Common Law Procedure Act, 1856. [His Lordship read the section, and commented on the words "at the trial."] It has been said that the judge might have certified before, but, until he knows the findings of the jury, it is impossible for him to do so. I am certain the judge never could certify, until he knew what the findings were. *Brophy v. Jones* has decided he must give the certificate at the trial. A very serious question remains, whether this is a proper case for a certificate at all. It appears further, that the parties did not intend the issues to be given or decided at once. The award was not made for six months. It is asked, why did not the plaintiff give to the arbitrators the power to certify? It is answered, that he might not wish to entrust such power to country gentlemen. We cannot give costs unless we are able to say there is jurisdiction. I again, therefore, revert to the main question, has there been a trial in the present case? I confess my own impression to be, that the Legislature contemplated, in this section, the case of a trial before a judge. *M'Allister v. Callan* is, however, every way similar. There the Queen's Bench decided there was no trial. Are we at liberty to go contrary to that? In *Cooper v. Pegg*, there was a verdict taken, and the question there was, was the plaintiff entitled *ex debito justitiæ*. Possibly, if no decision had been given on the subject, I might have yielded to the forcible arguments brought forward by the defendant's counsel, and decided differently. But the Court of Queen's Bench has decided this question with the Act of Parliament before them, and we must abide by that decision. One court should not interfere with the decision of another of co-ordinate jurisdiction,

and the more especially as, perchance, parties may have acted on the faith of such decision.

BALL, J.—I concur. If the case were *res integra*, I should entertain great doubt; indeed, I know not what my decision might be; possibly, different from what it is at present.

CHRISTIAN, J.—In assenting, I do so solely on the authority of *M'Allister v. Callan*. I look upon that as a decision of the Court of Queen's Bench, though, I admit, the case appears not to have been argued, nor the authorities referred to, so far as I can judge from the report. I feel bound to add that, if I considered the question was still open for my decision, I should decide differently, having regard to the authorities cited. I allude especially to those in 13 and 16 Com. Bench; for, though these are not precise authorities on the point, yet, to me they appear clearly to show that what has taken place is equivalent to a trial, within the meaning of the 97th section. Let it be understood that the decision of the court only goes to this, that the present case comes within the 97th section.

It was then directed by the court that the motion should stand over till the first day of the next term; the defendant to consider that the court had decided they had jurisdiction to entertain the question, and the argument to be confined to the fitness of the case for a certificate.

May 30.—Ball, Q.C. (with him *Levinge*) for the plaintiff.—Napier's Practice of the Civil Bill Courts contains the cases in which the Civil Bill jurisdiction is ousted. The words "as it ought to flow," must occur in every plaint concerning the diversion of a water-course. The sixth plea asserts a right, and so the case is still stronger: *Orr v. Cahill* (1 Crawf. & Dix., 566). The defendant's affidavit only goes to show that the case was a very difficult one. Sergeant Sullivan directed a finding against us on the first count, because the whole dam was not the plaintiff's. Even if this case could have been tried in the Civil Bill Court, it was not a case to be so tried from its magnitude.

Macdonagh, Q.C. (with him *Martin*) contra.—The only question of title in the case has been found for us. The first three issues were found in our favor, and they involve the question of title. The 243rd section of the Common Law Procedure Act, 1853, and the 103rd general order, should be taken into consideration along with the 97th section of the Common Law Procedure Act, 1856. Did the dam exist as of right? was the whole question. A subordinate one involved in that was, whether the flow of the gully commenced at a certain point. The rest was trespass, not title; and trespasses are commonly tried in the Civil Bill Court. The judge of that court is not to refuse to try a question of a water-course, but if he finds a question of title arising he is to stay his hand.

MONAHAN, C.J.—On the second count of this summons and plaint the point substantially made is this—the plaintiff had a right to have the water of a river that flowing in a particular way. The defendant pleads that he had a right to have the water flowing in a particular way. We are of opinion that the certificate must be given. I think it very doubtful if an assist-

ant-barrister or a judge on appeal could have tried this question at all, but that point we need not decide. When we see the number of witnesses, &c., we come to the opinion that the case was a fit one to be tried before a judge and jury. The jury have found that the defendant lowered the bed of the river below the level at which the plaintiff had a right to have it flowing. We say nothing as to whether the costs are to be half costs or full costs.

Rule accordingly.

NOTE.—The 97th section of the Common Law Procedure Act, 1856, enacts that “if in any action of contract brought after the commencement of this Act in the superior courts (save for breach of promise of marriage), when the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than twenty pounds, or in any action for any wrong or injury disconnected with contract (not being for replevin, slander, libel, malicious prosecution, seduction, or criminal conversation), a sum not exceeding five pounds, the plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause the judge shall certify on the back of the record, either that the case was one which could not be tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it nevertheless was a fit case to be tried in one of such superior courts, or (in case there shall be no trial) unless the court or a judge shall on motion make an order to the like effect; and in case there shall be no such certificate or order, it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs.”

Court of Criminal Appeal.

[Reported by A. D. M'Gusty, Esq., Barrister-at-Law.]

QUEEN v. WILLIAMS.

[BEFORE THE CHIEF JUSTICE WITH JUSTICES O'BRIEN, KEOGH, FITZGERALD AND BARONS FITZGERALD AND DEASY.]

Under the 24 & 25 Vic. c. 97 s. 51, evidence of damage committed at several times, in the aggregate, but not at any one time exceeding £5, will not sustain an indictment.

This case was reserved by Mr. Justice Christian from the last Spring Assizes at Derry. The prisoner was indicted under the 24 & 25 Vic. c. 97 s. 51. The indictment contained three counts, 1st, for malicious damage to real and personal property, exceeding in value £5. 2nd, to personal property only; and 3rd, to real property only. The evidence shewed that on two following days damage was committed exceeding in amount of value £5.

Mr. Irvine, for the prisoner submitted, that the indictment was not sustained, it not being proved that damage exceeding £5 was done at any one time, and cited *Rex v. Petrie* (1 Leach 297); *R. v. Jones* (4 C. & P. 217).

Solicitor-General (with him *J. Richardson*)—This is but one indictment with different counts. There is only one single malicious purpose as shewn by several malicious acts following one another: in the case in Leach, the acts were distinct.

LEFROY, C.J.—At first sight we had some doubts in this case, but on consideration, we are all of opinion the conviction is bad.

[BEFORE ELEVEN OF THE JUDGES, BALL, J., BEING ABSENT.]

QUEEN v. MULLEN.

To the deposition of a marksman, the Petty Sessions' clerk attached the prisoner's name, so that it appeared to have been signed by the prisoner's mark. Held, that this deposition was properly received in evidence against the prisoner.

THE prisoner in this case had been tried, at Sligo, for manslaughter, the question, now to be decided, arose under the 14 & 15 Vic. c. 93 s. 14, as to the admissibility of the deposition of the deceased. This deposition purported to have been made by the deceased in the presence of the prisoner, and was signed by him (the deceased) with a cross (+), he being a marksman. By mistake, the clerk wrote the prisoner's name to the mark, so that it *prima facie* appeared to be the deposition of the prisoner, accusing himself, and was in the following form:—

James Brennan,	}	<i>Petty Sessions District of Sligo.</i>
Complainant.		
Peter Mullen,	}	<i>County of Sligo.</i>
Defendant.		

DEPOSITION OF JAMES BRENNAN,—

Taken in the presence and hearing of Peter Mullen, who stands charged, that he at Thomas-street, in the town of Sligo, on the night of the 30th of November, 1861, stabbed in the side the complainant. The deponent saith on his oath, that last night about eleven o'clock, at Scandans, as I was walking down the street to go over the bridge, I met Smith the cutler and that boy that I now see before me. Some of the two tripped me, I did not fall, immediately after I was tripped, this boy that I now see before me, stuck me with a knife in the ribs on the left side, we had no words before he stuck me, he was drunk at the time—I don't know his name—I often saw him before he lived at Higgins. When I was stuck I ran down to the hotel. Smith the cutler did not do anything to me but to the best of my opinion, he struck me twice before I was stuck, but I cannot swear positively, I have no more to say.

And the said deponent binds himself to attend at on the to prosecute the said Peter Mullen, for the said offence, when called on, or otherwise to forfeit to the Crown the sum of £10.

(Signed,) PETER + MULLEN, *Informant.*
(his mark.)

Taken before me, this 1st day of December, in the year Eighteen hundred and sixty one, at Sligo, in the said county.

(Signed,) WM. B. STARKIE,
Justice of Peace for said County.

I certify that the above is a true copy of the original.

WILLIAM CLANCY,
Clerk of Crown, Co. Sligo.

It will be seen the recognizance entered into, by the deceased complainant, to appear and prosecute, was inserted before the mark.

G. O. Malley, for the prisoner—contended that admitting a deposition would be good, in some cases, if

signed by a mark, as oral testimony might then be admitted to prove who made the mark; but this goes further, and would require oral testimony to explain a patent ambiguity, as it purports to be signed by another. Several cases, on the execution of wills and contracts, under the Statute of Frauds, may be cited for the former proposition, such as *In Re Redding*, (14 Jur. 1052); *In Re Glover* (11 Jur. 1028); *In Re Savoy* (5 Jur. 1042); *In Re Fleming* (2 Leach C.C. 854); *King v. Lambe* (2 Leach 552); *Schneider v. Norris* (2 Maule & Selwin, 286); *Johnson v. Dodgson* (2 Mea & Welsby, 653); *Hubert v. Turner* (4 Scott, N. R. 486). But in the cases on wills, the statute required the signature to be by the direction of the testator, which direction, if proved, rendered the signature itself immaterial. But there is no case where the name signed, is the name of some other than the witness signing. [*Hayes, J.*—The mistake here appears to have been made by the person who wrote the name, and not by the deponent, his business was done when he put his mark.] There was the further point, that if it was a signature at all, it was a signature to the recognizance, and not to the deposition, which was a distinct document, (in this case) wrongly joined to the recognizance, the latter being the only part intended to be signed by the deceased.

The Solicitor-General (with him *Concannon*) *contra*—The document was complete when the deceased put his mark to it, it does not matter whether the clerk put the prisoner's name or what name. [*Christin, J.*—The document purports to be signed by another. The question appears to me to be, can the Crown give parol evidence? That it was not that other person's signature.] That is the only question. [*The Chief Justice*—All the mandatory provisions of the Act would appear to have been fulfilled, but not the directory, this is only to be signed, if he will.] That is so in the form given in the schedule. This document was signed by a mark, and that signature cannot be vitiated by what another person wrote. *In Re Anne Ashmore* (3 Curtis 756); *Baker v. Dening* (8 Ad. & Ellis 94).

Cur. adv. vult.

June 11—*LEFROY, C. J.*—The question reserved in this case, was whether the deposition was properly received at the trial. It appeared to the court to be a case of such importance, that it was reserved for the twelve Judges, and we are all of opinion that this deposition was properly received at the trial, we have come to this conclusion by different views on the several points, but not in such a preponderance on any one point as to render it of importance to the public, that we should give any further grounds of judgment. The conviction must therefore be affirmed.

Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

HURST v. CAMPBELL—June 19.

New trial—*Judge's certificate approving of verdict*—*Verdict against weight of evidence*—*Peculiar position of the parties*—*Costs*.

A. creditor of A, who was the heir-at-law and sole

next of kin of the deceased, relied on a will of the deceased dated in Oct. 1853, which gave A. all the property of the deceased. B., the son of A., relied on a will of December, 1853, which gave B. all the property. The plaintiff (the creditor) replied that the will dated in Oct., 1853, was in fact executed after the will of Dec., 1854; and he also disputed the signature of the deceased to the will of December, 1854. The case was twice tried at Belfast. No verdict was had at the 1st trial; and at the 2nd both wills were condemned, and the judge certified that he was not dissatisfied with the verdict. On showing cause against a conditional order for a new trial, Held, that the verdict was not so satisfactory upon the evidence as that final judgment should be entered on it; and also, as the parties were by the verdict placed on unequal terms, viz., the plaintiff as a creditor of the heir-at-law and sole next of kin, being in as favorable a position as if his will had been established, while B.'s right, if any, would be for ever concluded, that there ought to be a new trial, notwithstanding the certificate of the judge who tried the case that he was not dissatisfied with the verdict. The costs of the former trials reserved.

THIS was a motion on the part of the plaintiff showing cause against a conditional order obtained by the intervenient to set aside a verdict had at the last Spring Assizes at Belfast. The suit arose out of proceedings in the Landed Estates Court for the sale of the estates of James Taylor Campbell. The facts are detailed in the judgment of the court.

Samuel Ferguson, Q.C., and *Cosby*, for the plaintiff, cited *Bushell's case* (Vaugh. 150); *Lush, Pr.*, 490; *Honeyman v. Lewis* (23 L. J., N. S. Ex. 204). *Joy, Q.C.*, and *Falkiner*, for the intervenient, cited *Swinfen v. Swinfen* (27 Beav. 148).

KEATINGE, J.—This is a motion on behalf of the plaintiff, showing cause against a conditional order obtained by the intervenient to set aside the verdict had at the last assizes for the County of Antrim before Mr. Justice Fitzgerald, and for a new trial, on the ground that such verdict is against the weight of evidence. No objection has been made to the charge of the learned judge, nor to the evidence which was received; for, though some portions of the evidence were taken subject to objection, those objections have not been pressed, and had I tried the case I should not have taken them subject to objection, but I would only have taken a note of the objection. The case is rather a peculiar one. The plaintiff is a creditor by mortgage of James Taylor Campbell; and he alleged a will of the deceased Stewart Campbell of the 25th Oct., 1853, whereby he left all his property of every kind to his only brother, the said James Taylor Campbell. The deceased left no father or mother, niece or nephew, save the intervenient him surviving; and one peculiarity, and not an unimportant fact in the case, is, that this will gave to James Taylor Campbell nothing but what, as sole next of kin and heir-at-law he would have been entitled to in case of an intestacy. James Taylor Campbell, the defendant, pleaded and relied on a subsequent will of the 26th Dec., 1853, by which the earlier will was revoked, and by which the whole of the deceased's property was given to Stewart John Campbell son of

James Taylor Campbell; and after that plea was filed Stewart John Campbell intervened, and being a minor, by permission of the court, a guardian *ad litem* was appointed for him, and he relied on the will of 26th December, 1853, as subsequent to and containing dispositions inconsistent with the will of the 25th Oct., 1853, and that it also had an express clause of revocation. The plaintiff replied and alleged that the will of 25th Oct., though dated in 1853, was in fact executed after, and so revoked the will of December, 1853. But though both of those wills were brought before the Landed Estates Court, and the parties had full opportunities to make enquiries as to the genuineness of the will of Dec., 1853, it was not disputed; and the sole question between the parties was, whether it was revoked by a will executed subsequently, though by mistake dated previously to it. The parties went to trial at the Summer Assizes of the Co. Antrim, 1861, on those pleadings, before Baron Hughes, and the jury could not agree and were discharged. Subsequently an application was made to me to amend the pleadings: and the plaintiff filed a further replication, alleging that the will of the 26th Dec., 1853, was not signed at the foot or end thereof by the said deceased or by any one in his presence, and by his direction. And the parties went to trial before Mr. Justice Fitzgerald at the Spring Assizes for the County of Antrim of 1862, and then the issue was as to the validity of both the wills, viz., whether either, and which of them, was the last will of the deceased. On the 3rd day of the trial the jury found a verdict condemning both the wills. In ordinary cases that would be a verdict, both in form and substance, against the plaintiff and the intervenient; but there is this peculiarity in the case, that though this verdict is in form and substance, so far as the issue was raised against the plaintiff, yet he, as mortgagee of the interest of James Taylor Campbell, the heir-at-law and sole next of kin of the deceased, would, as his assignee, take as much as if the will he relied on had been in fact established; and he therefore has no interest in further litigating the matter. A great deal of evidence was gone into as to the intervenient's will of Dec., 1853. The signature of one witness who was dead was said to be a fabrication; the other witness, apparently a respectable person, was produced. But there was no evidence that the name of the deceased to that will was a fabrication. Now, in sending this case for further investigation, as I intend doing, I am only following the course of the common law judges when they so send cases on the ground of the verdict being against the weight of evidence, not to go fully into the evidence lest I might in any way prejudice the case on a second investigation. The grounds on which I consider that the case should be again investigated are, that under the peculiar circumstances of this case, and notwithstanding the certificate of the learned judge that he was not dissatisfied with the verdict, I confess that I am not of that opinion, and I think the verdict is not so satisfactory as that it would warrant final judgment to be entered on it; and also that whilst in ordinary cases the parties stand on equal terms, here the plaintiff and intervenient do not, as, if this verdict stands, the rights of the intervenient are for ever gone; whereas, in that case, the

plaintiff will be in as favorable a position as if the verdict had been in favor of his will, for he derives under the heir-at-law. Besides, the genuineness of the deceased's signature to the will of Dec., 1853, was not questioned in the original pleadings, but looking to the peculiar position of the heir-at-law, who is devisee and universal legatee in the will of Oct., 1853, which, it is alleged by the plaintiff was in fact executed in 1854; and a will of an earlier date is relied on by the intervenient which was not at first controverted, it is difficult to account for the will of Oct., 1853, being executed at all, except for the purpose of getting rid of an earlier testamentary disposition; and this is in one view favorable to the plaintiff, viz., as to the will being in fact executed in 1854, but it leaves untouched whether that will was a fair or a fraudulent one. I therefore disallow the cause shown and make absolute the conditional order, and direct the case to be tried again, the costs of the motion to be costs in the cause; and I reserve the consideration of the costs of the two former trials.

On a subsequent day the case was directed to be tried before his Lordship and a special jury.

GOSLIN v. GOSLIN.—21st June, 1861.

Practice—Default in setting down cause—Conversations between opposite solicitors—Stamp Duty on Orders—Costs.

Where the plaintiff, who propounded a will, obtained an order that either party should be at liberty to set down the cause for hearing, but did not pay the duty, and declined to act on that order, a motion on that ground, by the defendant, to dismiss the suit, and that the will should be condemned, is irregular; his proper course is, to pay the duty himself, and take out a copy of the order, and set down the cause.

The rule of the Prerogative Court, that proctors should not, in any proceeding, refer to private conversations had between them, is still in force, and applies as well to solicitors.

Dr. Townsend, for the defendant, moved to dismiss the suit, and that the will, alleged by the plaintiff, should be condemned. It appeared, from the affidavit of the defendant's solicitor, that the defendant had, as one of the next of kin of the deceased James Goslin, lodged a caveat, and served a citation on the plaintiff to bring in, and lodge in the Registry, a will of the deceased, which he did. The plaintiff, on the 27th February, 1862, filed his declaration alleging the will; and, on the 7th March, 1862, the defendant pleaded undue execution, want of capacity, and undue influence. On the 5th of April, the eight-day notice of moving to fix the mode of trial, was served by the plaintiff; and, on the 16th of April, on the motion of the plaintiff, it was ordered by the court that *either party* should be at liberty to set down the cause for hearing before the court itself, during that term. The affidavit then referred to conversations had by the defendant's solicitor with the plaintiff's solicitor, in

the streets, as to his reasons for not proceeding, and of his refusal to act on the order, on the ground of the poverty of his client and his want of means to pay the duty; but these conversations were negatived by the affidavit in reply, of the plaintiff's solicitor. Counsel contended that, as the plaintiff alleged the will, and got the order to set down the cause, he properly, had the carriage of it, and as he did not think fit to act on it, the suit should be dismissed, and the will condemned.

Concannon for the plaintiff.—The defendant might, if he pleased, have taken out the order, but the plaintiff is ready now to do so, and the present motion is irregular.

KEATINGE, J.—The notice of the present motion was given on the last day but one of Trinity term—the term ensuing that in which the order to set down the cause was made, viz., on the second day of Easter term; the defendant now says that he could not act on that order, because the plaintiff refused to pay the duty on it. But, as the order was that either party be at liberty to set down the cause, it was open to the defendant to have paid the duty, and taken out a copy of the order. I hold it to be the duty of every solicitor, who makes a motion on which an order is made, to pay the stamp duty on that order. If the order refuses the motion, then the party moving is, perhaps, not bound to pay the duty on the order, but the party in whose favour the order is made. But here, *either* party could have acted on the order, and the costs of taking it out would have been, properly, costs in the cause; but I consider the plaintiff's solicitor to have been in great default. However, the defendant did not pay the duty, but he moves for an order to have the will alleged by the plaintiff, condemned. I cannot do so, unless the cause is brought to a hearing, and, therefore, the present motion must be refused. With respect to the costs of the motion, I wish the solicitors who practice in this court to know that, by the Probate Act, all the rules and practice of the Prerogative Court, which are not rescinded or altered, remain in full force; and one very salutary rule of the Prerogative Court was, that proctors should not, in any proceeding, refer to private conversations with one another. Here there are conflicting statements, as to conversations in the public streets, between the opposite solicitors, which I entirely disapprove of. I, therefore, direct, that the plaintiff's solicitor do this day pay the stamp duty on the order of the 16th April; and I now direct that the cause be set down for trial before the court itself for Thursday next, and I direct the parties, respectively, to abide their own costs of the motion, and that in no event shall the same be chargeable against the assets of the deceased, or against the plaintiff or defendant, but shall be borne altogether by the respective solicitors themselves.*

* The following is the order of the Prerogative Court, referred to by his Lordship:—

"23. That no private conversation, or any private communication, not in writing, between proctors, or their clerks, be hereafter noticed or attended to in any proceeding, hearing, or motion."

DAVIDSON v. WOODS AND WIFE.

Verdict by consent—Next of kin not cited, but consent of suit—How far bound.

A suit was instituted in this court by an executor in a will, against the widow of the deceased, a caveat, to have said will established. Certain persons were cited in that suit, who were alleged to be the next of kin, and heir-at-law of the deceased. The case, when at hearing, was compromised, and a verdict had, by consent, establishing the will. The defendants in this suit knew of the former trial, and were in court during part of it, but were not cited in it, and were no parties to, nor aware of, the compromise, or consent, until after the verdict. Before the probate issued, they lodged a caveat as next of kin of the deceased. Held, that they were not bound by the verdict, so had by consent.

A PETITION was filed by the plaintiff, as directed by the court (see ante., p. 202), and it prayed that the defendants should be restrained from further proceeding in this suit to impeach the will of the late John Colvan, M.D., deceased, and from further litigation in respect of the succession to his estate. The petition stated the circumstances of the former suit to remove a caveat, lodged by the widow of the deceased, and that in that suit a citation issued, and was served on several persons named Kerr, who were supposed to be the next of kin, and on a person named Thomas Colvan, supposed to be the heir-at-law of the deceased; and it alleged that the defendants were aware of that suit, and were in communication with the plaintiff and his attorney respecting a legacy of £25, given by the will to the defendant, Anne Woods; that the cause was at hearing on the 24, 25, 26, 27, and 28th days of June, 1861, and that Anne Woods was present at it in court for several days; that on the 28th June a compromise was effected, which the petitioner alleged Anne Woods was aware of; and a verdict had accordingly. The defendants filed a caveat, on the 13th July, 1861, before the probate issued, in right of Anne Woods, as first cousin and one of the next of kin of the deceased, which was duly warned, and an appearance entered for the defendants. The defendants, by their affidavit, denied that the Kerrs were of kin to the deceased; their father, who was alleged to have been a half-brother of the deceased, having been illegitimate; and, also, that Thos. Colvan was not heir-at-law of the deceased, being himself illegitimate; and, as to the former trial, they denied that they were aware that the Kerrs or Thos. Colvan were cited in it, and stated several interviews, which Anne Woods had had with the plaintiff and his co-executor, Mr. Gardner, and their solicitor, Mr. Stanley, in which she apprised them of her claims as next of kin, and stated that the father of the Kerrs was illegitimate, and that, shortly before the trial, the widow of the deceased told her that she and her sister were the nearest relations of the deceased, and that the Kerrs were not legitimate, and promised to contest the will for her own and their benefit. The affidavit admitted

that Anne Woods was, on the first two days of the trial, in court, but stated that she went home on the third day, satisfied that the will would have been condemned, and that she knew nothing of the compromise until after the verdict was given; and that, by said compromise, the widow got £5,000, in addition to the interest for her life of £3,000 given to her by the will, and that Thomas Colvan got £1,500. The plaintiff, Mr. Gardner, and Mr. Stanley, their solicitor, filed affidavits in reply.

Dr. Ball, Q.C. (A. Hamill with him), for the plaintiff, contended that the defendants were bound by the former suit—*Newell v. Weeks* (2 Phill., 224); *Bell v. Armstrong* (1 Ad., 572); *Ratcliffe v. Barnes* (8 Jur., N.S., 313—31 L. J., N.S., 61, Prob.); *Pickard v. Sears* (6 Ad. and Ell., 469 & 474).

Dr. Miller, for the defendants.—The cases cited were all contested cases; no case can be cited of a verdict by consent, or compromise binding a next of kin, who is not cited; that distinction is taken by Baron Smith in *Furnell v. Stakpoole* (Milw., 695), *Duffy v. Brady* (Ib., 582), where, at page 587, it is laid down that a sentence is binding on parties who have knowledge of the suit, "unless they can show fraud or collusion on the part of the executor, or prove that the executor has been guilty of neglecting or mismanaging the cause."

Cur. adv. vult.

June 17.—KEATINGE, J.—The petition in this case was filed by the plaintiff on the 8th May last, and it prayed that the defendants might be restrained from further litigating respecting the validity of the will of the late Dr. Colvan. A suit was pending in this court lately, respecting the validity of that will, and in that suit several parties were cited, and several pleas were put in, disputing the validity of that will. The principal defendant was the widow of the deceased; he had left no children, and as she, if there were no will, would be entitled to one half of the assets, she was most interested in contesting it. Several persons were cited by the plaintiff as representing the next of kin, and also one, alleged to be the heir-at-law of the deceased. The case went to trial, and lasted five days, and, before the evidence closed, an arrangement was made, part of the terms of which was, that the widow should get £5,000, in addition to what the will gave her, viz., the interest for her life of £3,000, and the alleged heir-at-law was to get £1,500. The consent having been signed by all the parties who were before the court, and others who were cited, a verdict was given, by consent, for the plaintiff, in favour of the will. In that suit, Mrs. Woods was not cited, nor did she intervene. She says she is first cousin of the deceased, and that is not disputed; she also says, in her affidavit, that she is one of the next of kin of the deceased, and she makes that out by displacing the nephews and nieces, who were cited as next of kin, as deriving from an illegitimate source; and she also says that she is one of the co-heiresses-at-law of the deceased. A few days after the verdict was had, and before probate, a caveat was lodged on the part of the defendant, Anne Woods and her husband, and, notwithstanding that caveat, the plaintiff

thought fit to sell the real estate, as directed by the consent, in order to realise a fund to pay the several sums of money agreed to be paid to the widow and others. The case of the plaintiff, who now seeks, by his petition, to have the caveat and appearance of the defendant's dismissed, is, that they had notice of the former cause, and that, though they were not cited in it, they were fully aware of the proceedings, and are, therefore, bound by the verdict. Now, if this case had gone to a verdict in the regular way, on proofs made, the defence being *bona fide*, it might be the duty of the court, under the circumstances, to restrain the defendants from further litigation. But this is a peculiar case: there is no doubt that the defendants knew of the trial, and that Mrs. Woods was in court for two or three days, and that after she had left Dublin, and gone home, the consent was agreed on, and that she was not consulted about it. It also appears that she had, previously to the former trial, waited on the plaintiff and his co-trustee, Mr. Gardner, and on their solicitor, Mr. Stanley, and stated that the Kerrs were illegitimate, or derived their descent from an illegitimate source. That is placed beyond all doubt, as Mr. Stanley, in his affidavit, admits it. Mrs. Woods had an interest, to the extent of a small legacy of £25, to establish the will, but she had a much greater interest to dispute it; and it appears that the widow told her that the Kerrs were not legitimate, and that, if the will were broken, Mrs. Woods and her sister would be entitled, as the nearest relations, to several hundred pounds, and the widow has made no affidavit denying that. The authorities referred to by the counsel for the plaintiff, do not apply to this case, but to a case where there has been no neglect or mismanagement; no compromise, or buying off an opponent. Can I, in this case, attach greater value to a verdict had on a compromise, by which all opposition was withdrawn, in consideration of £5,000 additional paid to the widow, and £1,500 to an alleged heir-at-law, than I would to a probate had in common form before the Registrar? I am of opinion that I cannot, and no authority has been referred to the contrary; and, therefore, so far as the petitioner seeks to restrain further proceedings, on the ground of the knowledge of the defendants of the former suit, I direct that the petition be dismissed. But, as the plaintiff in his petition relies on a double case, viz., also, that Mrs. Woods is not one of the next of kin, or a co-heiress-at-law, of the deceased, and has no interest in the assets, that part of the petition must stand over, and I reserve the consideration of the costs.

Court of Appeal in Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE DAY, AN ALLEGED BANKRUPT.—May 16.

The Irish Bankrupt and Insolvent Act, 1857—secs. 31, 92, 93.

The Court of Bankruptcy in Ireland has jurisdiction only over traders who reside in, and trade in, Ireland, or who trade with England and reside in Ireland. Therefore, a person who, while residing in, and trading in, England, contracted trade debts there, cannot be adjudicated a bankrupt in Ireland, in respect to those debts, although he may have resided for some years, and may have contracted debts, in Ireland.

THIS was an appeal by William Ansell Day, from an order made by Judge Lynch* on the 4th of April, 1862, whereby he refused to adjudge the appellant a bankrupt. The facts of the case were as follows:—W. Day, a solicitor and money scrivener, carried on the trade of brickmaker from September, 1855, to September, 1858, at Hadlow, Sussex, England. In 1858 he was adjudicated a bankrupt in England, but the bankruptcy was subsequently superseded at his own instance. In the month of November, 1858, Day came to Ireland, and resided for some months at Kilkeel, Co. Clare, and subsequently, down to the 10th of October, 1861, he resided with his wife and family in Westport, Co. Mayo. He never carried on any trade, business, or occupation in Ireland. On the 10th of October he went to England, to endeavour to come to an arrangement with his creditors in that country, and, during his absence, his wife's father removed Mrs. Day and her children from Westport; and by his direction the furniture (which had been purchased with Mrs. Day's money) was sold by auction. The landlord went into possession on the 25th of December, 1861. The appellant, having failed to settle with his creditors in England, came to Dublin, and took lodgings in Blessington-street, on the 22nd of December, 1861. Upon the 25th of December he filed a declaration of insolvency, and on the 31st of December a petition for an adjudication of bankruptcy against the appellant was presented by his brother, to the Court of Bankruptcy. On the 11th of January, 1862, Mr. Day was adjudicated a bankrupt by Judge Lynch. The appellant surrendered, and filed his schedule, by which it appeared that his debts amounted to £97,132, and his assets to £81,348, that with the exception of £66 10s. due to shopkeepers in Westport, all his debts had been contracted in England, where all his assets were situated. On the 24th of January, an assignee was appointed and several creditors proved their claims. On the 21st of February, several of Day's English creditors presented a petition to the Court of Bankruptcy to annul the adjudication of the 11th of January, which was done by Judge Berwick, notwithstanding the opposition of many of the creditors, *In re Day*, (7 Ir.

Jur., N. S. 163). On the 28th of February, Day was arrested by the Sheriff of the City of Dublin, and committed to the custody of the Marshal of the Marshalsea of the Four Courts. On the 27th of March, the appellant presented his own petition to the Bankrupt Court, praying that he might be adjudicated a bankrupt. By an order of the 4th of April, Judge Lynch refused the application, *In re Day*, (7 Ir. Jur. S. N. 207). W. A. Day now appealed.

A. Brewster, Q.C. (with him Alex. Graydon), for W. A. Day, the appellant.—Imprisonment for life was abolished in 1821, but it will be the fate of the appellant if the order of the Court of Bankruptcy be upheld. Where a person carries on a trade in one kingdom belonging to Great Britain and comes over to another, a commission of bankruptcy can be taken out by a creditor, in the place where the bankrupt happens to be; consequently, persons residing in the colonies of Great Britain could be made bankrupts in England. *Ex parte Williamson* (1 Atk. 81). A debt follows the person of a debtor (Story Conf. of Laws, par. 403-4) *a fortiori*, of the property follows him, therefore, the appellant should be adjudicated a bankrupt in Ireland. Day being in Ireland at the time of the commission of the act of bankruptcy, gave to his assignees in Ireland a right to all his property in the world. A man can be made a bankrupt for an act of bankruptcy committed after he has ceased to trade, if his trade debts remain unpaid. *Ex parte Bamford*, (15 Ves. 449-458). Where was the bankrupt resident if not in Ireland in December, 1861, for he has ceased to reside in England in September, 1858? [*The Lord Chancellor*.—If he came to Ireland to avoid his creditors in England, did he not commit an act of bankruptcy as regards them?] They did not avail themselves of it, but his being now in prison, is an act of bankruptcy in Ireland, and entitles him to be adjudicated a bankrupt here, 20 & 21 Vict., cap. 60, sec. 92. The 31st section of the Bankrupt Act will be relied upon by the other side: that section enacts that the Bankrupt Court in Ireland "shall have exclusive jurisdiction in bankruptcy over all trades residing or carrying on business exclusively in Ireland," but the word "exclusively" is alternative, either exclusively residing, or exclusively trading in Ireland. *Ex parte Rogers* (9 Ir. Chan. Rep. 150). *In re Sanderson* (7 Ir. Jur., N. S. 48). [*The Lord Chancellor*.—Is there any case in which a man was made a bankrupt in a country, in which he had never carried on any trade?] Yes; *ex parte Williamson*. [*The Lord Chancellor*.—In that case inhabitants of the colonies are treated as trading with England; but trading in Ireland under the 31st section of the Bankrupt Act cannot mean trading with Ireland.]

D. C. Heron, Q.C. (with him, T. Purcell), for the English creditors, in support of the order of the Court of Bankruptcy.—The preamble and the last section of the 20th & 21st Vict., chap. 60, show clearly that that Act applies only to Irish traders, and although the word "Ireland" does not occur in the 90th section, which enumerates what persons may become bankrupts. England and Scotland are not mentioned. The words "this realm" in the

* 7 Ir. Jur., N.S., 207.

92nd section can only refer to Ireland. The 31st section gives exclusive jurisdiction to the Irish Court of Bankruptcy over traders residing in and trading in Ireland, and over traders trading elsewhere but residing in Ireland. The very fact that the appellant's debts in England amount to £97,000, and his debts in Ireland to but £66, disentitles him to relief in this country. It cannot be contended that Day "resided" in this country.

Alexander Graydon, in reply.—The fact that the appellant's object was to protect himself from his creditors is no ground for annulling the adjudication of bankruptcy. *Ex parte Norton* (4 De Gex. Bank. Cas. 504, 527).

THE LORD CHANCELLOR.—I might have been contented with merely expressing my concurrence in the opinion of Judge Lynch, that there was an absence of *bona fides* in these proceedings; I might, like him, express my doubts as to the *bona fides* in Mr. Day's return to this country last year; and I might also believe that an adjudication in bankruptcy in Ireland would tend to Mr. Day's advantage only, and not to that of his creditors. In that view of the case, if we thought that we would be doing substantial justice, and if the majority of the creditors desired it, we might say, let the proceedings in bankruptcy take their course. But there is another question in this case—the most important one, which has not been touched upon, regarding which Judge Lynch entertained a different opinion, upon which, in preference to the ground of convenience, I prefer to base my judgment. The real question which we are called upon to decide is, was Mr. Day a trader within the meaning of the Irish Bankrupt Act. That statute exhibits no intention of subverting the old law of bankruptcy, or of diverting the course of jurisdiction. There can be no question that the Irish Bankrupt Act extends only to Irish traders. The 410th section of the 20th & 21st Vic., cap. 60, declares, that that "Act shall not extend to either England or Scotland, except where the same are expressly mentioned." The preamble and the "short title" of the Act, lead us to the same irresistible conclusion. Who are the traders, then; who are to participate in the benefits of that Act? Surely, only those traders for whose benefit that Act was passed, viz., traders trading in, or to, Ireland. Any possible doubts as to the application of the 92nd section are removed by the language of the 93rd section, from which it is plain that the 92nd section contemplates the case of a trader departing out of Ireland and out of Ireland only. The word "elsewhere," was introduced into the section, to meet the cases of transactions out of Ireland. The Irish Bankrupt Act introduces no new regulations as to traders. I repeatedly asked the bar on both sides for a case, in which a man had been made a bankrupt in a country to, or in, which he had not traded; but none could be supplied. The 3rd chapter of Cooke on Bankruptcy treats of this subject; and from all the authorities, down to *Allen v. Cannon* (4 B. & Ald. 418), it is plain that the place in, or to, which, the party trades, constitutes the test as to the jurisdiction of the Court of Bankruptcy; and it is evident, that under the statute 20 & 21 Vic. cap. 60, no man can be made a bankrupt, unless he has been

in the habit of trading in or to Ireland. A merchant residing in Ireland, may trade to England, and if he becomes embarrassed, he may be adjudicated a bankrupt either in England or in Ireland, according as he may be first caught in the one or the other country. It has been said that the 31st section has introduced a new code of regulations; but such is not the case. In my opinion, the words "all traders," means, "all traders *bona fide* trading in or to Ireland." If such persons commit an act of bankruptcy and reside in Ireland, the Irish Bankrupt Court has exclusive jurisdiction over them. That very section confirms the view which I take of the application of this Act. I entertain the highest respect for both the judges in the court below; yet, I do not feel the slightest doubt or hesitation in deciding, that unless a man be a trader in or to Ireland—unless that element exists—he has no *locus standi* in the Bankrupt courts of this country. If this state of things be found inconvenient, the Legislature can be called in aid. If an English trader be arrested in this country, there are no means of relieving him; for the provisions of the statutes relating to the discharge of persons from prison, (into which I have looked carefully during the progress of the case) relate exclusively to the place where the party is arrested. The appellant here could file his petition in insolvency if he chose; but, as he does not wish to adopt that course we cannot help him, as the Bankrupt Court of this country has no jurisdiction over him.

THE LORD JUSTICE OF APPEAL.—I fully concur in the judgment of the Lord Chancellor, and will only make one observation. It is plain that the 31st section precludes any doubt as to the jurisdiction of the Irish Courts of Bankruptcy; the object of that section was to limit that jurisdiction, and the only way it could be limited, was the restriction of its extent to the place of trading.

Order of the Bankrupt Court of the 4th of April, affirmed with costs.

Court of Chancery.

[Reported by Charles H. Foot, Esq., Barrister-at-Law.]

PRESTON v. LORD GORMANSTOWN.

May 1, June 18.

Will—Codicils—Construction—Revocation—Satisfaction—Rentcharge.

The revocation of a clear devise can be effected only by words equally clear; and where the construction of a codicil is uncertain and ambiguous, there will be no revocation of the will.

The doctrine of satisfaction of legacies by subsequent portions does not apply in the case of the gift of a legal rentcharge.

On the 20th November, 1834, the late Lord Gormanston made his will, reciting that under marriage articles, 1794, and under certain fines, and an indenture declaring the use of them, certain lands were charged with a sum of £16,000 Irish, equivalent to £14,769 4s. 8d. British, composed of two sums of £12,000 Irish, equal to £1176 18s. 6d. British, and £4000 Irish, equal to £3692 6s. 2d. British, which entire sum was directed to be raised, limited, apportioned, and paid at such times and in such manner as

the said testator should by deed or will appoint. And by his will the testator made several appointments of the said sum among his younger children; and among other appointments he gave and appointed to his son Thomas, the petitioner, the sum of £4000 present currency, portion of said sum of £11076 18s. 6d., and the sum of £1000 present currency; and then by his said will, after devises of certain annuities charged upon certain portions of his real estate to trustees for certain other of his children in the will named, and a devise of an annuity also charged upon a certain other portion of his real estate to his daughter, the Honourable Matilda Preston, otherwise Corbally. The said testator also gave, devised, and bequeathed to the petitioner, in addition to the provision already made for him, an annuity or yearly sum of £150 sterling, British currency, to be paid and payable to him for and during the period of his natural life, and to be chargeable upon and payable out of all that and those the town and lands of Malt and Inch, with a power of distress to the petitioner in case of non-payment of the annuity. The testator then charged all his real estates with the payment of his debts, and appointed his eldest son, the respondent, his executor, and gave, devised, and bequeathed to him all the rest, residue, and remainder of his estates, real and personal, charged as aforesaid. On the 13th July, 1836, by a codicil then executed and made after the execution by him of certain settlements entered into upon the marriage of the respondent, the testator expressly declared that he had executed the said settlements without prejudice to his said will or any of the bequests, legacies, or annuities therein contained, and he thereby republished his said will. By a further codicil dated the 13th December, 1844, reciting that the testator had, since the execution of his will and first codicil, made a provision for his daughter upon her marriage with Mathew Corbally, Esq., and had also made a provision for the petitioner upon his marriage. The testator, besides other matters, declared it to be his intention that the provision so made for his said daughter and the petitioner should be deemed a satisfaction of their respective shares of the sum of £16,000 late currency, in his will mentioned; and that they should not be entitled to claim under his said will the sums respectively appointed or bequeathed to them. By this codicil he further directed that the several principal sums given to the petitioner or his trustees in his marriage settlement should remain outstanding; and in case the respondent should oblige the petitioner or his trustees to receive payment of the said sums contrary to petitioner's wishes, then the testator in such event gave and bequeathed to the petitioner the further legacy of £3000; and then by his said codicil the testator gave and devised to petitioner's wife, in case of her surviving her husband, an annuity of £100, and gave and bequeathed to petitioner's daughter the sum of £1000 sterling. On the 14th January, 1854, the testator made a further codicil, reciting that by his will he had devised his real and freehold estates to his son, the respondent, and his heirs, charged with the payment of the testator's debts. The testator charged the estates so devised with the payment of the several legacies and annuities devised and bequeathed by his will and co-

dicils, save such of them as had been revoked by said codicils; and by the same codicil the testator gave and bequeathed certain pecuniary legacies to the petitioner and to his children. By indenture dated the 3rd August, 1843, and made between the late Lord Gormanston of the 1st part, the petitioner of the 2nd part, his then intended wife of the 3rd part, and two trustees of the 4th part, certain sums of money were put in settlement; and, amongst other matters, it was witnessed that the then Lord Gormanston gave, granted, bargained, and sold to the petitioner, his executors, administrators, and assigns during the life of the petitioner, one annuity or clear yearly rentcharge of £100, payable on every 1st January and 1st July in each year, to be issuing and payable out of and charged upon certain lands in the indenture mentioned, and which included, besides others, those upon which the annuity given to the petitioner by the will was charged. This deed contained powers of distress and entry, and secured the annuity by a term given to the trustees. The marriage between the petitioner and his intended wife took place; and after it, by another indenture dated the 26th January, 1844, and made between the late Lord Gormanston of the 1st part, the petitioner of the 2nd part, and the trustees of the 3rd part, the late Lord Gormanston gave, granted, bargained, and sold to the petitioner, his executors, administrators, and assigns, for the life of the petitioner, a further annuity of £50, issuing out of and chargeable upon the lands mentioned in the previous indenture of the 3rd August, 1843. This indenture also contained powers of distress and entry, and gave the trustees a term of 500 years to secure the annuity. The late Lord Gormanston died on the 10th February, 1860, and the respondent, the present Lord Gormanston, succeeded to the title and estates, and obtained probate of his father's will and codicil. The present petition was filed for the purpose of raising the annuity devised by the will. The respondent, by his answering affidavit, admitted the facts stated in the petition, but submitted that by the codicil of the 13th December, 1844, the testator had expressly, and on account of the provision secured by the marriage settlement of the petitioner, revoked the bequest of the sum of £5000, part of the sum of £16000 Irish, and also the bequest of the annuity of £150. And the respondent denied that it was the intention of the testator to limit the revocation to the said sum of £5000, and submitted that in the 3rd codicil of the 14th July, 1854, the sum of £6000, and the annuity of £150, were expressly declared to have been revoked by the previous codicil. The respondent also, by his affidavit, submitted that the sums charged and secured by the indentures of the 3rd August, 1843, and the 26th January, 1844, were advancements to the petitioner as a younger child, and as such were a full satisfaction of the annuity bequeathed in the will.

The Solicitor-General, Brewster, Q.C., and Woodlock, for the petitioners.—There are two questions in this case; first, whether the devise of the annuity was satisfied by the indenture subsequently executed; and secondly, whether, upon the construction of the will and codicils, the gift of the annuity is to be considered as revoked. As to the doctrine of satisfaction, *Davys v. Boucher* (3 Y. & Col. 397) is an authority to show,

that the rule as to double portions does not extend to the case of a legal rentcharge. There is no annuity properly so called here. The devise substantially is of so much of the land as is subject to the rentcharge. The question then is reduced to one of revocation. We have here a clear devise in the will. The terms of the codicils are too ambiguous at best to operate as a revocation of that clear devise—*Doe dem. Hearle v. Hicks* (8 Burr.,); *Cledburey v. Beckett* (14 Beav.,); *Agnew v. Pope* (1st De G. & J., 49). The words "appointed and bequeathed" are to be read as expressing only the one idea and refer to the shares of the sum of £16,000. The word "sums" does not properly apply to such a subject as annuities. A clear intention to revoke must be shown—*Heron v. Stokes* (12 Cl. & Fin. 186).

Serjeant Sullivan, J. E. Walsh, Q. C., and M^cGusty, for the respondent.—The annuity given by the will must be taken as satisfied. The fixed rule on the doctrine is, that the two gifts must be of the same nature; land must be given for land, and money for money; but there is nothing to show that real property is not within the rule—*Bellaris v. Huthwaite* (1 Atk., 438); *Bengough v. Walker* (15 Ves. 507); *Weald v. Rice* (2 Russ. & M., 251); *Garner v. Holmes* (8 Ir. Ch. Rep., 469); *Hopwood v. Hopwood* (7 H. of L.). If the doctrine of satisfaction applies, then at the date of the second codicil the annuity was gone, and the codicil acted as a declaration rather than as a revocation. As to the question of revocation, the word "sums" in the second codicil includes annuities; where the testator refers to the shares of the £16,000, only he uses the words "principal sums." The words "appointed or bequeathed" must be taken *reddendo singula singulis*; the first to the shares of the £16,000, the second to the annuity. From the terms of the third codicil it is evident that the testator looked upon the annuity as revoked. The terms of the first codicil show that he was under the impression that the execution of a settlement interfered with the validity of his will.

June 18.—THE LORD CHANCELLOR now delivered judgment.—The object of the cause petition which has been filed in the present case is to establish an annuity of £150 a year devised to the petitioner by the will of the late Lord Gormanston. The case involves the consideration of several documents; there is no parol evidence; and the question which was very forcibly argued, involves partly questions of principle, and partly questions of construction of the will of Lord Gormanston, and the codicil to it. (His lordship then read the will which has been already given.) The testator had thus by his will made a provision for all the members of his family, and apparently the provision so made was the only one for all his children. After that the testator's eldest son, the respondent in this suit, being about to be married, a settlement was made on that occasion; and afterwards the testator added a codicil to his will, dated the 13th July, 1836, by which he expressly declared that he had executed the said settlements without prejudice to his said will or any of the bequests, legacies, or annuities therein contained. So that at the date of this codicil the testator's estates stood charged with the annuities given by the will; and the scope of the petition is, to estab-

lish that they have not been invalidated by the documents which were subsequently executed. In the year 1843, the petitioner married, and upon his marriage a settlement was executed dated the 3rd August, 1843. (His lordship stated the terms of that deed, and also those of the subsequent deed of the 26th January, 1844.) Thus by these two deeds a provision was made for the petitioner equal in amount to that which had been made by the will, but charged upon additional lands. It was pressed on behalf of the respondent that the case came within the doctrine relating to double portions, and that it should be considered that the provisions of the will respecting the annuity of £150 a year were satisfied by the two deeds to which I have just referred. However, upon full consideration of the case, I am of opinion that that view cannot be sustained, and that these annuities do not fall within the doctrine in question. The devise in the will in this case is of a legal rentcharge. The devise is clear and unambiguous; and if it is to be disturbed it must be by revocation, either express or implied. Now, there is no authority to show that the subsequent grant of a legal rentcharge is to be considered as a substitution for a devise of a rentcharge of the same nature and amount. The only case upon the subject is that of *Davys v. Boucher* (3 Y. & Col., 397), before Baron Alderson, a judge who took a great part in the decision of the equity side of the Court of Exchequer, and whose decisions I have never heard controverted or mentioned otherwise than with respect. He says that no authority is to be found binding the case of devises of real estates within the principle in question. "As far as my researches have extended," he says, "I do not find any instance of this principle having been extended to devises of real estate, and I think so to extend it would be to repeal that provision of the Statute of Frauds which applies to the revocation of wills of real estate," and he then goes on to discuss the case. Now, the section of the Statute of Frauds which Baron Alderson thus thinks would be repealed by extending this doctrine in the manner contended for is re-enacted by the 20th section of the recent Wills Act. The 19th section of the same statute, I may remark, seems to me to bear upon the subject before me. The old doctrine of revocation by marriage of the testator proceeded upon the ground that the change in the testator's circumstances warranted the court in presuming that a change took place in the testator's intentions. So here it might be said that it might be presumed that Lord Gormanston intended a revocation by reason of the alteration in his circumstances in consequence of the settlement upon the petitioner's marriage; but the 19th section of the statute, which enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances, prevents that argument from having any weight. On this subject I find the following observations in 2nd Jarm. on Wills, p. 135 (2nd edition):—"It may be observed that where a testator has devised his real estate among his children in undivided shares, afterwards, upon the marriage of one of such children, conveys, or covenants to convey to uses, for the benefit of that child, an aliquot share equal to that which he had devised to the child (no doubt, intending to

substitute it for the share so devised), such settlement or covenant does not revoke the devise of that share *in toto*, there being nothing to identify or connect the devise with the settled share; but it revokes the devise of all the shares *pro tanto*, letting in the advanced child to participate equally with the others in the remaining shares not affected by the settlement." Now, that is a strong proposition bearing upon the present question. There were several cases cited for the respondent, but it does not appear to me that they decide the present question; they may all be distinguished. When I find that that is so, and that the general proposition here contended for is nowhere sanctioned, and is controverted by Baron Alderson, I must say that I am of opinion that the settlement and the deed following it did not revoke the devise of the annuities given by the will. But then comes the question, whether anything was afterwards done by Lord Gormanston which could have that effect; and it is contended that the two codicils of the 13th December, 1844, and of the 14th January, 1854. When considering this part of the case I must remark that Lord Gormanston appears, from the wording of his will and codicils, to have been well acquainted with legal phraseology. The will and codicils are all very carefully worded, and one might expect to find the intentions of the testator very clearly expressed. (His lordship then read the codicil of the 13th December, 1844.) The provisions alluded to in that codicil as having been made on the marriage of the petitioner and of his sister. Nothing can be clearer than that all that he expresses in that codicil to have been satisfied are the shares of the £16,000 Irish. Then comes the expression, "and that they shall not be entitled to claim under my said will the sums respectively appointed or bequeathed to them." Manifestly the reference here is to the shares of the £16,000 which in the will itself are expressed to be "appointed and bequeathed;" and it would be a strong thing for me to hold that it applied to anything else. There are, I may remark, legacies and annuities given by this very codicil. Can it be supposed that if the testator had intended to revoke the annuity given to Thomas, he would have passed it over in the ambiguous word "sums," which, in its natural sense, applies only to such an object as the £16,000, and not to such a thing as an annuity. At best, any attempt to construe this codicil in the way proposed would be mere uncertainty and guess-work; and that being, so, I will not hold it a revocation of the clear devise contained in the will. Then comes the codicil of the 14th January, 1854. No doubt, this may be referred to as an interpretation of the other, and, no doubt, also force is to be given to every word of it; but the words, "such of them," which occur in it, and which have been relied upon by the respondent, are equivocal and may refer either to legacies and annuities or to legacies only. It all appears, therefore, again to be mere uncertainty and guess-work; and on the whole of the case I am of opinion that whatever may have been actually the intention of the testator, judging on the construction of the documents here, and there being no evidence of any contract having been entered into by Mr. Preston upon his marriage not to claim the annuity devised by the will, the petitioner must have

the relief prayed for by him—the costs, of course, must follow.

NUNN v. DONOVAN.—May 2, 6.

Settlement—Construction.

Held that notwithstanding the absence of words of inheritance an estate in fee passed under a marriage settlement, the parties to which, clearly intended to convey an estate in fee.

HENRY PALMER being seised in fee of certain lands in the county of Tipperary, and of other lands in the King's County, under a lease for lives, with a covenant for perpetual renewal, by the settlement made upon the 22nd of June, 1787, upon the marriage of Edward Westby with his niece, Anne Palmer, conveyed all his estates to the trustees to the use of himself for life, remainder to Edward Westby for life, remainder subject to a jointure to Mrs. Westby, to the use of the issue of the marriage in such shares and proportions as Edward Westby or Anne Palmer should by deed or will appoint; and in default of appointment, share and share alike as tenants in common; and in case there should be no issue of the marriage to whom such limitation or appointment should be made, then to the right heirs of Edward Westby, or to such other use or purpose as he should by deed or otherwise limit or appoint. H. Palmer also conveyed to the trustees his reversion in the lands in the King's County upon the same trusts as those before declared of the lands in the County Tipperary, save that he limited the reversion of these, in case of there being no issue of the marriage, to himself and his own right heirs. There was issue of the marriage two daughters, Frances, the mother of the respondent, and Mary, the petitioner. Henry Palmer died in the year 1812, and by his will, dated the 6th of July, 1806, he confirmed the settlement of 1787, and devised to Edward Westby and his heirs his reversion in the King's County lands. Edward Westby, upon the death of H. Palmer, entered into possession of the lands so limited to him as above. By the settlement made on the 18th of October, 1816, upon the marriage of Frances Westby with Richard Donovan, after reciting that she was entitled to a moiety of all the lands contained in the settlement of 1787, expectant upon the death of her father, Edward Westby, she conveyed the same to trustees to the use of herself for life, remainder to the issue of the marriage in tail male. By the settlement executed upon the marriage of Mary Westby with Joshua Nunn, on the 14th of May, 1817, after reciting that under the settlement of 1787, Edward Westby had power to appoint the reversion in all the lands contained in that settlement, it was witnessed, that Edward Westby did thereby appoint to Mary Westby, her heirs and assigns, for ever, the reversion expectant upon his decease in one moiety of the lands comprised in the deed of 1787. And Edward and Mary Westby did each of them grant to the trustees of her marriage settlement, their heirs and assigns, "all future estate which might revert to the said Mary Westby or Edward, or either of them, upon the death of Frances Westby otherwise Donovan," in case the latter should depart this life without issue.

"it being the intention" of the settlement of 1817 to "grant all such future or reversionary estates as the said Edward or Mary Westby is or may be entitled to under said settlement or otherwise howsoever" to the trustees, their heirs and assigns, upon the trusts declared of the moiety expectant upon the decease of Edward Westby. Mr. Nunn died several years ago, as did Mr. and Mrs. Donovan, leaving Edward Donovan, the respondent. Mrs. Nunn now filed a cause petition, praying that she might be declared entitled to the moiety of Edward Westby's lands, which were settled upon Mrs. Donovan by the settlement of 1816.

The Solicitor-General (with him *W. M. Gibbon*), for the petitioner.—Frances and Mary Westby took only life estates under the settlement of 1787, which empowered Edward Westby to appoint to his issue "in such shares and proportions" as he should think fit, not "in such manner and form." Therefore *Ree v. Marquis of Stafford* (7 East., 521), and *Kenworthy v. Bate* (6 Ves. 797); Sugd. on Pow., 401, 2, 3, cannot be relied on as enabling Edward Westby to appoint in fee. The latter case is sufficiently disposed of by Mr. Sanders' Comments, in 1 Sand. on Uses, 123 n, upon the absence of words of limitation. There are no words of limitation in the settlement of 1787, nor is this case analogous to that of *Doe v. Jackson* (1 Moo. & Rob., 553), where the words "subject to such directions" were held to authorise an appointment in fee. This case is governed by that of *Barron v. Barron* (8 Ir. Chan. Rep., 364), affirmed on Appeal, 10 Ir. Chan. Rep. 120, where the same words occurred as here, and it was held that under the power the appointees could take but life estates. The recital in Mrs. Donovan's settlement in 1816 has not the effect given to a recital in *Wilson v. Piggott* (2 Ves. J., 351), and *Chaigneau v. Bryan* (10 Ir. Chan. Rep., 172). The exercise of the power of appointment by Edward Westby, was one of the considerations of that marriage—*Moneypenny v. Moneypenny* (3 De G., M. & G., 572) overruling the decision below; 4 Kay & J., 186; *Jorden v. Money* (5 Ho. of Lds., 185, 214, 226).

Serjeant Sullivan (with him *R. R. Warren, Q. C.*, and *Twigg*), for Edward Donovan, the respondent.—Frances Westby, the mother of the respondent, took an estate in fee. "It is not necessary to have words of inheritance to pass the fee if the intention to pass the estate of the grantor be indicated"—*M'Clinlock v. Irvins* (10 Ir. Chan., 480); *Crozier v. Crozier* (3 Dru. & War., 382). Edward Westby has used words expressive of an intention to pass the largest estate possible. Mrs. Nunn stood by and consented to the settlement of 1816, executed upon the marriage of her sister, Frances Westby, with Mr. Donovan, therefore she is now estopped from disputing the validity of that settlement, which was made under the supposition that Mrs. Donovan was entitled to her moiety of the lands in fee—*Teesdale v. Teesdale* (Select Cas. in Chan., 59); *Oliver v. King* (8 De G., M. & G., 110); *Hill v. Mill* (12 Ir. Eq. Rep., 112); *Cooke v. Mascall* (2 Vern. 199).

W. M. Gibbon in reply cited *Jameson v. Stein* (21 Beav., 5.)

Wm. Brereon (with him *Walter Boyd*) appeared for other parties in the suit.

THE LORD CHANCELLOR.—I have formed so clear an opinion upon the intention of the parties to, and their construction of, the settlement of 1816, that it is not necessary for me to go into the many other questions which have been very fully discussed in this case; and perhaps it is better for all parties that I should not do so, for it is very doubtful what estate the petitioner takes, who comes here seeking to deprive her sister's child of the portion which the petitioner's father intended to give his daughter, the mother of the respondent. If the settlement of 1787 stood alone it would present many difficulties of construction. First, there is the question as to the power of appointment; secondly, as to the estates taken by each member of the family; thirdly, as to the devolution of the property in default of appointment; fourthly, as to the ultimate limitations of it. These are all questions of no small difficulty, to which is to be added another, viz., whether in certain events the property would go as undisposed of, or pass to Henry Palmer. But in the views I take of the settlement of 1816, a great many of these difficulties are evaded. There is certainly, in that deed a great deal of conveyancing; there are a great many recitals, and there is much complication; but looking at the whole of it, I think that the intention of the parties to that deed was clear. Mr. Westby was about settling his eldest daughter in marriage; she had only an estate for life in remainder, upon the father's death, in a moiety of the lands. Mr. Westby took that estate in remainder under Henry Palmer's will. Miss Westby took an estate for life in strict settlement under that same will; she and her sister had contingent remainders in fee in the newly purchased lands. There may have been (but in my view of the case I am not called on to say whether there was or not) absolute estates in reversion in all the lands, after the death of the father, vested in herself and sister. Upon my construction of the settlement Miss Westby had an estate for life with cross-remainders; that was all she really had to settle, and that estate was contingent upon the death of the father before her. She was about to be married to Mr. Donovan. If Mr. Westby thought that she had only a contingent life estate, how is it conceivable that we would have this complicated conveyance of the lands, giving her husband a life interest in possession, and transferring all rights and benefits of renewal to trustees? I entertain no doubt but that the intention of the parties was to convey all her estates as absolute estates. Then we have most particular recitals, some of which point to her issue; and there is a power of partition added. Mr. Westby does not convey anything, for it is clear that all parties imagined (erroneously, in my opinion) that his daughter took absolutely upon his death. It is impossible to look at the settlement of 1816 without seeing that. The Donovan family acquiesced in that view of Miss Westby's estate. Mr. Westby concurred in the settlement; the marriage met his approval; therefore he did not suppose that there was any occasion for an appointment. He assumed that his daughter took an absolute estate upon his death. That all parties thought so is manifest from Mrs. Nunn's settlement in 1817, which was after all only a settlement of a moiety. Mr. Westby's intention was to do for

Mrs. Nunn what had been done for Mrs. Donovan. Substantially his object was to convey a moiety to his second daughter; and when Mr. Westby comes to state what his daughter shall have, it is difficult to say what exactly was running in his mind; but this much is clear, that he never intended to do more than settle one moiety upon one daughter, and the other moiety upon the other daughter. The late Mr. Westby was a Master in Chancery. I was not myself personally acquainted with him, but from the estimation in which I know he was held by all who knew him, I am thoroughly convinced that he was a just man; and were he alive now, I am sure that nothing could give him more pain than to learn that he had, by the settlement of 1817, upon the marriage of his second daughter, defeated what was manifestly his intention to effect by the first settlement of 1816. I will not make Mr. Westby sin in his grave, therefore I dismiss this petition with costs.

BOND v. M'WATTY.—May 9.

Practice—Wilful default.

In a cause petition against an agent praying an account as to wilful neglect and default, the petitioner must aver some specific instances of such neglect and default.

THIS was a cause petition praying that it might be referred to one of the Masters of this court to take an account of what rents and monies the defendant had received as land agent for the petitioner, and also of what monies he might have received but for his wilful neglect and default. When the case came before the court

Serjeant Sullivan (with him *A. Brewster, Q.C.*, and *Macready*), for the respondent, objected that the cause petition averred no instances of the wilful neglect or default of the respondent—*Pelham v. Hilder* (1 Y. & C., C. C. 3); *Sleight v. Lawson* (3 Kay & J., 292); *Jones v. Morrall* (3 Sim. 241, 252); *Brooke v. Elliott* (6 Ir. Chan. Rep., 310); *Lambert v. Lambert* (10 Ir. Chan. Rep., 500); *Coope v. Carter* (2 De G., M. & G., 292).

The Solicitor-General (with him *H. Joy, Q.C.*, and *Dames*) for the petitioner.

THE LORD CHANCELLOR.—As the respondent is willing that an account be taken I will refer it to a Master to take such; but without any direction as to wilful neglect or default, as the cause petition should have specified some three or four instances of such neglect or default.

DAUNT v. DAUNT.—May 9, 11.

Will, construction of—Charge of legacies upon the real estate to the exoneration of the personality—Residue.

THOMAS Achilles Daunt being seised in fee-simple of the lands of Fahalea, Brownstown, and Glynnny, in the county of Cork, and of two one-third parts of the lands of Killinure and Grange, in the County Limerick, by his will dated the 5th of Nov, 1847, after

directing all his debts, funeral and testamentary expenses to be paid, divided them to John Travers and Henry Harris, to the use that the testator's wife should receive an annuity of £100 out of the above lands, £50 to be charged upon the lands in the Co. Cork, and £50 upon the lands in the Co. Limerick. And, subject to the above annuity, he devised his estates in the County Cork to his son, Henry Daunt, sen., for life, remainder to his first and other sons successively in tail male. And the estates in the Co. Limerick he devised to Thomas, his second son, remainder to his first and other sons successively, remainder as to both estates to the testator's own right heirs, but charged with £1000, and interest at the rate of £5 per cent. from the day of his death. The £1000 he bequeathed equally to and amongst his three sons, Hungerford, Townsend, and Robert, the share of any son dying in his father's lifetime to be divided between the survivors. The testator then gave several specific legacies to his wife and daughters, and concluded: "And as to all the rest, residue, and remainder of all real property and personal estate and effects whatsoever, &c., &c., I give and bequeath the same unto my said three sons, Hungerford, Townsend, and Robert Daunt." Henry Daunt was appointed executor. Thomas A. Daunt died in the month of January, 1861; Henry Daunt proved the will. Robert Daunt now filed a cause petition, praying that the £1000 bequeathed as above might be declared charged primarily upon the County Limerick estates, and not upon the testator's personal estate.

R. R. Warren, Q.C. (with him *Wm. Exham*), for Robert Daunt, the petitioner, contended that the personal estate was exonerated from payment of the £1000, and relied upon *Ion v. Ashton* (28 Beav., 379).

Charles Leetch (with him *Sergeant Sullivan*), for Thomas Daunt, the devisee of the Limerick estates.—There are no words in this will specially exempting the personality from the payment of the testator's debts; unless there be such the personality is primarily liable—*Duke of Ancaster v. Mayer* (1 Wh. & Ta. L. Cas., 505); *Bridgman v. Dove* (3 Atk., 201). Neither the charging the payment of debts on real estate, nor the bequest of the residue, will exonerate the personality—*Tait v. Northwick* (4 Ves. J., 816); *Collis v. Robins* (1 De G. & Sm., 131). Nor is the personality exonerated by a gift of legacies and then a gift of "all his personal estate"—*Ouseley v. Anstruther* (10 Beav., 453, 456). In *Ion v. Ashton* (*sup.*), there was no fund for the payment of the testator's debts.

THE LORD CHANCELLOR.—I have no doubt upon my mind but that the personal estate of the testator was intended by him to be exonerated, and that the principle laid down in *Ion v. Ashton* must be followed. The personal estate of a testator is the primary fund for payment of his debts and legacies, unless he obviously intended to charge the payment of them on his real estate. Here we have a life annuity given to the testator's widow, and well secured upon his estates in both the counties Cork and Limerick. Having devised the Cork estate to his eldest son, he devised the Limerick estate expressly subject to half of his widow's annuity and the £1000. Nothing can be clearer than that he intended that sum of £1000 to be paid by the

person to whom he devised the Limerick estates. Where the testator comes to deal with this £1000, he says,—“I give and bequeath to and amongst my three sons, Hungerford, &c. &c., the sum of £1000, to be equally—” If the will had stopped there that would be a plain gift of a legacy, but the testator goes on to say,—“and I charge the same upon the said towns and lands of Killeenun and Grange, together with £5 per cent. interest.” Those latter words are very important, as showing that he fixed the bequest of £1000 as a charge upon the land, and all benefit arising from it, i.e., the interest; and that it should not be a mere legacy, the interest upon which would not be payable for a year after the testator's death. Then he goes on to give ordinary legacies, and by his language, he shows that he well knew the distinction between charges upon the realty, and legacies. The testator then goes on to give all the residue of all his real and personal property to the same three sons to whom he had given the £1000. I admit that if the testator had given the residue to three other persons save the three legatees, it would be very difficult to show that the personal estate was exonerated. But as his intention was to benefit those three sons as well as their sisters, I cannot reconcile that intention with any other supposition than that he intended to charge the £1000 upon the Limerick estate, which I hold he so charged to the total exonerated of the personality.

ALFORD v. M'CAUSLAND.—May 28, 29.

Will—Construction.

Gift of an annuity to A and her children.

JANE BOLTON by her will dated the 10th of February, 1826, made the following devise, amongst others:—“I give, leave, devise, and bequeath to my said sister, Barbara O'Ferrall, her executors, administrators, and assigns, all my bank stock, as also my share or proportion of that property to which I am entitled arising out of the lands of Baltrasna, situate in the Co. of Meath, and payable to me half yearly, upon trust only, nevertheless, and to and for the sole and separate use, benefit, and advantage of Jane Lalor, who now lives and resides with me; and that the interest arising from said bank stock, and also my share of the rent arising and payable out of the said lands of Baltrasna shall be applied by my said trustee, the said Barbara O'Ferrall, towards the maintenance, education, and clothing of the said Jane Lalor; and that the receipt alone of the said Jane Lalor shall be a sufficient discharge to my trustee, the said Barbara O'Ferrall, without being subject or liable to the control, debts, or engagements of any husband she may hereafter happen to marry, or subject to the control, management, direction, or interference of any relation whatsoever of the said Jane Lalor, subject, however, to an annuity of £70, to be paid by my said trustee, Barbara O'Ferrall, out of the interest and produce arising from the said bank stock to Mary Lalor, the mother of said Jane Lalor, and to and for the sole use and benefit of the said Mary Lalor and her child; and that the said annuity of £70 shall not be subject or

liable in any manner whatever to the control, debts, or engagements of her present husband, Peter Lalor, or any husband she may hereafter marry, but only to be for her own sole and separate use and benefit; and the receipt alone under the hand of the said Mary Lalor to be a sufficient discharge for the same to my trustee, the said Barbara O'Ferrall. But it is my will, wish, and particular order and desire that the said Mary Lalor shall reside in either of the following counties, of Kildare, Carlow, or Wicklow; she may have her choice of any of the said three counties to live in, or in any part thereof she may think proper; but should the said Mary Lalor not comply with this my will and desire, and should go reside elsewhere, said annuity of £70 shall cease and determine to be paid to her, the said Mary Lalor. And in case the said Mary Lalor's present husband, Peter Lalor, should happen to die, and that she should marry again and leave issue by her after-taken husband or husbands, the issue of such marriage or marriages is not to have anything to do with the said annuity of £70, but said annuity shall go to and be for the use and benefit of her children by her present husband, the said Peter Lalor; the said annuity of £70 to commence from the day of my decease, and to be payable half-yearly. I also leave and bequeath to the said Mary Lalor the sum of £40, to be paid to her by my executors hereinafter named immediately after my decease, for the support and maintenance of herself and children until the half year's annuity shall become due and payable. And it is my will, and I desire that my said executors shall, after paying said annuity of £70 to the said Mary Lalor, and after payment of all expenses whatsoever attending the maintenance, education, and clothing of the said Jane Lalor, the surplus (if any) is to be put out at interest for the sole use and benefit of the said Jane Lalor in the best and most advantageous manner, and to be settled upon herself.” Having declared that Jane Lalor should forfeit the annuity in case she married without the consent of Barbara O'Ferrall, the will went on to say,—“But should she marry agreeable to my wishes in this my will expressed, and with the consent of my trustee, the said Barbara O'Ferrall, then, and in such case, my will is, that if she shall have issue of said marriage, that the said bank stock and my share of the property in Baltrasna, as hereinbefore mentioned, shall go to and for the sole use and benefit of the said Jane Lalor, and after her death to go to and amongst the issue of such marriage, share and share alike.” Jane Bolton died in the year 1828. Upon the marriage of Jane Lalor, in 1830, to T. H. Ball, who is now dead, the sum of £3136, capital stock of the Bank of Ireland, was transferred to Oliver M'Cauleland and E. T. Wakefield upon trust, to pay to Jane Lalor for life so much of the dividends as would remain after paying the annuity of £70 bequeathed to Mary Lalor as above. Mary Lalor died in 1857, leaving her husband, Peter Lalor, and six children surviving, of whom the petitioner, Mrs. Alford, is one. Peter Lalor took out administration to Mary Lalor, but the trustees of the bank stock having refused to pay the annuity of £70 to Peter Lalor or any of his children, unless directed to do so by an order of the court, the following suit was instituted,

William Duggan (with him *Serjeant Sullivan*), for Mrs. Alford.—The gift of the annuity of £70 "to Mary Lalor and her children" made the annuity perpetual, and the petitioner is entitled to one-sixth of the £70 per annum—*Stokes v. Heron* (12 Cl. & F., 161); *Bridges v. Harpur* (3 De G. & Jon., 129); *Mansergh v. Campbell* (De G. & Jon. 232). Or Mary Lalor's children must be entitled to the annuity for their lives—*Lett v. Randall* (30 L. Jour., Chan., 110); 6 Jur., N. S., 1359. But the annuity was there held not to be perpetual, by reason of the absence of a clear intention by the testator that it should be so. Here the fund for payment of the annuity is segregated, which the Lord Chancellor said could not be done in that case—*Hill v. Potts* (5 L. Times, 787).

R. R. Warren, Q.C., (with him *Tutill*) for Mrs. Ball.—The words of the will gave a benefit, even during Mary Lalor's life, only to such children as required support and maintenance. The annuity was not perpetual, but for Mary Lalor's life—*Carr v. Living* (28 Beav., 644).

Alex. Norman, Q.C., (with him *Synge*) appeared for the trustees of Mrs. Ball's marriage settlement.

May 29.—THE LORD CHANCELLOR stated that he was of opinion, looking at the whole of this will, that the testator did not intend the annuity of £70 to be perpetual; that *Heron v. Stokes*, (*sup.*) had been commented on severely; and he decreed the petitioner to be entitled to one-sixth of the annuity during her life, Mrs. Ball being entitled to her share as well as the other children.

Court of Queen's Bench.

[Reported by Walter Bourke, Esq., Barrister-at-Law.]

TRINITY TERM, 1862.

REGINA v. THE TOWN COUNCIL OF DUBLIN.—June 3.

Certiorari—3 & 4 Vic. c. 108—*Right of a corporation to apply borough funds to oppose a bill which would affect their property.*

Application for certiorari against Corporation of Dublin, who had applied borough funds to oppose a bill before Committee of the Lords. It was shown that the provisions of the bill would have the effect of reducing the income of the corporation,

Held—That the *certiorari* should not issue, as the corporation were justified in opposing the bill, and applying the borough funds for that purpose.

THIS was a motion to make absolute a conditional order for a *certiorari* directed to the town council and town-clerk of the borough of Dublin, directing them to return into this court certain orders made by said counsel whereby certain sums were ordered to be paid out of the funds of said borough for the purpose of defraying the expense of opposing a certain bill then being promoted in Parliament, said bill being for the purpose of providing and constructing a new cattle market, market places, slaughter-houses, and all necessary approaches and conveniences in the city of Dublin, and all orders made by said council for any payment out of said fund for any purpose touching said bill, and for certain resolutions, reports of com-

mittee, &c., having reference thereto, in order that same, or such of them as are illegal, may be quashed, upon the ground that same are illegal and void, and affect and attempt a disposition and application of said borough fund not authorised or warranted by law. It appeared from the affidavits of the prosecutors, on which the conditional order had been obtained, that the bill was promoted in consequence of the insufficiency of the existing cattle market accommodation, the increasing requirements, and the frequent complaints made on the subject; that the site proposed for the new cattle market was chosen by G. W. H., a civil engineer, at the request of influential persons, and for the public benefit alone. It was also alleged that the provisions of said bill did not injuriously affect the Smithfield market, or the interests of the Corporation of Dublin, or of any persons therein, or in the property adjoining, nor the privileges of the Lord Mayor or Corporation with reference thereto. That the present market at Smithfield was monopolised unjustly and illegally by salesmasters, and was not an open market as it ought to be; that as a cattle market it is not under the control of the corporation, nor do they derive any revenue from it, but that they do receive tolls for hay and straw sold therein, and that the bill did not propose a new market for these commodities. It further appeared that said bill had been twice read, and was then referred to a committee of the House of Commons; that the proposed bill was referred to a municipal committee by the town council of Dublin, who recommended a petition against it; and said committee were authorised to draw to the extent of £500 on said borough fund for the furtherance of said petition, which was laid before the select committee of the House of Commons, who, nevertheless, declared the preamble proved; that subsequent to the proving of said bill a special meeting of said corporation was held for the purpose of authorising the application of the borough funds to the purpose of opposing said bill; and though notice of the illegality of such application of said fund was served on them, they passed a resolution authorising the city treasurer to pay a further sum of £500 for that purpose; that said borough fund consists of the monies specified in 3 & 4 Vict. c. 108, the 126th sec. whereof provides that said fund is only to be applied to the purposes specified in the Act, said purposes being set out in the 131st section; and that the orders complained of are unauthorised by said 3 & 4 Vic., or by any other statute. The town clerk being absent made no affidavit; but that of the solicitor to the corporation contained the facts relied upon as cause. They were, that the city estates called "antient revenue," (including lands and tenements in the neighbourhood of Smithfield) were, in 1809, conveyed by the corporation to trustees for certain trusts, the first being "to take the rents and profits thereof upon trust, to pay thereout all costs which may at any time be necessarily incurred for the purpose of recovering and protecting the said estates or any of them, and all other charges connected with the due execution of said trusts," &c.; and that the rents of these estates are portion of the borough fund under the 3 & 4 Vic. c. 108. That the preamble of the bill and the 134th section provided for the erection of a new

market, and that the market company should be empowered to levy tolls and sell shires thereat, the corporation having incurred considerable expense in fitting up a "green hide crane," and keeping it in repair, though it was a free and open market. Under certain circumstances the Recorder of Dublin was to have the power of making rules and regulations for the management of the new market instead of the Lord Mayor, who at present had that privilege. Certain houses and premises in the neighbourhood of Smithfield, the leases of which would fall in 1863 and 1881, would produce then an increased rental to the corporation as a portion of the "antient revenue" of about £5000 per annum in case the proposed bill was not passed; that the bill came before the select committee on the 18th March; the evidence given against it on behalf of the corporation was produced, the promoters having concluded theirs, and the corporation now relied on an opposition before the Lords. That the majority of the corporation believed the proposed bill to be detrimental to the interests of the rate payers, and of the property held by the corporation in trust for the citizens, subversive of their own statutable rights; and that a public nuisance would be created by the passage of cattle through the city if it should pass. And further, that G. W. H. was engineer to the Great Southern and Western Railway Co., whose traffic would be much increased by the establishment of the proposed market: that the relators were unconnected with the cattle trade, and that the present market was sufficiently commodious; or if any alteration were needed in it, that the corporation would carry them out according to plans already prepared by their engineer for that purpose.

Armstrong, Sergeant (with him *Malley* and *O'Driscoll*), moved to make absolute the order.—By the 131st section of the 3 & 4 Vic. c. 108, any surplus funds that may remain in the hands of the corporation after defraying all necessary expenses, are to be applied to the improvement of the city. This enactment is explicit and peremptory; and it is no matter with reference thereto whether the revenue of the corporation is likely to be lessened, or any inconvenience occasioned to others by reason of the passing of the bill. The real and only question before the court is, can the corporation travel out of the words of the Act? Counsel relied on *Rothwell v. The Borough of Dublin* (12 Ir. L. Rep., 206).

Lawson, Q.C., Solicitor-General, and *C. Barry, Q.C.*, contra.—The Corporation in this case are only opposing a bill which, if it pass, will reduce their revenues considerably: and in so doing they are only protecting their property. They are acting just as they might in case they proceeded by ejectment against anyone who held possession illegally of their property, and they are obliged to preserve the property entrusted to them—*Regina v. The Commissioners of Sewers for Norfolk* (15 Q. B., 549); *The Attorney-General v. Eastlake* (11 Hare, 205); *The Attorney-General v. The Mayor of Norwich* (2 Myl. & Craig); *The Attorney-General v. Andrews* (2 M'Naghten & Gordon, 225).

LEFROY, C. J.—We are all of opinion that we should not make absolute the conditional order. The Corporation have voted money to oppose a bill which

was being promoted in Parliament. It appears they, or a majority of them, believe it to be detrimental to their interests that it should become law, and we must be satisfied that the orders they have made with reference to it are invalid before we can issue the *certiorari*. There was no deceit in these orders, and there was nothing on the face of them to render them invalid as orders to oppose a bill brought into Parliament. The gist of the bill was to obtain a new cattle market, and a new crane for the sale and weighing of hides; with respect to the market, they were by the course they took only exercising their common law right. It was their duty to oppose the bill, as it was attended with prejudice to the interests of the citizens of Dublin, inasmuch as the property of the corporation itself would be seriously injured; and is it to be said that, under these circumstances, they were to be precluded from appearing before Parliament to oppose the bill? What could be more fair and just than that they should appear before the House of Lords? The dread of injury to their property appears to me a fair ground for their raising a sum of money to protect it. This is not a job of the solicitor; there is nothing suspicious on the face of it. With respect to the crane, the bill goes to the length of abolishing it; the corporation derived a revenue under it, and they would have been deprived of this as well as of a considerable part of their property. If the reversion in expectancy which the corporation were entitled to were not to fall in for a great number of years, the opposition to the bill prejudicing such reversion might be considered a speculation; but that is not the case here. Some of the leases will fall in next year, and there is a sufficient and substantial ground for justifying the corporation in taking measures to resist this bill in passing through Parliament. On the whole there appears, in my opinion, sufficient reason for refusing to make absolute the conditional order.

O'BRIEN, J.—I am also clearly of opinion that the order should be refused. The 3 & 4 Vic., under the authority of which the corporation disposed of the rents and profits of their property, provides that the parties to whom the property of the corporation are entrusted as trustees shall refund themselves all expenses they incur in protecting such property; and I think we should be slow in putting a construction on the Act which has not yet been put on it. The decision in the case quoted does not affect this case. Where it is not a speculative opposition, but that a serious injury is apprehended from a bill passing through Parliament, the opposition given to it by the corporation is a legitimate exercise of their powers; it is sufficient for this purpose to show that it was the interest of the people of Dublin that they should resist the bill. The question is with respect to the protection of the Smithfield property, and is not a speculative one; not that the property is to become theirs in 1881, but the result of the opposition will affect their property next year. If this bill passed, the Recorder might take the place of the Lord Mayor, who now makes rules and regulations for the carrying on of all the markets in Dublin. Is it not consistent with the provisions of the Act of Parliament that they should protect the property left to them?

HAYES, J.—The decision of this court is not final;

but the Act gives us the authority to decide the question here at issue; and all that we have to do is, to see whether in administering the rights bestowed on the corporation, this may be a proper application of the funds placed at their disposal. Many reasons have been given why it should be considered so, but I hold by their right to protect their property. Where a public body gets property for public purposes they have a right to protect and defend that property; and if it were shown that that property was likely to be injured by any measure this would be sufficient indication to them that they should, by opposing it, protect and defend that property. Some of the corporation property will fall out of lease next year, and more of it in nineteen years; and, on the principle of universal benevolence, I hold that it should be preserved. If this court don't give satisfaction to the relators, they can go elsewhere.

FITZGERALD, J.—We are satisfied that the intended bill was likely to injure the property of the corporation, and that they opposed it in the legitimate exercise of their privileges.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

CONNORS v. JUSTICE.—May 7-9, 1862.

Demurrer—Slander.

To impute incontinence to a female domestic servant whilst in the course of her employment is actionable.

THE summons and plaint stated that the plaintiff was and is a female domestic servant, and that it was and is necessary for her to be of a chaste and continent character in her employment as such domestic servant, and that the defendant spoke of her the words following: "I was so incensed at her (meaning the plaintiff) coming to hire with me after having had a miscarriage in the service of Mrs. —," and that the said words were so spoken in relation to the occupation of the plaintiff. The defendant demurred.

Jellatt, in support of the demurrer. Words imputing incontinence are not actionable—*Campbell v. White* (5 Ir. Com. Law Rep. 312), and accordingly, the pleader has endeavoured to connect the imputation with the plaintiff's occupation. What are the special circumstances which take this case out of the general rule? What do these words "In relation to the occupation of the plaintiff" mean? They are intelligible when misconduct in any professional capacity is imputed, as if it were said of an attorney that he divulged the secrets of his clients. The practice of chastity is incumbent on every member of the community, it is a moral duty, and to impute unchastity, without special damage, is not actionable—*Lumby v. Allday* (1 Crompton and Jarvis 301); *Ayre v. Craven* (2 Adol. & El. 2). In the latter, at page 6, the very case we have here is noticed in the argument, thus, "a maid servant would, undoubtedly, be less likely to obtain a place, if charged with prostitution, yet, such a charge would not of itself be actionable," and Lord Denman, in giving judgment says, "Some of the cases have proceeded to a

length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." In *Gallwey v. Marshall* (9 Exchequer 294) it was held that an imputation of incontinence in an unbeneficed clergyman is not actionable. The summons and plaint avers that it was and is necessary for the plaintiff to be of a chaste and continent character, but it is for the court and not the parties to say what are the necessary qualifications of an employment which render an imputation actionable: so Bayley, B. in *Lumby v. Allday*. A conclusion of law is here inserted. A character for general lying would, doubtless, lessen a servant's chances of employment; but to impute it would not be actionable. See the remarks of Twisden, J., in *Wharton v. Brook* (Ventr. 21).

W. M. Johnson, contra.—I admit the general rule that incontinence being imputed is no ground of action, and I admit it is for the court to say what are the necessary qualifications of an imputation; but on the question of pleading I refer to the case of *Hemmings v. Gasson* (27 L. J., N. S. 252). The present action is not novel. The cases cited on the other side, with the exception of the first, were cases of professional persons. I say, firstly, that if there be an imputation on a quality necessary for carrying on an office or trade, it is actionable; and I say, secondly, that a servant's employment comes within this category. For the first proposition see 1 Starkie, on Slander, 117; Cooke, on Defamation, 16, 17; for the second, see Smith's Master and Servant, 271. [*Keogh, J.*—Is there a case in point?] Scarcely, because the defence of privilege is most frequently resorted to. [*Keogh, J.*—Are there any legal reports in the Isle of Man?] They would, probably, be in point, if there were. [*Monahan, C. J.*—Is there any case to be found in which a physician was charged with having taken liberties with a patient?] Not on the civil side of the court, and the absence of it can be easily accounted for. See 2 Lush's Saunders, 904; *Terry v. Hooper* (1 Lev. 115) which was the lime-burner's case. As to the objection that too many actions may be brought, see *Beavor v. Hides* (2 Wilson, 300). That a domestic servant must be chaste, see *R. v. Inhabitants of Brampton* (Caldecott's Settlement Cases 11); *R. v. Inhabitants of Welford* (Caldecott's Settlement Cases, 57). These cases establish that a master may immediately discharge a servant for incontinence. [*Christian, J.*—Is there any case where a master was justified in turning away a servant on account of what he had heard of her incontinence before her coming to him?] That seems to be treated as averred in the contract, 1 Chitty's Practice of the Law 76 note; Addison, on Contracts, 5th ed. page 387; Nun and Walsh's Justice of the Peace, 682. By 14 & 15 Vic. chapter 92, section 16, misconduct of this nature is summarily punishable. [*Christian, J.*—Being averred in the contract would seem to imply that the chastity was a requisite to the servitude.]

In *Rumsey v. Webb* (Carrington and Marshman 104), there was special damage alleged; but the case shows that there need have been none. It did not appear in the cases cited that the professional men were acting professionally at the time, but in this summons and plaint it is stated that the plaintiff was and is a female domestic servant. A barrister may be a country gentleman; a clergyman may have no cure of souls; a physician may be a physician and not a practising physician. *Gibb v. Price* (Style's Reports 231); *Watson v. Vanderlash* (Hutley's Reports 71); *Pridham v. Tucker* (Yelverton's Reports 153). The last of these is not so strong as the present, for the office was not continuing. A clergyman is assumed not to have temporal employment till the contrary be shown. In *Southey v. Denny* (1 Exchequer Reports 196), the declaration stated that the plaintiff was a surgeon and accoucheur, that, in that character he had attended one Mrs. Reay, during her confinement, and that the defendant, in a discourse which he had with her, spoke of the plaintiff the following words: "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character: none of the medical men here will meet him. There have been many inquests had upon persons who have died because he attended them." The last words were not proved, and the declaration was amended at the trial by substituting the words, "Several have died that the plaintiff had attended, and there have been inquests held upon them;" and the court held that the words as amended were actionable, and inclined to think that the words, "He is a bad character; none of the medical men here will meet him" alone were actionable, as they implied that he was a person who, in a case of necessity, requiring a consultation with others, could not obtain the benefit of their assistance for his patients.

Serjeant Armstrong, (with, *W. M. Johnson*)—It is conceded that an imputation of incontinence is not in general actionable, but it is equally well settled that to disparage a person in his occupation is actionable. I need not argue that in every conceivable case of female domestic service, chastity is an element essential. Suppose the case of a lady's maid, or of a young woman attending on young children, would not the head of a house, if forced to elect between a servant who had committed an act of theft under temptation and an unchaste woman, prefer the former? The only wonder is that this necessity should be doubted. But here the necessity is stated in fact and not traversed by the demurrer. Will not this take the case out of the general rule? [*Monahan, C. J.*—It is argued on the other side that, whatever may be the general rule, this averment raises the question, if in this particular instance there was a duty incumbent on the plaintiff of being chaste.] A cook, for example, is not under the same amount of obligation. Could the present plaintiff, if the imputation be true, be called a good, honest servant? [*Monahan, C. J.*—The imputation here is in the singular number; it only charges one transaction.] Suppose an imputation exactly like this, cast on a doctor, would not that have all the effect necessary? In *Ayre v. Craven*, the professional character of the

physician was not the subject of conversation at the time. [*Christian, J.*—It seems to me that the power to dismiss by the master for incontinence goes far to show that chastity is an element essential to domestic servitude.]

Jellatt in reply.—It is insisted on that a master may dismiss a servant for incontinence, and that chastity is a qualification necessary for domestic service. The fallacy of the argument lies in confounding professional qualifications with those moral qualities which greatly assist the practice of the profession, and so far are essential, but which, in strictness form no part of the essence of the qualifications. Take the following illustration: a physician must have two sets of qualifications; firstly, professional skill, &c.; secondly, manners, habits, and moral qualities. The imputations which are taken cognizance of, must affect the first of these. To call a doctor vulgar and brutal, would be to impute to him the absence of what may prove one of the chief ingredients in his success in life. To call a barrister nervous might damage him, and would be to impute the absence of what is necessary to his success, but no action would lie. [*Christian, J.*—Take the first of your illustrations; to impute to a surgeon that for which he might be struck off the roll of surgeons would be ground of action; similarly, if a servant may be dismissed for want of chastity, why is not to impute that actionable?] Parke, B., lays it down that a servant may be dismissed for visiting a sick mother, and staying out without leave is ground of dismissal. *Ayre v. Craven* is *quatuor pedibus* with the present case. Driven by *Ayre v. Craven* from his first position, the plaintiff next contends that to have been once incontinent was a breach of an engagement with the lady who dismissed her. There is no distinction recognised by the law between the chastity of a man and that of a woman. Society draws a wide distinction, but the law knows none. There is no such engagement as that spoken of in the case of a governess. In *Wharton v. Brook* (Ventris 21), Twisden, J., said, "This hath been adjudged, where one brought an action, declaring she was a school-mistress, and taught children to write and read, by which she got her livelihood; and that the defendant said of her, she was a whore, and that J. S. kept her as his whore: that to slander one in such a profession was not maintainable without special damage." This is referred to by Lord Denman in *Ayre v. Craven*, and is said to be overruled by the two lines in 2 Lush's Saunders, 904. "To say of a young lady, a governess, that she had had a child by the man whose children she is instructing, has been held to be highly defamatory." This is not overruling it. This averment of a duty is commonly resorted to in order to get the question before the jury, which ought to be decided by the court; the effort has always failed. In *Seymour v. Maddox* (16 Q. B. 326), the action was brought against the owner of a theatre for injuries sustained by leaving a passage from the dressing-room to the stage unlighted, and having a hole which was unfenced, and on motion in arrest of judgment, it was held that the declaration was bad, because the facts stated did not raise the duty, a breach of which was complained of, and that the express al-

legation of duty would not aid. So *Macalfe v. Hetherington* (11 Exchequer Rep. 269); In *R. v. Inhabitants of Brampton*, the servant had been paid her year's wages. [*Christian, J.*—Surely, nothing would justify the master in dismissing a servant without notice but what amounts to a lapse of duty.] For the matter of implied contract which is relied on, every Magdalen institution in the kingdom is in the habit of putting its inmates out to service, and will it be said that a master who had discovered his servant came out of one of them could part with her on the ground of broken contract? There is no such implied contract anywhere but in the one case of marriage, where the breach of such a contract may be pleaded in answer to an action for breach of promise of marriage. [*Monahan, C. J.*—Would not the imputation of one act of misfeasance in an attorney be the proper subject of an action of slander?] Yes, but to hold this plaint good would be to demand a higher standard of virtue in servants than in any other class of the community.

May 12.—*PER CURIAM*.—Overrule the demurrer.
Demurrer overruled.

M'MAHON v. ELLIS, AND ANOTHER.—May 10 and 30, 1862.

Practice—Interrogatories.

Where the court has directed an interrogatory to be exhibited to the plaintiff in an action, and to be answered by him, and has afterwards disposed of the order by refusing to make any rule on a motion to attach him for non-compliance, and the defendant, subsequently, obtains from a judge in chamber an order, that a similar interrogatory be exhibited and answered, withholding all mention of the previous proceedings, the court will set aside the judge's order.

Where in an action brought for the disturbance of the plaintiff in an office which he claims to hold, the court has previously ruled upon demurrer that it lies upon the plaintiff affirmatively to show he took the necessary oath of office, it will not permit the defendant to elicit from him by exhibiting an interrogatory, whether or not he ever took such oath, inasmuch as this is seeking to know what evidence the plaintiff means to give at the trial, or else an endeavour to procure evidence which may rebut his case.

THE plaintiff claimed to be weighmaster of Clones, as heir at law of his father. The action was for disturbing him in the exercise of his said office. On the 8th of June, 1859, the court, on motion by the defendant, directed the following interrogatories to be answered by the plaintiff within ten days from service of the same. 1. Did the late Sir Thomas Barrett Loonard, Bart., administer to plaintiff the oath directed by the 3rd section of the statute of the 4th Anne, chap. 14, to be taken by weighmasters appointed under said statute, and if so, where and when did he administer said oath to plaintiff, and was any person and who present when said oath was so administered, and was any entry or memorandum made

respecting the administering and taking of such oath, and where is such memorandum or entry at present? 2. Did any person, other than said Sir Thomas Barrett Loonard administer said oath to plaintiff prior to the 22nd day of January, 1853, and if so, where and when was said oath so administered and by whom, and was any person or persons present, and was any entry or memorandum made respecting the administering and taking of such oath, and where is such entry or memorandum at present? 3. Did the plaintiff ever take the oath of supremacy, directed to be taken by the 9th section of said statute of 4th Anne? 4. Is the plaintiff a member of the Roman Catholic religion, and has he been such from the 1st January, 1844, to the present time? 5. Did the plaintiff, within three calendar months next before his alleged appointment to or his alleged entering upon the exercise and enjoyment of the office of weighmaster of Clones, take and subscribe the oath directed by the statute of 10 Geo. 4th chap. 7, to be taken by all persons professing the Roman Catholic religion before their appointment to or their entering upon the exercise or enjoyment of any office under the Crown, or any other offices or franchises at any of the places appointed by said statute for the taking and subscribing of said oath, and at which of those places and at what time and before and in the presence of whom did he so take and subscribe said oath? 6. Did plaintiff take and subscribe said last-mentioned oath at any time between the 1st day of January, 1844 and the 22nd day of January, 1853, and if so, at what time and at what place and before and in the presence of whom did he subscribe and take said oath? The plaintiff not having answered these interrogatories, the defendant, on the 3rd November following, moved for an attachment to issue against him, when the court made no rule on the motion. The pleadings were protracted and complicated, and upon argument of a demurrer to some of them, the court decided in the defendant's favour, that it devolved upon the plaintiff to prove affirmatively that he had taken the requisite oath of office. On the 25th of June, 1861, the defendant went before Hughes B., in chamber and obtained an order that the plaintiff should, within ten days after service of the same, answer by affidavit the following interrogatory—Whether the said plaintiff, John M'Mahon ever took the oath mentioned and set out in the third section of the statute made and passed in Ireland, in the fourth year of the reign of her late Majesty Queen Anne, entitled an "Act for regulating the weights to be used in this kingdom, and that salt and meal shall be sold by weight," and if so, when and where did he take said oath and by whom was said oath administered to him, and were any and what persons present when said oath was taken by the plaintiff, and was any and what memorandum made respecting the said taking of said oath, and where is such memorandum at present? At the ensuing Hilary After-sittings, the cause came on for trial when, after having been partly heard, it was postponed owing to the illness of a juror. The plaintiff refusing to answer this interrogatory the defendant obtained a conditional order to attach him, against which

Charles Hemphill, Q.C. (with him *Myers Kelly*),

now showed cause.—There was a suppression of facts before Hughes, B. No mention was made of the order previously obtained from this court. The plaintiff is not to answer a question which might have a tendency to criminate him.

Charles Rolleston, Q. C., (with him, *Hercules Ellis*), contra.—If this order was obtained irregularly from Hughes, B., the plaintiff was bound to have come in proper time and applied to have it set aside. *Saunders and another v. Jones* (3 Dowling & Lowndes 770). The plaintiff does not allege in his refusal to answer the interrogatory, that to do so, might criminate him, but that it is pointed to make him show how he is going to shape his case. The defendant has made an affidavit, in which he states that the plaintiff absented himself at the trial and for some time previously. This is not contradicted.

MONAHAN, C. J.—The order must be set aside since it was obtained from Hughes, B., upon a suppression of an order made by us in this cause. The only answer the defendant makes is to plead the plaintiff's delay in applying to set it aside, but though we think there has been great delay, we do not think it too great, and so we set it aside with costs.

Rule accordingly.

May 30.—*Charles Rolleston, Q. C.*, (with him, *Hercules Ellis*), applied to the court for an order directing the plaintiff to answer the interrogatory concerning which the order had been obtained from Hughes, B. [*Christian, J.*—A serious difficulty in your way is that you are, in fact, seeking for a discovery of the materials with which the plaintiff means to prove his case.] I have also to meet the objection which will be made, that the answer to this interrogatory would tend to criminate the plaintiff; but he has made no affidavit to show how it can. He might not have been appointed under the statute of Anne, and then there could be nothing to criminate. [*Christian, J.*—There would be a penalty for acting in the office.] The plaintiff may have weighed all these people's goods, and not be liable to an indictment. He may be able to explain it otherwise. At all events, he should himself make an affidavit of the fact—*Osborn v. The London Dock Company* (10 Exchequer Reports 698); *Sidebottom v. Adkins and others* (3 Jur. N. S. 631); *Parkhurst v. Lowten* (2 Swanston 194). [*Monahan, C. J.*—The present is an action for disturbing the plaintiff in his office, and therefore, it is assumed he acted in it.] We allege there was no such office in existence, in which case there could be no self crimination. The court will not allow a counsel or attorney to allege this risk when the plaintiff himself will not make the statement. On the part of the second defendant, White side, it would be all-important to know the date of the plaintiff's taking the oath. Whiteside has made an affidavit, stating, he has exercised the office for ten years, and that the plaintiff never took the oath of office, and this is not contradicted. In answer to the objection that this matter has been already decided and cannot be heard now, I rely on *The King v. Eve and Parlbay* (5 Ad. & El. 780). [*Christian, J.*—Have you any authority for this, that where a defendant's case is not an affirmative case, but

merely negatives the plaintiff's, a discovery can be obtained by the defendant of matter which may enable him to sustain that negative?] That is not this case. [*Christian, J.*—We ruled on the demurrer that the taking this oath was a preliminary necessary to holding the office.]

Charles Hemphill, Q. C. (with him, *Myers Kelly*), appeared to resist the motion. There are three grounds on which this application ought to be refused. In the first place, it has been already discussed. The present is in fact a re-hearing of what was decided before. There was no distinction taken between one interrogatory and another by the decision which the court then made, and we have a right to assume that the whole case was argued. *McMahon v. Ellis* (10 Ir. Com. Law Rep. 120). [*Christian, J.*—If there was a miscarriage, and two points were decided on grounds applicable to only one, there might be strong reasons for reconsidering it.] The defendant has not shown that it was so. [*Keogh, J.*—You contend that we cannot go behind the order of November, 1859, but that was made on a motion to attach, and the court may have made no rule on that motion on other grounds, such as that the interrogatories were never served, &c.] The entire of the application must be taken into account. In *Hargreave v. Meade* (9 Ir. Com. Law Rep. App. xlv), a motion, virtually the same as the one made before, was attempted to be made; the court having said, "No rule" on the former occasion, and Monahan, C.J., said, "A motion upon which, 'no rule' has been pronounced cannot be renewed." *De Montmorency v. Pope* (2 Ir. Jurist 213); *O'Brien v. Taylor* (2 Ir. Jur. N. S. 53). In the second place, this application ought to be refused, because, to answer the interrogatory might expose the plaintiff to an indictment. *R. v. Davis* (Sayer's Rep. 163); *R. v. Boyall* (2 Burrow 832); 1 Russell on Crimes, 49, 50. Thirdly, this is a fishing inquiry on the part of the defendant. *Ivy v. Kekewick* (2 Vesey Junior 679); *Moor v. Roberts* (2 Com. Bench, N. S. 671). It has been assumed on the other side that interrogatories may be exhibited on every point on which questions may be asked at the trial. That is not law. [*Keogh, J.*—I suppose there is no ground for the statement that the plaintiff absented himself as described?] None whatever.

Hercules Ellis, in reply.—The excuse of privilege must be sustained by oath. If the answer to this interrogatory were to criminate the plaintiff, it could never be made use of against him. Upon the former argument, the plaintiff's counsel suppressed a fact, and the court made an error in law. See *Masters v. Butler and Baker* (19 Jur. 869). [*Keogh, J.*—If it were worth remarking, one of your observations answers the other; for, if the counsel suppressed the fact, the court made no mistake, and if the court were in error, then there was no suppression.]

MONAHAN, C. J.—This application is substantially for liberty to ascertain when and where and under what circumstances the plaintiff took the oath of office required by Act of Parliament. We have already determined upon the demurrer which was argued in this case, that this taking of the oath was matter of affirmation, that it needed to be affirma-

tively proved by the plaintiff. This is an application, therefore, to get what evidence the plaintiff means to give or to get evidence which may rebut his case. Without deciding whether or not a witness could be asked in court the questions of which this interrogatory consists, we think the interrogatory cannot be exhibited. We need go no further to show that this motion must be refused. We consider that it was substantially brought before us on a former occasion.

Motion refused with costs.

Consolidated Chamber.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

[BEFORE HAYES, J.]

EGAN v. VESEY.—15th July.

Practice—Motion to change the venue—Summons and plaint not filed.

A motion by the defendant to change the venue, will be heard, where the defendant has lodged his pleas, and the assizes are close at hand, though the summons and plaint has not been filed, and the court will order it to be forthwith filed, unless the plaintiff undertakes not to give notice of trial for the next assizes.

J. A. Byrne, for the defendant, moved to change the venue on special circumstances as to the convenience of the witnesses. To-morrow will be the last day for notice of trial for the assizes, and the plaintiff has not filed his plaint, in order to prevent this motion being made.

J. A. Phillips, for the plaintiff.—This motion is premature as the summons and plaint has not been filed, and the pleas could not be filed until after the summons and plaint has been filed—if they were, it would be irregular, and the defendant is not entitled to force on this motion.

HAYES, J.—The plaintiff has no right by keeping his summons and plaint back, to deprive the defendant of his right to make this motion. I will order the plaintiff forthwith to file his plaint, and will now hear the motion, unless the plaintiff undertakes not to give notice of trial for the next assizes.

This was not done, and the motion was heard.

SARGENT v. CLEARY.

Inspection of deed referred to in defence—64th sect. of Procedure Act.

To an action for rent brought by the heir at law and devisee of the lessor, the defendant in his defence referred to a deed of assignment made after the demise by the lessor of all her estate in the reversion.

Held—That it should be produced for inspection, though it destroyed, if genuine, the plaintiff's title.

C. Shaw, for the plaintiff, moved for inspection and a copy of a certain deed of assignment mentioned in the defence. The action was for rent. The plaintiff sued as heir at law and also devisee of his

mother the lessor. The defendant pleaded that the plaintiff was not entitled to the rent, as after the making of the lease and before the rent became due, the said lessor by a certain indenture, which she referred to by date, assigned all her interest in the reversion of the lands to A. B. and J. M. their heirs and assigns. Notice had been given demanding an inspection and copy, to which the defendant replied that he had not the custody of the deed; but no affidavit was made to excuse the inspection.

W. O'Brien, for the defendant.—This deed defeats the plaintiff's case and does not sustain it. No one can be required to produce a document, unless the party requiring the production claims under it. The 64th section of the Com. L. Pro. Act, 1853, is only intended as a substitute for proferat. The defendant is not in privity with the deed. The words in the section "when any party shall rely on any deed," &c., means when he founds his interest on it. *White v. Montgomery* (Str. 1198); *Leyfield's case* (10 Co. 88).

HAYES, J.—It would be most unjust if I could not make the order sought, for there may never have been in *rerum natura* such a deed as is alleged. The statute says that "when any party shall rely on any deed or document in his pleading, the said deed or document shall be produced, unless its non-production can be satisfactorily excused;" but here the defendant has made no affidavit to excuse the non-production. I must therefore order its production for inspection.

Let said deed be produced on Thursday next, at 12 o'clock, at the office of the defendant's solicitor for inspection—the plaintiff's costs of the motion to be costs in the cause.

[FROM THE COMMON PLEAS.]

DUNNE v. PLUNKET.

Practice—Motion for leave to file replication—Notice.

In this court notice is now required of a motion for leave to file a replication.

A Keogh, moved, without notice, for liberty to file a replication.

HAYES, J.—The officer has stated that the judges of the Common Pleas have assimilated their practice to that of the other law courts, and now require notice to be given of such a motion. There must, therefore, be no rule.

[BEFORE KEOGH, J.]

WHALLEY v. LORD MASSARENE AND OTHERS.—8th July.

Practice—Notice of trial pending an appeal from an order directing a venire de novo—Judge in chamber—Jurisdiction.

Pending an appeal to the Court of Error by the defendants from an order of the full court, which had set aside a verdict had for the defendant and directed a venire de novo, the plaintiff cannot serve notice of trial for the ensuing assizes; and a Judge, sitting in Chamber, has power to make an order to restrain him from proceeding to act upon it.

Joy, Q. C. (with him, *Jellett*), moved that the plaintiff be restrained from proceeding to trial at the next assizes for the County of Antrim, pursuant to notice to that effect, the defendant undertaking to speed the appeal pending in the Court of Error. There had been a trial of this action, which was one of *Quare Impedit* (*vide* vol. 6, N. S. 19) at the last assizes at Belfast, and a verdict had on the principal issues for the defendant. Exceptions were taken by the plaintiff to the judge's charge, and on the argument thereof, they were, on the 21st April last, allowed, and a *venire de novo* awarded by the court. From that order the defendant appealed to the Court of Error, and on the 7th June, the memorandum of error was filed and served, and on the 13th June, a suggestion of joinder of error was entered. On the 8th June, the plaintiff served notice of trial for the ensuing assizes at Belfast. Counsel referred to the Common L. Pro. Act, 1853, sections 170 *et seq.*, and the Act of 1856, sect. 49, and the note to that section in *Ferg. Proc.* 340.

D. McCausland, Q. C., and *Michael Harrison*, for the plaintiff, contended that the motion was intended only for delay, as the defendant had not moved in his appeal until the 7th June, and notice of trial was served on the 8th June. But, a judge sitting in chamber had no jurisdiction to make an order in the nature of an injunction, restraining the plaintiff from carrying out the order of the full court, ordering a *venire de novo*—Common Law Proc. Act, 1853, sect. 238. Until set aside, that order remains in full force, and the plaintiff is entitled to assume that it is right, and to have a trial at once, and not wait until the Court of Error should decide the appeal—*Beckham v. Knight* (7 Scott 347). If the Court of Error should decide for the plaintiff, and if he gets a verdict now, it will stand—if for the defendant, the verdict will go for nothing. Besides, there is as yet no bail in error, and the plaintiff cannot compel it to be given, so that he has no security for his demand.

KEOGH, J.—The plaintiff has no right to go on pending the appeal. If the Court of Error decides against him, this new trial would be wholly unnecessary. The order setting aside the defendant's verdict does not give a *venire de novo*, wholly regardless of the defendant's right to appeal, and if the defendant should succeed on the appeal, his verdict will be restored. I consider I have full power, though a single judge in chamber, to make an order restraining the plaintiff from going to trial pending the appeal, but the defendant must undertake to speed the appeal.

Order accordingly.

SUTTON v. PURDON.—July 4.

Security for costs—Pauper put forward by others—Laches in making application.

Where a trial was on the defendant's motion postponed from the Spring to the Summer Assizes, and notice of trial served for such assizes, it is too late for the defendant then to apply for security for costs on the ground of the poverty of the plaintiff, and that he is only the nominee of others.

Semble—That (independently of laches) if the plaintiff has himself an interest and is bona fide asserting it,

such an order would not be made, though others who have also interests have contributed funds to carry on the suit.

J. E. Walsh, Q. C., on behalf of the defendant, moved that the plaintiff be restrained from further proceeding, until he should give security for costs. The action was to try a right of way over the lands of the defendant, in the County of Wexford. The ground of the application was, that the plaintiff was a pauper, and merely put forward by others, and a letter published in the public papers, to which plaintiff's name was signed was relied on for that purpose, in which it was stated that he was supported in carrying on the action by other persons, and used strong language with reference to the defendant; it also said that the plaintiff had himself consulted counsel as to his right; the affidavit of the plaintiff denied that he wrote the letter, but admitted that contributions had been made to assist the plaintiff to carry on the suit, as well to assert his own rights as those of the public. *Rice v. The Dublin and Wicklow Railway Company* (8 I. C. L. R. 155); *Sheehy v. Dorman* (2 F. & Sm. 238).

Hemphill, Q. C., for the plaintiff, relied on the circumstance that the defendant had, before the last spring assizes, moved for and obtained an order to postpone the trial, which was then about taking place, until the summer assizes, on the terms of paying the costs of the motion, and allowing the right of way until the trial should take place, on the ground of the absence abroad of a person who was a necessary witness, and that no application had been then made for security, nor until notice of trial had been now given, and therefore, the defendant had been guilty of such laches as disentitled him to the order sought.

Purcell, in reply, contended that the defendant was entitled to make the motion at anytime when the facts came to his knowledge.

KEOGH, J.—In this case there has been such clear laches on the defendant's part as will prevent him carrying this motion. When the case was ripe for trial at the spring assizes, he causes it to be postponed, and pays the costs of the motion, and undertakes to allow a right of way until the case should be tried. Then, when it is ripe for the summer assizes, he, for the first time moves to restrain the plaintiff from having a trial until he gives security for costs, because he is a poor man and put forward by others. The defendant is too late now to make such a motion, which he ought to have made early in the cause. But it appears to me, if there were no such laches in the case, that the defendant could not carry the motion. The case is distinguishable from those cited. In those cases the plaintiff was not aware of any right, which he had until he was applied to by other parties, who invited him to bring the action and advanced, or became liable to pay the money to carry on the suit. But here the plaintiff's letter states that before the action was brought, he himself took counsel's advice as to his rights, and where it appears that the plaintiff himself has an interest, though others may also have, I cannot restrain him from asserting his rights, merely, because he is a poor man, and that a collection has been made to assist him to carry on the suit. The motion must, therefore, be refused with costs.

ETRE v. CONRAN.

Landlord and Tenant Act—Security for costs—Production by tenant of a lease.

A landlord not producing, on a motion under the 23 & 24 Vict., c. 154, sect. 75, for security for costs, any lease or other instrument regulating the terms of the tenancy, cannot refer to a lease produced by the tenant (the term of which is in existence) in order to ascertain the terms of the tenancy, the landlord contending that the term mentioned in said lease, was not now a valid and subsisting term.

Serjeant Sullivan, Q.C., for the plaintiff, moved for an order for security by recognizance against costs and damages, and mesne profits, pursuant to the 75th sec. of 23 & 24 Vict. c. 154. The affidavit stated that the defendant had held under a lease which was expired and held over as tenant from year to year; but plaintiff did not produce any lease or other instrument in writing regulating the terms of the tenancy. The defendant's attorney, on the motion, produced a document purporting to be a lease of the lands to the defendant, the term of which would not expire for several years. It was contended by counsel that, as the tenant had produced a lease, the court could refer to it to see the terms of the tenancy, though the plaintiff did not admit that the term was yet in existence, but, on the contrary, contended that the term was expired.

O'Brien contra.

KEOGH, J.—If you refer to the lease at all, you must admit that the term given by it is a valid and subsisting term, and then the ejectment is at an end.

The motion was refused, with costs.

[BEFORE FITZGERALD, B.]

FORSTER v. MURPHY.—July 18.

False defence—Setting aside on motion.

To a writ of revivor a defence of payment which, it was sworn by the plaintiff, was false, and only filed to delay and embarrass the plaintiff, will not be set aside on motion, nor will the defendant be ordered to verify it.

O'Neill, for the plaintiff, moved that the defence filed by the defendant to a writ of revivor on a judgment should be set aside as false and a sham defence, and filed only for the purpose of delaying and embarrassing the plaintiff. The judgment was recovered in 1852, and on the 7th June last the writ of revivor was sued out; and on the 1st July, the defendant appeared and filed a defence, alleging payment of the amount with particulars thereof. The affidavit of the plaintiff stated that the alleged payments were entirely false, and that the whole amount of the judgment was still due, and that the plea was only for the purpose of delay. The defendant's attorney made an affidavit that the defence was prepared pursuant to the instructions of the defendant; but there was no affidavit from the defendant. Counsel referred to the cases cited in Ferg. Proc. Act, 112, and submitted that either the defence should be set aside as false, or the plaintiff should be ordered to verify it.

Richardson contra.

FITZGERALD, B.—The defence, it is sworn, has been prepared from the defendant's instructions; and even without that fact it would not be set aside on motion. As to requiring it to be verified, the Act of Parliament does not require that, and I have no power to make such an order.

Motion refused, with costs.

TUPPER v. DAWSON.

Money lodged in lieu of security for costs—Costs of defendant on account of the plaintiff's default in not going to trial.

The costs to which a defendant is entitled by reason of a plaintiff's default in not going to trial will not, pending the cause, be made payable out of money lodged by the plaintiff in court in lieu of security for costs.

G. Foley, for the defendant, applied that out of the sum of £50 lodged in court by the plaintiff in lieu of security for costs, the defendant should be paid the amount of his costs, which he was entitled to against the plaintiff, for not going to trial pursuant to notice of trial. The plaintiff is out of the jurisdiction; and if he were here the defendant could at once proceed to make him pay those costs, and the money in court must be taken to represent him.

J. B. Murphy contra.

FITZGERALD, B.—The money is lodged in lieu of a recognizance with sureties to secure the costs of the cause. The defendant could not put a recognizance in suit against sureties for those costs pending the cause, consequently he cannot at present draw any of the money lodged as security for the costs of the cause instead of such recognizance.

Motion refused, with costs.

Court of Probate.

Reported by W. E. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF GEORGE C. STOWELL.—July 1.

Mistake adding a codicil to a revoked will—Parol evidence.

A testator had made a will in 1845, settling his estates first on A. and his issue, and then on B. and his issue. In 1854 he made another will, settling them first on B. and his issue, and then on A. and his issue. In 1858 he executed a codicil on the same paper as the will of 1845, mistaking it for the will of 1858, and beginning "This is a codicil to the above will." Held, that parol evidence was inadmissible to show the mistake; and that the will of 1845 was thereby revived, and together with the codicil formed the last will of the deceased.

Dr. Ball, Q.C., moved on the part of Jonas Stowell, the brother and one of the next of kin of the deceased, that letters of administration of the goods of the deceased, with his will and codicil annexed, should be granted to him. The deceased, it appeared by affidavit, died on the 14th January, 1862, having made a will on the 23rd December, 1854, in which

viso, namely, that the sum of £ , hereby bequeathed, shall remain in bank security in the event of my brother, Joseph Kennedy, dying without male issue, and to go to my nephews, David and Edward Kennedy, in equal shares, reserving, nevertheless, out of the interest which may have accrued up to the period of my demise on the said Government and Bank securities, the sum of £ a year, for the period of years, to be paid yearly, without any reduction, to my sisters (unmarried), Mary and Ellen Kennedy; and to my other sisters (unmarried), Gargarette and Anne, the sum of £ a year, for the period of years." (Then followed another legacy, also in blank, to his said brother Joseph, and a legacy in blank to the Right Rev. James Walsh, Bishop of Kildare and Lough, for charitable purposes, and proceeded) "And I do hereby appoint my said brother, Joseph Kennedy, my residuary legatee (save as is before restricted in the event of his dying without male issue)." [and then he appointed his said brother and three other persons named his executors, and added a clause of revocation of all former wills]; and the said will was attested by three witnesses. After the testator's death the said will was (according to the practice in Grenada) registered there, and the original was transmitted to one of the executors, who resided in Ireland, to be proved there.

J. A. Byrne, for the plaintiffs.—The second plea assumes that the old doctrine referred to in 1 Wm. Exors., 61, as to imperfect testamentary papers being aided by parol evidence, has not been entirely abolished by the Wills Act. That doctrine was in force when no form was necessary to the will, and when it was not necessary that the testator should sign the will nor sign it in the presence of witnesses; and it led to great inconveniences and required alteration, and accordingly the 9th and 13th sections of the Wills Act were introduced. The intention here of the testator was, that the residuary legatee should take everything except any legacies which might be filled up; but the testator never did fill up any of the blanks. The 15 Vict., c. 24, sec. 1, (Lord St. Leonard's Act) shows that the Court of Probate is to ascertain if the deceased meant the document to be his last will; and the question then is, whether it is apparent, *on the face of it*, that he so intended it? Before the Wills Act, devises of realty were in the nature of conveyances, and as such the proof was the same as of a deed. There was no case of parol evidence being admitted in explanation of the intent of deeds; and the same rule applied to wills, except in the cases of ambiguity upon the *factum* of the instrument. The only alteration made by the Wills Act as to wills of real estate, is providing that the will should speak as from the death, and the old law as to wills of realty has been applied to wills of personalty. The signature and due execution furnished clear evidence of the intention that all should go to the residuary legatee—*Goods of Corder* (12 Jur., 966); *Birch v. Birch* (ib., 1057); *Goods of White* (6 Jur., N. S. 808); *Sims v. Green* (1 Sw. & Tr., 401); *Roberts v. Roberts* (2 Sw. & Tr., 337).

R. Owen and *Dr. Walsh, Q.C.*, for the defendants.—Under the old law this plea would have been good—1 Wm. Exors., 313, and the cases cited there.

There is as much ambiguity here as in those cases; and parol evidence is admissible to show whether the testator did not mean this document only as heads of his will, or he might have drawn it as a model or precedent from the dictation of some person more conversant with wills, or he might have done it in jest; and if any possible case can be suggested which would account for it not being his will, it will sustain the plea. The real question is, if the Wills Act applies. The domicile of the testator appears to have been Grenada; he died there a parish priest, and, *prima facie*, the place of death is the domicile—*In the goods of Smith* (2 Rob., 332); *Burton v. Fisher* (Milw., 187); and the Wills Act don't apply to the colonies (2 Rob., 332). If, however, it does apply, still it only amounts to this,—that a will must be made with certain formalities, as directed by sect. 9, which is only negative, but does not say what shall be a valid will; and if it can be shown by parol evidence, and by the frame of the document, that it was not intended to be the last will, the law remains as it was before. It is manifest, on the face of this document, from the legacies in blank, that the deceased intended to give various legacies, and yet there is not a single blank in the entire will filled up; and if it be admitted to probate, the court will do exactly the reverse of what was intended by the testator. We admit that if a man intended to do the act, it is not open to us to show that he blundered in doing it; we must assail it as a whole. *Mathews v. Warner* (4 Vea., 186) is the leading case on the subject. The 13th sect. of the Wills Act merely annuls publication, but it does not make a will good which was not so before. Many cases occurred of wills failing for want of publication, which is one step short of this case; for if a man publishes his will, it is impossible to contend that he did not intend it to be his will.

Dr. Ball, Q.C., in reply.—The commencement of the will, "This is my last will," the residuary clause, the appointment of executors, and the clause of revocation, render this a valid will and parol evidence under any state of the law was inadmissible, Wms. Ex. 314. *Parson v. Law*, (1 Vea. 189). As to the point of domicile, that ought to have been pleaded; and if there were any difference in the law of Grenada, that also should be pleaded; but the will itself shows that the domicile was Ireland. He describes himself as of Ireland, but, at present at St. Davids, Grenada.

Cur. adv. vult.

12th July.—*KEATINGE, J.*—This case comes before the court on a demurrer taken by the plaintiffs to the second plea of the defendants. In the course of the argument it was contended by the counsel for the defendants, that the deceased must be treated as domiciled in Grenada, and that the English law does not apply to the will of a person so circumstanced. But there is no allegation in the pleas raising either of those points, and the case has been argued on the authority of English decisions. Now, the will in question, which on this argument, I consider as spread out, on oyer, on the face of the declaration, is very peculiar. The testator describes himself as "of Lisculeman in the County of Wicklow in Ireland, at

present in the parish of St. Davida, Grenada," he gives Ireland as his domicile, but adds, that at present he is at St. Davida. We all know that a domicile of origin continues until a new one is acquired, and his will, not only affirms that his domicile is Ireland, but the words added "at present," &c., mean that Ireland is his domicile, though he is now residing in Grenada. The plaintiffs sue here as legatees; by the will they were entitled to a legacy in reversion after their uncle's death, but a blank is left for the sum, and if that were their only interest, it of course would not be sufficient to enable them to sustain this suit, but there is a residuary clause, under which it is contended, that the words of it raise a question, whether they have not an interest in reversion after their uncle's death in the residue. Upon that, I am not bound to offer any opinion; it is enough for me to see that the words do raise that question; and to have that question decided, it is necessary that the document should first be established as testamentary. This is the first case since the Wills Act, of a will being impeached on the ground that it was only deliberative and imperfect. Before that Act, a will of personalty did not require any formality as to execution; it was sufficient under the Statute of Frauds, that it was in writing, and would be good without the testator's signature. This led to great uncertainty—in some cases the will was not signed by the deceased; in others it had an attestation clause, but yet, it was not attested, and in the case of an unexecuted or unfinished paper, it was necessary to make out that the deceased had come to a final intention respecting the document as his will, but that the defect of his not signing or finishing it, was caused by the act of God, and not to any change of intention on the part of the deceased; but though there are many cases of that kind, I have not been referred to any case in which a will of personal estate, formally executed, has been deemed deliberative. The cases which were cited do not refer to the case of a will duly executed. If the objection is founded on the will itself, that should not be brought forward by plea; but if the objection is founded on a co-temporaneous instrument, existing at the time of the will and forming part of it, such should be pleaded; but no such plea has been taken here, and, as I understand the plea in this case, it can only be sustained, and it is intended to support it by the admission of parol evidence; but I am of opinion that no such evidence would be admissible—*Walpole v. Cholmondeley* (7 T. R. 138). If all the words of the will are to stand—and by the plea they are admitted—and if there be no co-temporaneous document qualifying the will—and none such is pleaded—then the plea that the document was only deliberative and imperfect, and was not intended or published as the last will of the deceased, is in direct contradiction to the words appearing on the face of the will. The intent must be collected from the document, and since the Will's Act, no further evidence can be received. Even, before the Will's Act, this plea could not be allowed. That is settled by a case which was not cited during the argument, viz.—*Phillips v. Thornton* (3 Hagg. 752)—the principle of which applies very much to the present. Here as there, the execution or the ca-

capacity is not denied nor is fraud alleged; but this plea, as the allegation in that case, admitting the execution, says, that it was executed for another purpose, and in that case the allegation was rejected. But the intention must be collected from the document itself, if testamentary; whereas, if you are trying to establish a document as a will, but not testamentary on its face, you could give evidence of the intention. *Kings Proctor v. Daines* (3 Hagg. 218 & 231). The law as to wills of real estate, under the Statute of Frauds and the Will's Act is the same in all respects—*Newburgh v. Newburgh* (5 Madd. 364.) and referred to in *Langston v. Langston* 8 Bli. N. S. S. C. 223; *Müller v. Travers* (1 Moo. & Sc. 342.) If, indeed, a latent ambiguity, which is raised by parol evidence, exist, parol evidence also will remove it; but there is no record of any case as to real estate of an attempt to make out a will duly executed to be only deliberative, and the objection would be equally valid as to wills of realty as to those of personalty. Now, having regard to the blanks in this will, can I establish it in part and not in the whole? I cannot strike out the clause of revocation, nor the appointment of executors, nor the appointment of a residuary legatee—that clause may be so vague, that it may be held that nothing can pass under it, but with its construction I have nothing to do. But I hold that with an express appointment in this will of executors, with an express clause of revocation of all former wills, and with the appointment of a residuary legatee, I cannot pronounce against this will on the grounds suggested in this plea; and if it had not been demurred to, and if there had been the most abundant evidence of mistake on the part of the deceased, that case is beyond the reach of the court. I must, therefore, allow the demurrer, the costs of the plaintiff to be costs in the cause, and I reserve the question, whether the defendants shall not ultimately have to pay such costs.

Demurrer accordingly allowed.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

RE GUSTAVUS WILSON.

Proof by mortgagee under the arrangement clauses—Arrangement turned into bankruptcy—Rights of mortgagees.

Where a mortgagee makes his proof under the arrangement clauses, and the case was afterwards turned into bankruptcy, such proof under the arrangement will not be deemed an abandonment of his right as mortgagee, but, on the contrary, it will be deemed an establishment of that right where the mortgage property had been valued, and credit given for what it was worth, and this is not in contravention of the ruling of the Landed Estates Court, that a specific incumbrancer, proving in an arrangement matter as a general creditor, could not afterwards, when the case was turned into bankruptcy, claim on foot of his specific charge.

This case came before the court upon charge and discharge. The question at issue being the right of a

creditor to prove as mortgagee, who had previously made a proof under the arrangement clauses before the case had been turned into bankruptcy.

Heron, Q.C., on the part of the assignees, objected to the proof.

Kernan, Q.C., for Messrs. Smith and Dubedat and Messrs. Hone and Barton, creditors, appeared in support of it.

The facts appear in the judgment.

JUDGE LYNCH said, this case comes before me on the charge of Messrs. Smith and Dubedat and Messrs. Hone and Barton, claiming a right against the house of the bankrupt in Leinster street, by virtue of a mortgage executed to a trustee for them. In the course of the argument before me a decision was referred to respecting the effect of making proof in an arrangement proceeding, and the judgment of Judge Hargreave was cited, and many inferences drawn from that judgment, greatly extending the point ruled by him. By the kindness of the reporter the judgment has been furnished to me, and the only point ruled thereby was, that a specific incumbrancer, proving in an arrangement matter as a general creditor, could not afterwards, when the case was turned into bankruptcy, claim on foot of his specific charge. Any decision of Judge Hargreave must bring with it the greatest respect and authority, and had I now to decide that question I would consider that judgment as of the greatest weight in determining my decision. But in this case that judgment as pronounced, notwithstanding the interpretation put on it, seems to me not at all applicable. The case I have to deal with is a very simple one. The chargeants by their trustee have a legal mortgage on this house, and their rights are simple and clear in law, unless some equity exists to limit or deprive them of their legal title. The facts of the case are, that the chargeants proved their demand in the arrangement proceedings, not thereby relinquishing their mortgage, but, on the contrary, insisting on it, by valuing it and giving credit for what it was worth. So far, therefore, as the proofs in arrangement go, they establish an admitted claim on foot of this mortgage, and if the case so stood I think no question could arise such as has been argued; but no doubt the charge, as put in, stated that the valuation was confined to the furniture, and the dealing with the house seems, in some measure, to infer that the furniture was the only thing regarded by the chargeants as their actual security. By subsequent events they lost this security, and I am of opinion that it is owing to this circumstance I have now to decide this question at all. But having now to decide it I have before me a clear legal title, and the act of relinquishment or abandonment must be as clear to deprive the parties of their rights. The proof made does not show this, it shows the opposite, and the charge filed, I cannot forget, was a charge filed to establish that very right, and yet, it is contended, it shows an abandonment. In my opinion I would be giving too strict an interpretation to the language of the charge to hold it as establishing a case against a plain legal title. Therefore, in my opinion, I must hold this as a valid existing mortgage of the house. I will give no costs to the chargeants as the charge raised the question against themselves.

House of Lords.

EYRE v. BURMESTER.

Fraudulent release—Notice.

A conveyed to B certain lands on which C had a mortgage. B had notice of the mortgage before the completion of the sale to B; and A undertakes with B to obtain a reconveyance of the estate to B. A by fraud obtained release and a reconveyance of the lands to himself from C, of which fraud B had no notice. A dies seised of the estate and interest so conveyed to him by C. B as owner, after the death of A, proceeded to sell in the Landed Estates Court the estates conveyed to him. C filed an objection, alleging that the deed of reconveyance obtained from him by A was fraudulent and void, and claiming to be reinstated in his original position as an incumbrancer. Held—reversing the order of the Court of Appeal, approving of Judge Longfield declaring that the deed of reconveyance was void, not only as against it, but also against B; and that C was entitled to be restored to his rights under his mortgage deed.

It is not necessary to give any statement of the facts of this case, they are accurately stated in the judgments given in the House of Lords.

W. M. James, Q.C., Hugh Cairnes, with Beale, for the appellant; R. Palmer, Q.C., Serjeant Sullivan, Q.C., and Stephens for the respondent.

THE LORD CHANCELLOR.—My Lords.—The facts material for the decision of this appeal are few, and may be shortly stated. In October, 1854, the late Mr. John Sadleir made a mortgage to the appellant, Mr. Eyre, of certain estates in Ireland, to secure the payment by Sadleir to Eyre, of considerable sums of money. Afterwards, and in September, 1855, John Sadleir being very largely indebted to the London and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the Bank to secure such debt and further advances then made by the Bank to Sadleir. No mention was made by Sadleir to the Bank of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadleir to the Bank as free from any incumbrance. Before this mortgage to the Bank was completed by registration, of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agent's of the Banking Company, who thereupon refused to allow the arrangement between Sadleir and the Bank to remain unless he obtained a release from Eyre of the estates in question. This Sadleir engaged to do; and he prevailed upon Eyre to execute a deed of reconveyance to Sadleir himself of these estates in consideration of Eyre receiving from Sadleir other securities of equal or greater value. The substituted securities consisted chiefly of a large quantity of (apparently real) shares in the Royal Swedish Railway, and of a promissory note for £12,000 expressed to be made and signed by Mr. Dargan. But the shares were fictitious, having been fabricated by John Sadleir for the purpose; and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadleir upon Eyre, and by means of that fraud the release of Eyre's mortgage was obtained. The

release was contained in a deed dated the 5th, but executed on the 13th of October, 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadleir the estates comprised in the mortgage deed of October, 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October, 1855. After the execution of this deed of reconveyance to John Sadleir no further conveyance was made by Sadleir to the London and County Bank. The Bank was assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadleir until he committed suicide in the month of February, 1856; on that event the fraud of Sadleir was discovered. These estates have been since sold, by an order of the Incumbered Estates Court in Ireland. With respect to the proceeds of that sale a contest has arisen between Eyre and the London and County Bank. Eyre claims the benefit of his original mortgage, and insists that the reconveyance is void for fraud. The Bank claims the benefit of the reconveyance as purchasers for valuable consideration without notice of the fraud committed by Sadleir on Eyre, and on that ground the court below has given judgment in the Bank's favour. A purchaser for valuable consideration without notice will not be deprived by a Court of Equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre remained in Sadleir, and was never conveyed by Sadleir to the Bank. In answer to this objection the Bank insists on the estoppel created by the previous conveyance. The answer would be good as against Sadleir and all claiming under him. The estoppel created by the antecedent contract and conveyance of Sadleir would bind parties and privies—that is, Sadleir and those claiming under him; but the claim of Eyre is against Sadleir by paramount right to recover the estate of which he had been deprived by fraud, and Sadleir required no interest to feed his prior contract by virtue of that fraudulent transaction. It is urged by the respondents that the reconveyance, when made by Eyre, enabled Sadleir to obtain money from the Bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadleir, and was obtained by him by fraud and covin. There was no contract or direct communication between the Bank and Eyre, who acted with perfect *bona fides*. The Bank left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is. If (which is not proved) they had advanced money to Sadleir on the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only would still, in my opinion, have been subject to the superior equity of Eyre—whilst the estate remained in Sadleir so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the Bank; and the only foundation of the Bank's claim is the

mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir, but under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner and might at any time during the life of Sadleir, by bill in equity, have set aside the release and obtained a reconveyance of the estate and an interim injunction to restrain any alienation of it by Sadleir. This equitable title still remains unimpaired, and ought to be preferred to any claim by the Bank. I therefore advise your lordships that the orders of the court below be reversed, and that it be declared that the claim of the appellant to priority in respect of his mortgage ought to have been allowed, and that the case be remitted with that declaration to the Landed Estates Court. If the appellant has obtained any additional security under the agreement of the 6th of October, 1855, not comprised in his original mortgage, that must be given up or accounted for to the Bank.

LORD CRANWORTH.—My lords,—The deed by which the appellant conveyed to John Sadleir his equitable interest in the lands in question was executed by him on the 13th of October, 1855. Nothing was done altering the rights of the appellant and the respondents under the deed between the time of its execution and the death of John Sadleir, so that the question as to their rights may be considered as if it had arisen immediately after its execution. Suppose then that the appellant had on the day after he executed the deed discovered the fraud which had been practised on him, and had then immediately filed a bill against John Sadleir, and prayed that he might be directed to reconvey the property to him, what defence could Sadleir have set up to such a bill? I can discover none. The fraud practised on the appellant would certainly have entitled him to relief sought in such a bill unless Sadleir could have shown that there were rights in third persons which presented a bar to what would otherwise be a very clear equity. Suppose then that Sadleir had insisted on the claims now made by the respondents as precluding him from reconveying the estates to the appellant, and that they had consequently been made co-defendants, what case could they have made? They might have said truly that they had advanced a very large sum of money to John Sadleir on his assurance that he would, by way of security, convey to them the lands in question free from the appellant's incumbrance; and so that the conveyance executed by the appellant on the 13th of October, though made to John Sadleir, was in truth made to him on their behalf. But this would have amounted to no more than an allegation that what John Sadleir took by the conveyance in question he took as their trustee. The appellant might well assent to this proposition; for what Sadleir so took was only an estate liable to be defeated by the appellant on the ground of the fraud practised on him. In such a case the *cestui que trusts* can be in no better situation than their trustee. Whatever would be an answer to him would be an answer to them. When the appellant executed the conveyance to Sadleir all the advances by the Bank in respect of which they claim to consider it as having been executed for their benefit, had been already made. But they contend that the equit-

able rights of the Bank are to be considered as having arisen, not when the deed was executed, but at an earlier date, that is, at the time when the appellant agreed to execute it. They say, that on the faith of an assurance by the appellant that he would release the lands in question from whatever claim he had on them, they made the advances, or a part of the advances, for which they claim to have a charge on those lands; that on the faith of his promise to release the lands they altered their position, and so are equitably entitled to say that his conveyance was a conveyance made for their benefit. There can be no doubt, as a proposition of law, that if a person who has a charge on lands enters into a valid agreement with the owner to release his charge for the purpose of enabling him to raise money on mortgage, and on the faith of that agreement communicated to the mortgagees the mortgage is made, then the person who has the prior charge can never set it up against the mortgagees who has advanced his money in confidence that the prior charge would be released. But here there are no facts to warrant the application of such a principle. An attention to the dates of the various dealings among the parties makes this abundantly clear. Mr. Wilkinson's report to the Bank, which led to their advancing £95,000 to John Sadleir, was made on the 31st of July, 1855, and on that same day the directors agreed to make the advance. On the following day (i.e., 1st August) John Sadleir executed to the Bank twenty deeds of conveyance of his different Irish estates in trust for sale. Three of these conveyances were conveyances of the lands already mortgaged to the appellant, but they contained no reference to that prior mortgage. On the 13th of August, prior to which day £70,000, part of the £95,000, had been already advanced to John Sadleir. Stevens, one of the solicitors of the Bank, having gone to Dublin for the purpose of causing the twenty deeds to be registered, was informed by Kennedy of the existence of the appellant's mortgage, and he immediately communicated the information so received to Wilkinson, his partner, by letter, and to John Sadleir by telegraph, both of them being then in London. On that same evening John Sadleir wrote to the appellant, who was at Bath, proposing to substitute other securities for that comprised in his mortgage of the 20th of October, 1854, and suggesting to him that he should refer to Kennedy the task of carrying the proposed alteration into effect. On the next day (the 14th) the appellant sent John Sadleir's letter to Kennedy, who was in Dublin, together with a short letter from himself, saying little more than that Sadleir's letter would speak for itself. On the 17th Kennedy arrived at Bath, and there discussed with the appellant the proposed substitution of the new securities in the place of those which he then held; and late at night, on the same day, he reached London, and had an interview with John Sadleir. On the following day (Saturday, the 18th) Kennedy had a long interview with John Sadleir, when the terms of the proposed arrangement were fully discussed, after which he wrote a long letter to the appellant at Bath, detailing the particulars of the proposed new securities, and enclosing the form of a letter to be written by the appellant if he should decide on accepting the arrangement. The appellant

being satisfied with Kennedy's letter, wrote and sent to Kennedy on the 20th a letter according to the form which he (Kennedy) had sketched, and which is in the following words:—

"Bath, 20th August, 1855.

"Dear Sir,—Upon the terms stated in your memorandum of the 18th instant, I will release the Irish estates of Kilcommon, Skebane, Boggaun, Castlegrace, and Clonmore, from the indemnity given me upon them under the deed of the 20th of August, 1854, and I request you will prepare the necessary documents for my signature. Yours truly,

"J. B. Kennedy, Esq.

THOMAS EYRE."

The date, 20th August, 1854, given as the date of the deed is evidently a mistake for 20th of October, 1854. Up to this time the appellant had certainly done nothing binding him to release his original security; and before this time the whole of the £95,000 had been advanced by the Bank to John Sadleir or to his brother James, to whom he authorized the Bank to pay the money on his account. The evidence as to this part of the case stands thus: £70,000, part of the £95,000, had been advanced before Stevens discovered on the 13th of August the existence of the appellant's security. The remaining £25,000 was paid on the 15th to James Sadleir by direction of his brother John, in two cheques on the Bank, one for £10,000, the other for £15,000, both of which cheques were presented to and paid by the Bank on the 17th. It is certain, therefore, that no part of the £95,000 was advanced in reliance on the appellant's agreement to release his security, though, undoubtedly, the last £25,000 was advanced on the assurance of John Sadleir that he would obtain such a release from the appellant. This, however, could have no other effect than that of making John Sadleir, when he obtained a release from the appellant, a trustee for the Bank of whatever he so obtained. And this, as I have already said, would not have enabled them to set up against the appellant any ground of defence not open to John Sadleir himself. It was argued on behalf of the Bank that the whole £25,000 cannot be considered as having been advanced until after the 20th of August, when the appellant agreed to substitute the new for the old securities. The ground of this argument was, that though the two cheques for £10,000 and £15,000 were paid by the Bank on the 17th of August being three days before the appellant's engagement of the 20th, yet the £15,000 cannot be considered as having been really paid till some days afterwards. James Sadleir, who was employed by his brother John in applying the £95,000 in liquidation of numerous demands on him, applied the £15,000 cheque in taking up a promissory note for that amount which had been given by James to the Bank for securing the repayment of money advanced by them to him, and which fell due on the 17th. But the Bank, it seems, retained the note for some days afterwards by way of security, that the registration of all the deeds given to them by John should be duly completed in Dublin. And therefore it was argued the advance was not fully made till after the transaction relative to that note was concluded. I cannot attribute any weight to that argument. The note which the Bank held was given by James Sadleir ex-

pressly as a security for an advance to himself and to secure his own debt. The Bank refused to treat it as a matter in which John was concerned; and when, therefore, on the final advance of the £25,000 James allowed the Bank to continue to hold the note as a security that the deeds should all be duly registered, that was a mere private arrangement between him and the Bank, to which John was an entire stranger. It was a security given by James to protect the Bank, but in no respect altered the relation between John and the Bank. It must, not, however, be understood as being my opinion that even if the advance of the whole £95,000 had been subsequent to the appellant's agreement to release his security; but prior to the deed of the 13th of October, this would have destroyed the equitable rights of the appellant against the Bank. In such a state of circumstances the Bank might have had an equitable right to compel the appellant to perform his contract with Sadleir, that is to release his original security on having the new securities substituted. To this the appellant would not, I presume, have objected; but I see no ground for thinking that even in such circumstances the release fraudulently obtained without giving to the appellant the proposed new securities which constituted the consideration for his release, could be set up against him by the Bank any more than by John Sadleir himself. If, indeed, the release to Sadleir had preceded the advance of the money, and if that advance had been made on the faith of the title which the release gave, or appeared to give, to John Sadleir, the case would have been different. The Bank would then have altered their relation with John Sadleir, relying on what was in effect a representation by the appellant under his hand and seal, that so far as related to his security the title of John Sadleir was clear; and it would have been no answer to the Bank by the appellant to say that his execution of the deed had been obtained by means of a gross fraud practised on him. The Bank might truly say they were no party to the fraud, and had acted on the faith of a deed which he had executed, and which they had a right to presume, and did presume, had been fairly obtained from him. But this was not the real state of the circumstances. It is certain that all the money had been advanced long before the deed was executed, in reliance on John Sadleir's assurance that such a deed should be obtained. John Sadleir did obtain a release, but he did so by means of a fraud which made the deed void in equity as between him and the appellant; and the equitable right of the appellant to get himself restored to the situation in which he stood before the fraud practised on him is paramount to all other equitable rights which have not accrued to innocent persons ignorant of the fraud, and acting on the faith of the instrument executed by the appellant. On these grounds I am of opinion that the order of the Court of Appeal in Chancery in Ireland, bearing date the 13th of May, 1860, was erroneous and ought to be reversed; and that the court ought to have declared, in conformity with the appellant's petition of appeal to that court, that the appellant is entitled to a lien on the proceeds of the sales of the lands comprised in the mortgage of the 20th of October, 1854, according to the rights conferred by that deed, as if the deed of the 5th of October.

1855, had never been executed, and with that declaration ought to have remitted the matter to the Landed Estates Court.

LORD CHELMSFORD.—[His Lordship gave his decision on precisely the same grounds as the previous lords. It is not necessary to give them in detail here.]

LORD KINGSDOWN.—My lords,—I entirely agree with your lordships in this case. I had prepared, at some length, the reasons which have led me to the same conclusion; but after the full explanations which have been already given of this case, I think it better to spare your lordships the trouble of hearing the reasons.

The Solicitor-General.—Before the question is put perhaps your lordships will allow me to submit that it would be proper that there should be a declaration in your lordship's order in conformity with what fell from the Lord Chancellor as to the other securities which Eyre holds, and which he is to give up to us, because without that declaration the matter might be open to controversy.

Sir Hugh Cairns.—I quite recollect what the Lord Chancellor addressed to your lordships, and which was the view taken at the bar, as to the rights under the further securities; but I should humbly submit to your lordships that to include any declaration upon that subject in the present order would be very inconvenient if not unsuitable; for this reason, that the parties with whom that question must be considered are not here. My learned friend representing the London and County Bank, does not represent any party who would have an interest to raise, or be entitled to raise, that question. The parties with whom the litigation was last year before your lordships, are the Tipperary Bank and the representatives of Mr. John Sadleir. They are the parties interested in that question; and, of course, when they come forward here, subject to any consideration with regard to costs or otherwise, the observation which the Lord Chancellor threw out would conclude the substance of the matter; and, no doubt, any such benefit which we have under the deed would be given up.

LORD CHANCELLOR.—I do not advise your lordships to make any declaration upon that subject in the present order. The facts are not sufficiently before you to enable you to do so. At the same time the intimation that has been already given will, doubtless, secure to the London and County Bank an enquiry in the Landed Estates Court, of which one necessary consequence would be, that whatever the parties are now entitled to in respect of other securities which Mr. Eyre now holds will be provided for by that court. The declaration will be, that the appellant, Eyre, is entitled to priority over the London and County Bank in respect of his mortgage deed, and with that declaration the cause will be remitted to the Landed Estates Court.

Orders appealed from reversed; cause remitted with a declaration.

Rolls Court.

[Reported by William Woodlock, Esq., Barrister-at-law.]

BERNARD V. MEARA.—June 14, Nov. 4, 1861.

Specific performance—Covenant to plant.

The court refused to grant a decree for the specific performance of a covenant to plant and replant a particular place with forest trees, the contract being too uncertain to be enforced by a court of equity.

THIS was a cause petition praying, first, that the respondent, his agents, and workmen, might be restrained by injunction from felling, cutting, lopping, or injuring the trees which now stand upon the demised premises in the petition mentioned, and particularly upon that part thereof called "the Grove," or any of such trees or timber; and from injuring or removing any fences which enclosed or protected the said grove or any part thereof; and from placing cattle, sheep, or other animals in the said "Grove;" and from permitting cattle, sheep, or other animals to pasture within or enter the said "Grove." Secondly, that an account might be taken of all trees cut, felled, or lopped by the respondent within "the Grove," and of all trees broken, destroyed, or injured within "the Grove" by the respondent, his servants, workmen, cattle, sheep, or other animals, and of the value of all such trees; and that the respondent might be ordered to pay to the petitioner the amount of such value when ascertained by one of the Masters. Thirdly, that the respondent might be ordered specifically to perform his contract in reference to "the Grove," as mentioned in the lease stated in the petition, and might accordingly be compelled to plant or replant the said "Grove" with forest trees, and to make and keep proper fences round the said "Grove" for the protection of such trees. Fourthly, that the respondent might pay to the petitioner the costs of the matter, and for further and other relief. The petition stated that at the date of the lease, after stated, the petitioner was and still is seized of the lands of Loughnaboulia, otherwise Knockhill, in the King's County, comprised in the said lease. That on the top of a high hill, part of said lands, was a wood of about four acres in extent called "the Grove," planted by an ancestor of the petitioner, and which was a well-known land-mark, and an ornament to the petitioner's property, and served also as a shelter for cattle. That in the year 1851 there were several hundreds of fully-grown fir deal trees in said wood, but from the exposed position of the wood some of the trees had been injured by storm; and the farm being then out of lease and in the petitioner's actual possession, it was his intention to replant such parts of the said wood as required to be replanted, and fence it so as to preserve it from trespass; but before actually carrying out his said intention, John Meara, the respondent, proposed to become tenant to said lands, and his proposal, dated the 4th August, 1851, contained the following clause, viz.,—"The grove to be added to the farm, which I agree to plant with forest trees, viz., larch, fir, deals, &c., before the expiration of the year 1853, and to keep the fences around the said grove in good order, and to preserve the trees from trespass or damage by cattle." That

the petitioner was anxious to preserve the said wood in his own possession; but on the respondent stating that he did not wish anyone to have a right of passage through or trespassing on his farm, the petitioner accepted his said proposal; and thereupon the respondent entered into possession and did plant some fir trees, but did not fence the wood properly, and the result was, that the trees so planted were destroyed by the cattle almost as soon as they were planted. That in the year 1854 an engrossed form of lease was furnished by the respondent to the petitioner, but it did not contain any provision whatever as to the said wood or fences, and the petitioner did not take any notice of it. And in the year 1856 a draft of another lease was furnished on the part of the said respondent, which also did not contain any covenant in relation to the said wood or fences; but ultimately the petitioner's solicitor introduced into it the covenant on the subject afterwards set forth, and which was adopted by the parties. That accordingly by indenture dated the 23rd April, 1856, the petitioner demised to the respondent the lands of Loughnaboulia, otherwise Knockhill, and the lands of Cribby, containing 135 acres or thereabouts, plantation measure, including that part thereof called "the grove," containing four acres or thereabouts, plantation measure, all situate in the King's County, to hold to the respondent, his heirs, executors, administrators, and assigns from the 1st November then last, for three lives or 31 years, at the yearly rent of £100, with the usual powers of distress, and re-entry, and covenant for paying of said yearly rent and to keep the premises in repair; and also the following covenant on the part of the respondent, viz.,—"That he, the said John Meara, his heirs, executors, administrators, or assigns should and would within the period of twelve months, to be computed from the day of the date of the said lease, plant with proper forest trees all such parts of the said thereby demised and granted lands and premises called "The Grove," as had not then already been planted, and should and would, within the time aforesaid, replant such parts thereof whereon trees then stood or were planted, and which trees had been injured or destroyed. And also that he, the said John Meara, his executors, administrators, and assigns, should and would, during the term thereby granted, well and sufficiently repair and keep in repair the fence or fences whereby the said lands known as "The Grove" was then or should or might thereafter be enclosed so as at all times during said term to preserve and keep said trees which then were or should be thereafter growing or planted as aforesaid from all waste, spoil, damage, or destruction whatsoever." That after the execution of said lease the respondent did, as the petitioner believed, replant a small portion of the said wood, but not near the whole thereof; and the respondent so neglected the fences that all the young timber planted had been, with very few exceptions, completely destroyed; and the respondent also had from time to time cut down some of the large full grown trees and used same for his own purposes. That the petitioner was ignorant until recently that this misconduct on the part of the respondent had been carried to so great and injurious an extent: but having been within a fortnight before the filing of the

petition informed that great injury was being done to the plantation by cattle and otherwise, the petitioner, with Mr. Thomas Manifold, his agent, had on Friday, the 1st of March, 1861, proceeded to the said "Grove" and there discovered not only the fences broken down and injured in many places, but actually a breach regularly made for the egress and regress of cattle, with a barrier across it to prevent their getting out; and he found ten head of young cattle then grazing in the said wood; he found all with few exceptions of the young trees completely eaten down and destroyed; he found that not more than one-third of the wood had ever been replanted, and he found the stumps of twelve or fifteen of the large trees which had been evidently cut down within a very few days, and great numbers of other stumps of trees which had also been cut down within a recent period and since the date of the said lease. And he was informed by the herd of John Meara that sheep had been regularly driven in to feed in the said "Grove" during the winter, and had only recently been taken from it; and the said herd also admitted to the petitioner that timber had been cut down. And the petitioner had been informed, and believed, and charged that at the least fifty large trees of considerable value had been cut down and drawn away recently; said John Meara and the petitioner was afraid that others would be cut unless the respondent was restrained from so doing. That the specific performance by the respondent of his contract in the said lease contained of planting, fencing, and preserving "the Grove" was of importance to the petitioner's property, and the neglect and non-performance thereof would not be compensated to the petitioner by fifty times the pecuniary damages that could be expected to be recovered in an action at law; and the loss and injuries which the petitioner's property would have sustained at the expiring or determination of the said lease would be of such a nature that they could not be made good by money. The petition then prayed as already stated. The respondent by his answering affidavit stated that he did within twelve months after the execution of his lease plant every part of "the Grove" with forest trees as required by the covenant; that the fences were at the time of the execution of the said lease in good repair, and that respondent had kept them so ever since. And he said that it was wholly untrue that he neglected said fences; and that it was not true that all or any of the said timber planted in "the Grove" was destroyed; and he said that he did not fell or cut down any large or full-grown trees on said demised premises, or use any of them for his own purposes. That the petitioner resided within three miles of "the Grove" and frequently passed by it. And respondent therefore did not believe that the petitioner could have been ignorant of any misconduct in reference to the said "Grove," if such there were; but respondent denied that there was any such misconduct on his part, or any wilful waste or great injury done to the said plantation. And he said that petitioner's agent having on one occasion, in the year 1858, stated to respondent that petitioner was displeased with the state of the fence of said "Grove," respondent requested said agent to accompany him to said "Grove" for the purpose of inspecting said fence, which he accordingly did; and having inspected it, he

then and there admitted to respondent according to the fact and truth that said fence was in proper repair. But respondent further said that about a fortnight previous to the 1st of March then last an opening was for the first time made in the wall of the "Grove" for the purpose of admitting sheep to eat the grass, but the sheep rejected the grass and did not again enter the grove; and that save said opening, every other part of the fence of said "Grove" was then and now is in thorough repair, and no part thereof broken down or injured. And respondent denied that any of the young trees in said "Grove" were eaten down or destroyed by cattle; and he said that it was untrue that only a third thereof had been replanted by respondent, for he said that in the year 1856 he purchased upwards of two thousand forest trees, and therewith planted the whole "Grove" in said last-mentioned year and took proper precaution to protect the young trees; but owing to the exposed position of the place, and the soil being in many parts not three inches deep, several of the young trees became stunted, and some perished, but none of them were wilfully destroyed or suffered to be injured; and he said it was true that there was a barrier across the said opening to prevent the access of any cattle which would be mischievous; and the injury, if any, to said fence by making an opening was exceedingly trivial; and immediately after the service of the injunction in the matter he caused the opening to be stopped up, and same had since continued and now was in as good preservation as every other part of said fence. And respondent said that the trees in "the Grove" were of such a size that the admission of a few sheep such as were admitted by respondent's herd could do them no harm whatever; and he said that what were in the petition called ten head of young cattle were only a few young calves which deponent's herd let into the plantation merely to eat the grass therein; and they did it no injury whatever on the only occasion on which they were there, and had not since been allowed to go there. And it was not true that sheep had been regularly or at all driven to graze there in the winter, though it was true that a few sheep had been let in there to try if they would eat the grass there, which they rejected as already stated, and were not again admitted, and while they were there did no injury. He also said that it was wholly untrue that any large trees or any trees whatever had been cut down, and that the stumps of twelve or fifteen trees referred to in the petition were the stumps of decayed trees which were blown down by storms; and he submitted that he would have a right to use them, but said that in truth he had not done so, but believed that they were cut and carried away for firing by his caretaker; and the other stumps referred to in the petition were also stumps of trees which from time to time had been in like manner blown down by storms. He then said that the statement alleged to have been made by respondent's herd as to trees having been cut, if made was untrue, and positively said that no timber or trees whatever had been recently or at all cut down or carried or drawn away from said plantation by the respondent, nor were any cut down there by anyone else with the respondent's permission or to his knowledge; and he said that the value of all the trees which had been

blown down or carried away was not two pounds. Finally, after some other matters, he submitted that there was no ground for the account sought by the petitioner, and that no case had been made upon which the court could decree a specific performance of any part of the covenant mentioned in the petition. There was a good deal of evidence gone into upon both sides with reference to the amount of damage done and the state of the trees, but it seems unnecessary for the purposes of this report to set that evidence out.

Brewster, Q.C., Warren, Q.C., and Levinge, for the petitioner.

Serjeant Sullivan, J. E. Walsh, Q.C. and R. Ferguson, for the respondent.

The following cases were cited:—*Brace v. Wehnert* (25 Beav. 348); *Rayner v. Stone* (2 Ed. 128); *Lumley v. Wagner* (1 De G. M.N. & Gord. 604); *Taylor v. Portington* (7 De G. M.N. & G. 328); *Sanderson v. The Cockermouth and Workington Railway Co.* (11 Beav. 497); *Storer v. Great Western Railway Co.* (2 Y. & Col. Ch. 48); *Flint v. Brandon* (8 Ves. 159); *Story, Eq. Jurispr. s. 716*.

Nov. 4.—THE MASTER OF THE ROLLS delivered a written judgment, in which having stated the pleadings and the facts of the case, he proceeded to observe that the lease contained no clause of re-entry upon breach of the covenant in question. With respect to the first part of the relief prayed there was no difficulty, and the injunction sought would be granted. With respect to the second head of relief it was impossible to form any opinion as to the amount of the damage which had been sustained. A reference would be useless. The proper course to take would be to let the case stand over for an action to be brought by the petitioner against the respondent. The part of the case which involved most difficulty was the third head of relief prayed, namely, that which prayed for specific performance of the respondent's contract, and accordingly that he should be compelled to plant or replant "the Grove" with forest trees. There was no precedent for a decree of that kind, and he should point out the great difficulty which would arise in enforcing a decree of that nature. His Honour then referred to and commented upon the authorities—*Rayner v. Stone*, *Lumley v. Wagner*, and *Taylor v. Portington*. In Fry on Specific Performance, p. 19, the rule was laid down that, subject to certain exceptions, the court will not interfere in cases of contracts to build or repair, both because specific performance is "decreed only where the party wants the thing in specie, and cannot have it any other way," and because such contracts are for the most part too uncertain to enable the court to carry them out; and he refers to the case of *The South Wales Railway Co. v. Wythes* (1 K. & J., 186). His Honour then referred to *De Mattos v. Gibson* (4 De G. & J., 276), and said he was of opinion that the court could not in the present case give a decree for specific performance, the contract being too uncertain. What was meant by the term "forest trees?" Lord Coke in 1st Inst., 53 a, stated what were timber trees, enumerating oak, ash, and elm; and Mr. Hargreave in note 10, cited a case showing that beech and white-thorn might be timber by the custom of the country.

Viner's Abridgment, title, Trees, might also be referred to. There also the agreement of the respondent upon which the covenant in the lease was founded was stated to be "to plant with forest trees, viz., larch, fir, deals," &c. What was the meaning of the word &c.? Suppose the entire of the Grove was planted with beech, should he issue an attachment because nothing else was planted? Again: What number of trees altogether should be planted? How many were to be planted "on all such parts of the thereby demised premises as had not been already planted," and how many on the other parts described as "such parts thereof whereon trees then stood or were planted?" Was the court upon an attachment motion to inquire what trees were planted before the lease was made, and what injury had since been done? The observations of Lord Henley in *Rayner v. Stone* were very apposite to the present case. He might here make an observation very like those of Lord Henley. What might be forest trees in one place might not be so in another. He would only decide in the present case that the covenant in the lease was too indefinite to be carried into execution. The circumstance too that there was no precedent for the decree sought was one of great importance. It was right to observe that the difficulty in which one of the parties was placed arose not from any defect in the law, but from the fact that there was no clause of re-entry in the lease upon breach of this covenant. If there had been such a clause the petitioner might have re-entered and planted "the Grove himself," and the respondent would have had no relief against him in equity for so doing—*Hill v. Barclay* (16 Ves. 402); S. C. (18 Ves. 56).

Consolidated Chamber.

[Reported by William Woodcock, Esq., Barrister-at-law.]

[CORAM FITZGERALD, J.]

PARKINSON v. COOK.—July 30.

Setting aside summons and plaint—24 & 25 Vict. c. 43.

Summons and plaint set aside, it being brought under the Summary Procedure on Bills of Exchange Act, and containing counts for money lent, money paid, also on an account stated.

David Plunket moved to set aside the summons and plaint in this case.—The action was brought under the Summary Procedure on Bills of Exchange Act; but the summons and plaint, besides a count upon a promissory note, contained counts for money lent, money paid, and upon an account stated.

There was no appearance for the plaintiff.

The motion was granted.

[BEFORE KEOGH, J.]

MARTIN v. WILSON.—August 2.

Practice—Security for costs—Summary Procedure on Bills of Exchange Act, 1861—Affidavit of merits.

A motion to restrain the plaintiff from proceeding with an action under the recent Bills of Exchange

Act until he should give security for costs, the plaintiff being out of the jurisdiction, must be grounded on a full affidavit of the defence, and not on the mere statement that he has a valid defence on the merits. And, semble, the defendant should previously have had liberty to appear and defend.

F. Smythe, for the defendant, moved that the plaintiff should be restrained from further proceeding with his action until he should give security for costs. He moved on the common affidavit, stating that the plaintiff was resident out of the jurisdiction; and that the defendant had a just and valid defence at law on the merits. Liberty had not been applied for to appear and defend the action.

Dames, for the plaintiff.—By reason of the Summary Procedure on Bills of Exchange Act, 1861, 24 & 25 Vict. c. 43, under which this action has been brought, this motion is premature, as the defendant has not yet got leave to appear and defend; or, if not premature, the affidavit of merits is not sufficient. The affidavit is only the ordinary one—"that he has a just and valid defence at law on the merits;" but that is not sufficient under this Act of Parliament to sustain a motion for liberty to appear and defend. Here the twelve days allowed by the Act for the defendant to apply for leave to appear have already expired, and yet he has not made any such application; and if this motion be entertained, the very mischief mentioned in the preamble of the Act, that "*bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon," will still remain, as the defendant may not in fact have any defence at all; and yet the action will, by his motion, be indefinitely restrained. No case has been hitherto reported on the point in England.

Smythe, in reply.—The Bills of Exchange Act, 1861, does not touch this motion. It is a motion under the old practice for security for costs, the plaintiff being out of the jurisdiction, and that motion must be made before defence. And as the appearance and defence are now filed together, the defendant should make this motion before he appears; and as this case is in the Queen's Bench, the affidavit relied on is the proper and usual one.

Fitzgerald, J.—I am of opinion that the objection made to this motion is well founded. I happen to know that it was the original intention of those who introduced the corresponding Act of 1855, which applies to England, that it should be applicable to and include all written contracts which the defendant had vouched by his signature; but in its progress through Parliament the bill was limited to bills of exchange and promissory notes; but the intention was, as appears from the Act itself, to facilitate the holders of those instruments in recovering the amount. And the second section requires the defendant, if he, within twelve days from the service on him of the writ of summons and plaint, applied for leave to appear and defend the action, either, to pay into court the sum claimed by the summons and plaint, or to make an affidavit satisfactory to the judge which will disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove considera-

tion or such other facts as the judge may deem sufficient to support the application. But if I yielded to this motion the result would be that the defendant would restrain the plaintiff from proceeding with his action; and yet he might never be permitted to defend the action. If he applied to a judge for liberty to appear and defend, his affidavit must disclose a legal or equitable defence or such facts as I have mentioned, and therefore an affidavit to ground a motion to restrain the plaintiff until security be given for costs should be commensurate with that. But as this is the first case under the recent Act I say no rule on the motion, and I enlarge the time for the defendant applying for leave to appear and defend until this day week, so that he may, if he thinks fit, apply on a proper affidavit for such leave, and also for security for costs.

LYNCH v. THE LIVERPOOL AND NEW YORK AND PHILADELPHIA STEAM-SHIP CO.

Practice—Postponement of trial—Absence of material witness after undertaking to accept short notice of trial.

Notwithstanding that the defendant on a motion for further time to plead, has undertaken to accept short notice of trial, the trial will be postponed on the ground of the absence of a material witness.

Macdonagh, Q. C., moved for the defendants, that the plaintiff be restrained from going to trial at the ensuing assizes at Londonderry. The action was for damages for an alleged refusal to carry the plaintiff from New York to Dublin, though the passage-money, viz., £6 6s., had been paid on the 6th July, 1861. The action was commenced in June, 1862, and the writ served the 5th July, 1862. The affidavits relied on stated that Samuel Nicholson, who had been the defendant's booking-clerk at New York, was absent in Canada, and could not be had now to produce at the trial; and the defendants were willing to change the venue to Dublin, and a trial could be had after Michaelmas Term. The cases are collected, 2 Arch. Pr. 1282, 1291.

T. Purcell, for the plaintiff.—The defendants on getting further time to plead undertook peremptorily to accept short notice of trial—not, if necessary,—and then all the facts were before the court. Besides, it is not alleged when the agent of the defendants is to return to New York, and the postponement may be indefinite.

Fitzgerald, J.—I think that the defendants are entitled to the order, but I will change the venue to Dublin, and postpone the trial until the sittings after next Michaelmas Term, the defendants paying the costs of the motion.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

RE THOMAS HUGHEF.—July, 1862.

[BEFORE LYNCH, J.]

Practice of the office of Inland Revenue—Bonded stores—Delivery orders—Stoppage in transitu—11 & 12 Vic. cap. 122, s. 4.

The 4th section of 11 & 12 Vic. cap. 122, refers only

to contracts to be recognised by the excise, as enabling parties to deal with whiskey in bond, and still to be continued in bond in the changed proprietorship consequent on the contract, and that it has nothing to do with the immediate delivery to the party purchasing. Possession of bonded whiskey from the vendor to the vendee is transferred by the lodgment of the delivery orders, with the bonded storekeeper, without any transfer, being made by the excise officers in their books, and after the lodgment of the delivery orders, the right of stoppage in transitu, on the part of the unpaid vendor, is gone; the goods after the lodgment of the delivery orders being regarded by the excise officers as the property of the party named in the delivery orders, and that the whiskey would be delivered to the party named in such order, notwithstanding a countermand from the distiller.

Where a third party purchases bonded whiskey from a trader who afterwards becomes bankrupt, and who has acquired his title thereto by the lodgment of delivery orders, and that third party does all he can to get possession of the property before bankruptcy takes place, his title will prevail against the assignees.

THIS case had been previously before the Court of Bankruptcy, when a judgment to the foregoing effect was given by the Hon. Judge Lynch from which there was an appeal. The Court of Appeal remitted back the case to the Bankruptcy Court, with a view to obtain additional evidence as to the practice of the Inland Revenue Office with regard to delivery orders.

Dillon appeared for Messrs. Perse, the distillers, who claimed their right to stop *in transitu*.

Kernan, Q. C. was for the assignee.

Dowse, was for Mr. Crowe, a third party who purchased ten puncheons of the whiskey in question from the bankrupt.

The following cases were cited:—*Croker v. Lawder*, (9 Ir. L. Rep. 21); *McEwen v. Smith* (2 H. of Lds. Cases, 309); *Tanner v. Scovell* (14 Mee. & Wel. 28); *Haig v. Wallace* (2 Hudson & Brooke, 671); *Orr v. Murdock* (2 Ir. Com. Law Rep. 9.) The 11 & 12 Vic. cap. 122, s. 4, was relied on, on the part of the distillers. The facts appear in the able judgment of Judge Lynch.

LYNCH, J. in delivering judgment, said,—This case has been remitted to this court by the Court of Appeal to be reconsidered by me upon such further evidence as the parties might produce before me, “as well in relation to the duty of the office of Inland Revenue, in whose custody the whiskey was, as also to what took place on the occasion of the production of the delivery orders to such officers.” Under this order the case was again heard by me. The parties have gone into further evidence, and the whole matter has now been argued before me fully and ably by counsel on both sides. For the Messrs. Perse, Mr. Dillon has very ably contended before me—in the first instance, that there was no complete sale of the whiskey to Hughes, because by the provisions of the statute, 11 & 12 Vic. c. 122, s. 4, certain forms are prescribed for contracts respecting whiskey in bond, which admittedly were not complied with in this case. I stated my

opinion before, and to that I now adhere, that this clause of the statute only refers to contracts to be recognised by the excise as enabling parties to deal with whiskey in bond, and still to be continued in bond in the changed proprietorship consequent on the contract, and that it had no object to prevent the contract of parties respecting whiskey to be immediately delivered to the party dealing. I think the whole scope of the enactment shows this to be the natural sense of the clause, and the practice of the trade ever since shows that this has been the construction of the section always received and acted upon. On this point I therefore adhere to my former ruling, and I beg to add that, unless the Court of Appeal concurred with me on this point, it would seem to me to have been a needless act to send back the case for further evidence, it being plain and admitted that these forms were not complied with; and this point, if decided with Mr. Dillon, necessarily ruling the case in his favour. I may add, too, that in *Orr v. Murdock* this point was ruled as I have ruled it. It is next insisted on by Mr. Dillon, on behalf of the Messrs. Perse, as to the whole fifteen puncheons of whiskey, that, although by the contract the property in them passed to Hughes, yet that, on the facts disclosed, there was not such a complete possession in Hughes or the assignees at any period as would prevent the Messrs. Perse from exercising their right, as paid vendors, to stop the goods *in transitu*, or to insist on their lien on the goods in question. On this branch of the case, further and very material evidence has been laid before me, and I will now shortly state the facts of the case as now before me. The Messrs. Perse, being distillers in Galway, and having whiskey in bond there, entered into a contract with Hughes to sell to him the whiskey in question, and to send same for him to Ballina, where Hughes lived. This contract was made at the short price, and the duty was not to be paid until it reached Ballina, and until Hughes had occasion to draw it out of bond in the course of his trade. The Messrs. Perse having completed this contract in pursuance of its terms, had the whiskey forwarded to Ballina, and, the duty being unpaid, it still remained there in the name of Perse & Co. But the Messrs. Perse forwarded to Hughes delivery orders, directed to the warehousekeeper at Ballina, directing him to deliver to the order of Hughes the specific puncheons of whiskey sent by them to his care. The whiskey so sent to Ballina Bonded Warehouse remained there in Perse's name up to the period of Hughes' bankruptcy. At the former hearing I stated that I considered the evidence somewhat loose in the case, and I invited the parties to lay before me, if they thought proper to do so, more specific evidence as to any custom of trade relied on, or any practice in the Custom House, or any particular acts respecting this whiskey. This was not done at the time, but now, the case being remitted back here, further evidence has been laid before me. Two officers from the Inland Revenue Office, in Dublin, have been examined, and also the officer in charge of the Ballina Bonded Warehouse. Their evidence is now on the files of this court *in extenso*, having been taken in shorthand, and I will only state what I consider the substance of that evidence bearing on the questions I have to decide. It appears from the evidence of all the officers that their delivery orders form

a complete title for possession in the person to whom they are given by the distiller—that is, the revenue officer acts on them, allowing the party named to pay duty and draw the whiskey without any further act being done by the distiller. The Dublin officers state a practice in their office, to enter a marginal note of the party in whose favour the delivery order is made out, but, as far as these officers in their subordinate stations are concerned, it seems that they recognise a countermand of these orders by the distiller, or indeed by any party alleging an adverse title to this extent, that when such countermand or claim is received they feel it their duty to refer the matter to a superior department of the revenue, by whose order only they then will act. No evidence was given as to the manner in which such countermands are dealt with by the superior department. It appears upon the evidence of Mr. Preache, the officer at Ballina, that he never made any entry of these orders, or noticed them until they were brought to his office to be acted on; but when they were brought to him to be acted on, his practice was to treat the delivery order as conferring an absolute title, and he would act on it notwithstanding any countermand by the distiller. I refer particularly to his answers to queries 133, 134, 135, 138, 140, 143, 146, 150, and as far as his knowledge goes, and within his practice, he states that the delivery order was regarded by him as conferring so absolute a right, that he acted on it notwithstanding the countermand of the distillers, or although a delivery order of late date was produced. The officer then gave evidence as to the particular acts done respecting the two cases—namely, the five casks, the title to which I ruled to be with the assignees, and the ten casks, which I ruled to belong to Crowe, and these are material distinctions in the facts respecting them. The former five casks were portions of large quantities contained in two delivery orders; these delivery orders had been received by the officer and filed by him, and on his evidence he held them to be indefeasibly in possession of the person in whose favour the order had been drawn. As to the five casks, the evidence given seems to me to make the case greatly stronger than it was at the former hearing, and as to them I see reason still further to be confirmed in the opinion I formerly announced. But respecting the ten puncheons, the case stands on the more general evidence above stated by me. No act was done by the officer by way of atonement as to them; they still remained in Messrs. Persse's name, to be dealt with by the officer as through an agency derived from them, and legally there remained certain liabilities attaching on Messrs. Persse & Co., by reason of their custody by the officer of excise, as their goods. I am not unmindful of these difficulties, not entirely removed by the evidence given here. On behalf of Crowe, his able counsel has not insisted on a distinct legal title by usage of trade or otherwise, as giving him a title against Messrs. Persse otherwise than as he stands with a claim against the goods, if they belonged to Hughes. Therefore, in dealing with the Messrs. Persse's claim in this case to the ten puncheons, I need only regard the title of Hughes by virtue of the delivery orders to him. In saying this, I am not to be understood as at all dealing with the question

raised in *Croker v. Lawder* (9 Ir. Law Rep. 21), no similar question having been raised in the evidence, or argued before me. The only question I have to consider is the title of Hughes by virtue of the delivery orders to him. The case of *M'Ewen v. Smith*, (2nd House of Lords' Cases, 309) is, of course, of the highest authority; and also the case of *Tanner v. Scovell*, (14 M. & W. 28), is a most important case, and both of them have been most ably expounded to me by Mr. Dillon. Of course, it would make my judgment too prolix to deal with these cases in all their minute differences from the case before me, and I read them also in connection with the three Irish cases on this subject, viz.—*Haigh v. Wallace* (2 H. & B. 671); *Croker v. Lawder*, and *Orr v. Murdock* (2 I. C. L. Rep. 9); and I will endeavour out of all these cases to deduce the proposition on which I found my judgment in this case. I think it necessary in this case to have regard to the nature of the property dealt with, and the nature of the custody in which I found it. The article in question is one respecting which a very extensive trade is carried on in this country; it is subject to very high duties, and the Crown, for security of their duties, has made provision for the custody of the article, and while the duty is unpaid, it remains warehoused by the Crown. The general wholesale dealing with regard to this article is at the short price, and the whole of this extensive trade is carried on thus by the parties, the goods remaining in the custody of the Crown until it is finally reclaimed, by payment of the duty and dealt with for retail purposes. It is most important to this very extensive trade, if we can do so, to fix what acts make an indefeasible title in the vendee, and at what period in carrying out such contracts the distillers lose either the lien for their price, or the right to stop *in transitu* if such be the nature of the remedy. The case of *Haigh v. Wallace* has ruled that such a delivery order as has been proved here, having been shown to the officer and entered by him in his books, rendered the possession sufficiently acquired to prevent any rights in the distiller to countermand his order, or stop the goods as *in transitu*. And the case of *Orr v. Murdock* fully recognises the ruling in *Haigh v. Wallace*, and adopts it; but this last case, in the judgments given, shows that the Court of Exchequer considered the giving of the order itself as being the delivery of the goods mentioned. The goods are in possession of the Crown, held to secure the duties—the distiller has not actual possession of them—that possession so remains until the duty is paid, but subject to that possession for its purpose of Crown security, the parties deal with the article; and it seems to me not unreasonable, nor in contravention of any decided cases, to hold, as has been held now for a series of years in Ireland, that giving to the vendee, addressed to the storekeeper, their delivery orders, is intended by the vendor to extinguish every claim he had against the article so held by the public officer, and that by giving it to conclude his bargain, he does every act in his power to divest his title. He never can do this to the prejudice of the Crown. The Crown has the whiskey, and won't part with it until the duty is paid. Their possession is irrespective of any rights of ownership, and the cases differ entirely

from a custody by a private agent of the vendor. It is for the distiller's own convenience to have this power to give an indefeasible title, without the necessity of paying the duty on the whiskey—thus, as it were, abstracting the whiskey at short price, as the article disposed of between buyer and seller, and regarding the Crown's possession of the article as not a possession of the one more than the other, but of either, according to their agreement, which agreement is thus shown by the delivery order, to vest possession (of course he paying duty) in the vendee; thus, leaving the possession a naked power for securing duty to the Crown, but not leaving any right in the vendor consequent thereupon. The evidence given in this case by the officer dealing with these particular orders (as far as it can do so) shows this to be the recognised course of dealing with these orders by him, and he always recognised these orders as conferring the indefeasible title, not subject to be countermanded nor affected in their operation by any subsequent order. Every act of the distiller has been done to complete his contract, the order to the vendee; every other act is between the Crown and the vendee; no *transitu* remains, the goods are at their destination, and the distiller gives up all claim of lien, by giving the absolute delivery order. I think this view is not in contravention of any decision to which I have been referred; and the cases of Haigh, and Wallace, and Orr, and Murdoch are analogous; and as far as I see, I only sanction the practice of this trade, for many years in this country, by thus giving effect to Hughes' title. I therefore rule that Hughes had a completed title, incapable of being defeated by any claim of the Messrs. Persee; but as Crowe had bought this whiskey from Hughes for valuable consideration, paid by him, and as Crowe did all in his power to procure the possession of them, pursuant to his contract, I rule as before, that Crowe has a just claim for the ten puncheons, and accordingly I rule with him as before with regard to them. I thus maintain my former ruling in this case, and I order that the Messrs. Persee shall pay the costs in this court. The order of the Court of Appeal referring this case back to me, leaves the costs of the appeal in my discretion; I have therefore to deal with them; and seeing that the Court of Appeal deemed further evidence necessary, and considering that all parties were in fault, in not originally perfecting the case in this court, I order the parties respectively to abide their own costs of the appeal.

Attorney for Messrs. Persee—Mr. V. B. Dillon.
 „ for Crowe—Mr. McCormack.
 „ for the Assignees—Mr. Oldham.

[BEFORE BERWICK, J.]

RE LUCINDA ROBERTS—July 1862.

*Trading by administrator debts due by intestate—
 Order and disposition—Rights of creditors and of
 trustees of marriage settlement—Creditor claiming
 under an administration suit.*

*Where a trader dies owing debts to a considerable
 amount, and leaving assets, and his widow continues
 the trading in the same way as her husband did,
 and contracts new debts on her own account, and*

*in the mean time takes out administration to her
 husband's assets, those assets will be liable in the
 first place to pay the debts due by her husband, and
 although they remain in her possession a considerable
 time, and a large portion of them are sold to
 pay a bond debt due to the trustees of the marriage
 settlement of the bankrupt, they will not be held to
 come under the order and disposition clause, but as
 far as they have been ascertained to belong to the
 deceased, they will be applied to the payment of this
 debt where there has been no unnecessary delay on
 the part of the trustees.*

Where a suit is instituted in Chancery for the administration of a deceased trader's assets, and one of his creditors files a claim, it will not be deemed an election, or prevent the trader from proving on the estate of his administrator who becomes bankrupt.

It appeared that the husband of Mrs. Roberts had been a wholesale and retail grocer and wine merchant in Abbey-street, and having died in the latter end of December, 1860, his widow carried on the business for some months afterwards, paying a portion of the debts which were due at the time of her husband's decease, and contracting new debts for goods purchased in the way of her trade. On the occasion of her marriage there had been a settlement under which trustees had been appointed, with power to raise the amount of a bond passed to them by her husband for the fortune he received with her, and containing certain trusts with regard to the disposal of it. Shortly after the death of Mr. Roberts, the trustees became anxious to raise the amount of the bond, and they applied to Mrs. Roberts for payment of it, and threatened that, in the event of their not being paid, they would issue execution. Mrs. Roberts was unable to pay in cash, but having a large quantity of wine, and being about to get out of the wine trade, she arranged that the wine should be transferred to Messrs. Stokes, brokers, to be sold by them, and the proceeds handed to the trustees of the settlement in order to liquidate their demand. It was alleged that this transfer was an act of bankruptcy, and a petition for adjudication was presented for the purpose of overreaching this transfer, and adjudication obtained.

Against this adjudication, *Levy* for the bankrupt shewed cause; *Heron, Q.C.*, for the assignees, when Judge Lynch confirmed the adjudication, and the bankruptcy proceeded. The case now came before Judge Berwick upon charge and discharge.

Heron, Q.C. and *Curran* appeared for the assignees, *Kernan, Q.C.* and *Purcell* for the trustees of the settlement.

They cited *Ex parte Thomas* (3 M. D. & D., 40); *Ex parte Ellis* (1 Atk. 101); *Bennett v. Davis* (2 P. Wms. 316); *Butler v. Richardson* (Amb. 74); *Vines v. Caddell* (3 Esp. 88); *Fox v. Fisher* (3 B. & A. 135.)

JUDGE BERWICK delivered the following able judgment. He said, in this case a charge has been filed by the assignees of the bankrupt, claiming to be entitled to the proceeds of the sale of a large quantity of wines which were sold by auction on the 2nd of August last by the firm of Stokes & Co., commercial brokers, to whom they had been transferred shortly before by the bankrupt for the purpose of sale, with directions to hand over the proceeds to the trustees of

her marriage settlement, to be applied in discharge of a judgment obtained by them against her late husband William Roberts, in Michaelmas Term, 1860, on a bond of the 14th April, 1839, executed on her marriage, and intended to secure the sum of £1200 for the benefit of herself and her children. The net proceeds of the sale amounted to £1071 3s., and Stokes & Co. had paid over this money to the trustees of the settlement. The assignees have stated various grounds in their charge, in which they insist that the whole proceeds of this sale should be handed over to them for the purpose of general distribution among the creditors of the bankrupt. A discharge has been filed by the trustees of the settlement, in which after submitting to the jurisdiction of the court, they insist upon their right to retain the whole proceeds of the sale, in part discharge of their judgment, and this is the matter that I am now called upon to decide. No question has been raised as to the validity of the judgment, or the rights of the parties who are beneficially interested thereunder, and by the terms of the settlement, the trustees were bound on the death of Mr. Wm. Roberts to raise the amount of the judgment, and invest it for the benefit of his wife and children. It appears that Mr. Wm. Roberts in his lifetime was extensively engaged in business in this city as a wine merchant, and also in the tea trade, and that he died on the 27th of December, 1860, leaving his widow, the bankrupt, and several children. Mrs. Roberts took out administration to her husband on the 19th of Jan. 1861, and took possession of his assets, including his whole stock in trade, and continued to carry on the same trade in the same place, and still in the name of William Roberts. A considerable portion of the stock of wines of Mr. Roberts was in bond in the Custom house stores in his name at the time of his death. The trustees of Mrs. Roberts's marriage settlement proceeded after his death to revive the judgment for the purpose of realizing the amount in discharge of their trusts; the writ of revivor was issued in February, 1861, and judgment was entered on the 6th of April, following, against his personal representatives, and the trustees communicated to Mrs. Roberts their intention to call in the amount. It appears Mrs. Roberts was anxious that it should be invested in her trade to enable her to carry it on for the benefit of herself and her children; and she requested of her trustees to give their assent thereto. Their acquiescence was absolutely necessary, as it was admitted that the levying of the amount of the judgment at the time would at once have put a stop to the trade, as it would have withdrawn almost the entire of the stock invested therein. The trustees expressed their willingness to acquiesce in her wishes, provided it could be effected without risk to themselves as trustees; and it was suggested that this object could be safely attained by making the children wards of the Court of Chancery, and then obtaining the leave of the court to invest the trust funds in the trade, and a petition was presented to the Lord Chancellor on the 10th of May, 1861, and a reference was made by the court to the Master on the 29th of the same month to inquire and report the propriety of the proposed investment; in the mean time Mrs. Roberts was permitted to conti-

nue the trading, but pending the proceedings in the Master's office, the trustees got alarmed at the state of Mrs. Roberts's affairs, and particularly at finding that a Mr. Whitley, in whom they had confidence, and who had been negotiating a partnership with Mr. Roberts, had withdrawn therefrom entirely, and they accordingly pressed Mrs. Roberts for payment of the judgment, and directed their solicitor, Mr. Lodge, to issue execution thereon for the purpose of realizing its amount, and Mrs. Roberts, to avoid the exposure of a sheriff's sale, agreed to transfer the wines in question to Stokes and Company, for the purpose of sale, and accordingly on the 26th July last the transfer warrants were signed, transferring 76 lots of wine to Messrs. Stokes and Co., nearly the whole of which had been purchased by the late Wm. Roberts, and warehoused by him, and formed a part of his assets at the time of his death. The warrants for the transfer of these wines were signed, "Lucinda Roberts, administratrix of the late William Roberts." A small portion of the wines transferred had been purchased by Mrs. Roberts herself. It appeared that the dock warrants of the greater portion of these wines had been mortgaged to Mr. Gray, to secure a sum of £630 advanced by him to Mr. William Roberts. Of this mortgage Mr. Roberts had repaid a sum of £480 to Mr. Gray, and at the time of the transfer to Stokes and Son, a sum of £150 alone remained due to Mr. Gray. In order to enable them to realize the proceeds of the sale, the trustee, with the assent of Mrs. Roberts, paid off this balance, and by the directions of Mrs. Roberts the sale by auction of the wines was had on the 2nd of August, having been advertised to be sold on account of the executrix, at Messrs. Stokes, Widow, and Sons, Commercial Buildings, and the whole were sold on that day, and the proceeds handed over to the trustees, and this is the sum which they claim a right to retain. There does not appear any doubt now upon the evidence that by the transfer of these wines to Messrs. Stokes and Co., the bankrupt's trade as a wine merchant was necessarily stopped. The portion of wines that thereafter remained in her possession being very insignificant, a petition was presented to this court on the 14th of August following against Mrs. Roberts by one of her creditors, on which Judge Lynch adjudicated her a bankrupt. The case was contested before him, and after full discussion his decision was made, confirming the adjudication, and no appeal has been taken thereto. The act of bankruptcy on which this adjudication was founded was the transfer made of these wines, as before mentioned, Judge Lynch being of opinion that the property so transferred constituted substantially the whole of her stock in trade, and that she had thus deprived herself of the means of carrying on business, and thereby committed an act of bankruptcy. The grounds insisted on by the assignees to entitle them to the whole produce of the sale were—first, that these must be considered to be goods left by the true owner in the order and disposition of the bankrupt, as the reputed owner, and I was referred to *Ex parte Thomas* (3 M. D. & D. 40) as an authority for the proposition. Secondly, that the transfer of these warrants was a collusive proceeding, and done with an intention to

give a fraudulent preference to the trustees; and lastly, that the transfer itself having been declared to be an act of bankruptcy, the produce of the subsequent sale became the property of the assignee. The principal question discussed was that which arose under the order and disposition clause of the Bankruptcy Act. Now, admitting, as I do fully, the authority of *Thomas's Case*, which I am quite ready to adopt, I do not think that the evidence in this case brings it within the principle thereby established. I do not think that the trustees can be fairly charged with, even for a moment, foregoing their rights, or acquiescing in the possession by Mrs. Roberts of the goods of her husband as the reputed owner thereof. It must be borne in mind that she was the personal representative of her husband, and that, as such, she had a clear right to retain them until she had made herself acquainted with the true state of his affairs; and although a delay certainly occurred between the time she had administered to his estate and admitted the rights of the trustees, and the period of the sale, yet I think the whole of that interval is accounted for by the proceedings which were, I have no doubt, taken *bona fide* in the Court of Chancery, and which prove that although the trustees were anxious to assist the family, they were at the same time determined that no acquiescence on their part should deprive them of their just claims. To take a case out of the order and disposition clause, I cannot believe it to be necessary to shew that the party entitled to the goods has asserted his rights to the extreme rigour of the law. I am sure it is only necessary in the eye of justice and good sense to shew that he has *bona fide* insisted on his claim, and proceeded without undue delay to establish it, and that in the meantime he has done or assisted at nothing which could be construed by the rest of the world into suspension or abandonment of his rights. Neither do I think that the evidence shows any case of collusion on the part of the trustees with the bankrupt, or any desire on her part to give any fraudulent preference to them. That she was anxious to pay off their debt, and that, to a certain extent, the securing of this sum of money was a direct benefit to herself and her children, there can be no doubt; but it must be borne in mind that it was her duty to have applied the assets of her husband to its discharge in preference to all other claims so far as his assets extended, and although she handed over some portion of her own property, which was properly applicable to her own creditors, yet I believe it was done under the impression that if the execution were to issue, it would be attended with the same result, and from fear of the consequences of having that step taken. As it does not appear to me, therefore, that the case is brought within the order and disposition clause, it follows that even though the transfer of these goods may have been an act of bankruptcy, yet so far as the goods here sold can be shewn to be assets of Mr. Roberts, they are not distributable amongst the creditors of his widow, and, therefore, to that extent, I must declare that the trustees of her settlement are entitled to retain the amount in discharge of their demand. With respect to the residue, however, a different principle must be applied. Judge Lynch has decided that the transfer of these

wines is an act of bankruptcy. That decision has not been quarrelled with, and though I at first hesitated, from the peculiar circumstances of the case, to adopt it, yet, on further consideration, I am inclined to think it was right. It follows, as a matter of course, that the assignees are entitled to retain that portion of the sale which was the produce of her own goods, and I must direct an account thereof to be taken by the chief registrar, and that the trustees shall hand over to the assignees so much as shall be found to belong to her estate. The trustees are, I think, entitled to prove in this case for the balance of their demand, and also for the monies advanced by them to discharge the debt due to Mr. Gray. Mr. Curran has pressed me to decide that Mrs. Roberts has, by paying off Mr. Gray's mortgage, become a purchaser to that extent of her husband's assets, and that they are so far applicable to the demands of her creditors. Now, in the first place, the mortgage to Gray appears to have been principally for her own debt; but even if that were not so, and that she had paid off so much of a debt due by her husband, no evidence has been offered to shew out of what funds this payment was made, and therefore I am bound to presume that it was paid out of the assets of her husband, that being the proper fund applicable thereto. As it appears that the trustees made an offer to the assignees on the 16th of October last, substantially to the same effect as my present decision, I think they are entitled to their costs of those proceedings when taxed and ascertained, and I direct them to be taxed accordingly. The assignees are entitled to their costs against the estate of the bankrupt. Another charge has been filed in this case by Messrs. McCulloch and Company, claiming to be entitled to prove against the estate of Mrs. Roberts for the sum of £567 14s. 8d., composed in part of a debt due to them by the late William Roberts, amounting to £441, and the residue being for a debt incurred by Mrs. Roberts in the course of her trading since her husband's death. As to the portion due by Mrs. Roberts, no question is raised. The debt due by Mr. Roberts was for goods sold to him in his lifetime, for which he passed two bills of exchange, which fell due after his death, one for £217, due on the 28th March, 1861, and another for £224, due on the 29th June, 1861. When these bills came to maturity, Mrs. Roberts, being unable to take them up, renewed them by her own acceptances, passed to these creditors at three and six months' date; but before these renewals came to maturity, Mrs. Roberts had been adjudged a bankrupt. It appears that a suit is pending in the Court of Chancery to administer the assets of Mr. Roberts, and in this suit Messrs. McCulloch has intervened as creditors of Mr. Roberts, and filed a charge on foot of the above bills, claiming to be paid the amount out of his assets. They seek now to prove for the same demand in this court against the estate of Mrs. Roberts. The assignees have filed a discharge, in which they contest the existence of any debt by the bankrupt on foot of these bills of exchange, asserting that her acceptance of the renewed bills was merely in her representative capacity, and they further allege that even if this be not so, that these creditors having filed their claim on foot of the original bills of exchange against

the estate of Mr. Roberts, have thereby made an election, and thus deprived themselves of any right to proceed against the estate of Mrs. Roberts, and ought not to be permitted to do so. I cannot concur with them in this view of the case. Of course so far as these creditors shall realize their claim out of the assets of Mr. Roberts, it will go in reduction of their demand against the estate of the bankrupt; but I do not know of any principle, nor has any case been cited to me as authority to shew that they are precluded from proving their claim against both estates. The acceptance of the renewed bills by Mrs. Roberts was an admission of assets having come to her hands applicable to the demand, and I do not think that the assignees can be in a better position than she herself was, and she could not with truth say that she did not make herself personally liable for the debt. It appears to me to resemble the case of a principal and surety, and although the assets of Mr. Roberts are primarily liable, yet to the extent of whatever cannot be recovered thereof, the estate of Mrs. Roberts must be accountable also.

Rolls Court.

[Reported by William Woodlock, Esq., Barrister-at-law.]

COLCLOUGH v. SMYTH.—Nov. 1861; Jan. 13, 1862.

Tenantry Act, 19 & 20 Geo. 3 (Ir.) c. 30—Forfeiture of right to renewal—Reasonable time.

A tender of renewal fines made within less than six months after demand on the lessee's agent. Held to be made within reasonable time within the meaning of the Irish Tenantry Act, so as to prevent a forfeiture.

THIS was a suit for the renewal of a lease for lives renewable for ever. The petition, as originally framed, stated, that by lease of the 8th July, 1819, Arthur Reynell demised to John Carty, his heirs, &c., the lands of Munganstown, containing 326 acres plantation measure, and situate in the county of Westmeath, for three lives therein named, and for the lives of such other persons as should be added pursuant to the covenant after mentioned, at a rent of £72 Irish a year. This lease contained a covenant by the lessor, for himself, his heirs and assigns, with the lessee, his heirs and assigns, that upon the death or failure of the lives named in the lease, or any of them which should first happen, and the lessee, his heirs and assigns, first paying or causing to be paid to the said Arthur Reynell, his heirs and assigns, the full and entire sum of £33 of the then currency of Ireland, as a fine for every life so failing, over and above the annual rent thereinbefore reserved, and upon the nomination of the life of any person by the said lessee, his heirs and assigns, at his or their request to be put in and inserted in the place or stead of the said person so happening first to die as aforesaid, that then the said Arthur Reynell, his heirs and assigns successively, should and would, within six months from the death of such person so happening first to die as aforesaid, add and insert to the time and term of said lease the life of such person so nominated in the place and stead of the person

so happening first to die as aforesaid, which life so added and inserted was to be indorsed on said lease, or to be written in a deed, label, or parchment to be affixed to said lease for that purpose, and in like manner from time to time successively for ever, upon the failure of every other several life in said lease then nominated or thereafter to be successively nominated as aforesaid, and upon the like payment of the sum of £33 of the then currency of Ireland, fine, as therein was reserved over and above the annual rent before reserved, and upon like nomination of any other life successively in lieu of every several life so failing as aforesaid, that then the said Arthur Reynell, his heirs and assigns, should and would, within six months after the failure of every other such several life nominated as aforesaid, add and insert to the time and term of said lease, from time to time for ever, the several life or lives of such person or persons so successively happening to die as aforesaid, which several life or lives to be added and inserted as aforesaid were to be indorsed on said lease, or written in deeds, labels, or parchments to be affixed thereunto as aforesaid; and it was by the said indenture provided, that if it should happen upon the failure of any life therein-above nominated or thereafter to be nominated as aforesaid, the said John Carty, his heirs and assigns, should and did not pay unto the said Arthur Reynell, his heirs and assigns, the full and entire sum of £33 of the then currency of Ireland, as therein was reserved over and above the annual rent thereinbefore reserved, within six months after the failure of such life, and also should not within the said six months nominate the life of some other person in lieu thereof, to be added to the time and term of said demise as aforesaid, that then it should and might be lawful to and for the said Arthur Reynell, his heirs and assigns, for ever thereafter to deny and refuse the said John Carty, his heirs and assigns, to add, insert, nominate, or put any other lives or life to the time or term of said demise other than the life or lives which then should be in being, and then and in such case also the said demised premises, from and after the determination of the lives which then should be in being, should be and remain unto the said Arthur Reynell, his heirs and assigns. This lease was from time to time renewed, and all the lessee's interest in it became vested in Sarah M'Carthy, who by will, dated the — November, 1781, gave and devised the said lands of Munganstown and every part thereof, with the hereditaments and appurtenances thereunto belonging, subject and chargeable as therein mentioned to her niece Bridget Colclough, otherwise M'Carthy, for life, provided she did not intermarry, and after her decease or marriage, whichever should first happen, the testatrix directed that one moiety or half part of said lands, subject and chargeable as therein mentioned, should go to Henry Colclough, eldest son of the said Bridget Colclough, otherwise M'Carthy, and his assigns, for life, without impeachment of waste, and from and after his decease the testatrix directed it to be her will that the said moiety or half part of said lands should go to and be equally divided among the issue, male and female, of the said Henry Colclough, share and share alike as tenants in common, and not as joint tenants, with divers remainders over; and she declared it also to be her will and intent that from and immediately

after the intermarriage of the said Bridget Colclough, otherwise M'Carthy, and after the time of the decease of the said Bridget Colclough, otherwise M'Carthy, whichever should first happen, the other moiety or half part of the said lands of Munganstown, subject and chargeable as therein mentioned, should go to Beauchamp Colclough, younger son of the said Bridget Colclough, otherwise M'Carthy, and his assigns, for life, and after his decease the said testatrix declared it to be her will and intent that the said other moiety or half part of said lands of Munganstown, subject and chargeable as therein mentioned, should go and be equally divided among the issue, male and female, of the said Beauchamp Colclough, share and share alike as tenants in common, and not as joint tenants, with divers remainders over. Sarah M'Carthy died, and probate of her will was granted to Bridget Colclough. By deed of renewal, dated the 6th April, 1803, reciting that the lessor's reversion on the lease of 1719, had become vested in William Reynell, and the lessee's interest in Bridget Colclough, and that one of the *cestui que vies* in the indenture of 1719 was dead, and that Bridget Colclough had nominated the life of Beauchamp Colclough therein mentioned to be inserted in the place and stead of the *cestui que vie* so deceased, William Reynell gave a renewal to Bridget Colclough for the lives of the Duke of York, Lord Frankfort, and Beauchamp Colclough, the new life named. By indenture of the 1st April, 1828, made between James Gibbons of the one part, and Henry Colclough, of Sion, in the County of Carlow, and Beauchamp Colclough, of the City of Dublin, Esqrs., reciting the original lease and renewals of the 6th April, 1803, and the 10th October, 1826 (the latter being made to Henry and Beauchamp Colclough), and reciting that one of the *cestui que vies* in the latter renewal was dead, and that Henry Colclough and Beauchamp Colclough, to whom the lessee's interest had come, had nominated the present Duke of Cambridge as the new life to be added, the said James Gibbons, who was then the owner of the reversion, gave the lands to Henry and Beauchamp for the lives of the said Beauchamp Colclough, of her present Majesty, and of the present Duke of Cambridge, and such other lives as should be added pursuant to the covenant for renewal in the deed of 1719. The cause petition further stated, that James Gibbons' estate was now vested in the respondent Thomas Jas. Smyth; that Henry and Beauchamp Colclough were both dead; that Henry died leaving issue two sons and three daughters, namely Beauchamp Colclough (hereafter called Beauchamp the 2nd), M'Carthy Colclough, Sarah Butler otherwise Colclough, Anne Timmins otherwise Colclough, and Catherine Colclough, him surviving; and that upon the death of the said Henry Colclough, his son Beauchamp, under the limitations contained in Sarah M'Carthy's will, became seized and possessed of one undivided fifth part of one undivided moiety of the lands of Munganstown; that Anne Timmins's one-fifth of the moiety also became by mesne assignment vested in the said Beauchamp Colclough the 2nd; that Beauchamp Colclough (the first), the other lessee in the renewal of the 1st April, 1828, had issue, as petitioner believed, five sons and three daughters, namely Henry, Grey Carleton, John, Beauchamp Urquhart, Alexander, Maria, Bridget, and Harriet, and

that upon the death of the said Beauchamp Colclough (the first), the moiety of the lands to which he was entitled for life under the will of Sarah M'Carthy became vested in the said issue or some of them; that Beauchamp Colclough the 2nd, the son of Henry, died on the 26th November, 1858, and under and by virtue of his will, dated the 27th October, 1846, the petitioner became entitled to his estate in the lands, and all benefit and right of renewal; that the said Beauchamp Colclough the 2nd was one of the *cestui que vies* in the renewal of the 1st April, 1828, and he having died, as aforesaid, and all his estate and interest having become vested in the petitioner, and Thomas Jameson, the solicitor for the petitioner, having for the first time heard from Mr. Baptist Kernaghan, only some short time previously to the 18th January, 1860, that a notice was given by the respondent either to M'Carthy Colclough or to some other person, or otherwise, of a demand made for fines due out of said lands to the respondent, the said Thomas Jameson, as petitioner's solicitor, wrote to Messrs. Tyrrell and Stannell, the solicitors for the respondent, the following letter:—

“189 Great Brunswick-st., Jan. 18, 1860.

“Gentlemen,—I am directed by Mrs. Harriet Colclough to inform you she only heard for the first time the other day that any notice had been given in the Gazette, calling on all parties interested to pay all fines due to Mr. Smyth out of the lands of Munganstown within a period of three months, which has expired, and that had any notice been served at Mount Sion, she would have received it, and that Mount Sion was well-known in the County of Carlow, and also that it was the residence stated in the last renewal of Henry Colclough, one of the grantees thereto; that she has been lately informed a draft renewal or fee-farm grant was furnished for your approval with the amount of fines due, and that you declined, on Mr. Smyth's part, to approve of same. I am now to request you will inform me if you still decline to execute a renewal or grant, or to receive the amount of the fines which I hereby undertake to pay, and which has been, I am already informed, tendered, as in such event Mrs. Colclough is advised to file a petition in the Court of Chancery to enforce such renewal or grant, the costs of which she will seek against your client. Your reply will oblige your obedient servant,

“THOMAS JAMESON.

“Messrs. Tyrrell & Stannell.”

To which the said Messrs. Tyrrell and Stannell replied as follows;—

“41 Kildare-st., Dublin, Jan. 19, 1860.

Dear Sir,—We beg to acknowledge the receipt of your letter of the 18th instant, and in reply to state that we have been for a considerable time past in correspondence with Mr. Baptist Kernaghan, of No. 3 Inn's-quay, as the solicitor of Mrs. Harriet Colclough, and also of Mrs. M'Carthy Colclough, on the subject of your letter, with whom you have also been long in communication on the same subject, and we beg to refer you to him, as we are not instructed by Mr. Thomas James Smith to give any further or other reply to your letter than such as we have already

given to Mr. Kernaghan as such solicitor. We are, dear sir, yours truly,

"TYRRELL & STANNELL."

The petitioner charged that Mr. Kernaghan never was petitioner's solicitor, and that Mr. Jameson having been informed that Mr. Kernaghan was, on the part of said M^cCarthy Colclough, about to submit a draft renewal or fee-farm grant of the lands to Messrs. Tyrrell & Stannell for approval, on behalf of the respondent, required that petitioner's name should be inserted as one of the grantees therein; that in consequence of the letter of the 19th January, 1860, the petitioner's solicitor applied to Mr. Kernaghan, who informed him that he (Mr. Kernaghan) had received from Messrs. Tyrrell & Stannell the following letter:—

"41 Kildare-street, Jan. 9, 1860.

"Dear Sir,—In reply to your letter of the 4th instant (which we have submitted to Mr. Thomas James Smyth for his instructions), we beg to return you the cheques for £32 12s. 6d. and £2 2s. enclosed therein, not having any authority from Mr. Thomas James Smyth to receive same, and we are desired by him to state he does not see what right Mr. M^cCarthy Colclough has to call upon him for a renewal, or what right Mr. M^cCarthy Colclough and Mrs. Harriet Colclough have to call upon him for a fee-farm grant of the lands of Munganstown. We are, dear sir, yours truly,

"TYRRELL AND STANNELL.

"B. Kernaghan, Esq., 3 Inn's quay."

That Mr. Jameson then caused the following notice to be served on Messrs. Tyrrell and Stannell:—

"Gentlemen,—I herewith, on behalf of Mrs. Harriet Colclough, of Mount Sion, in the County of Carlow, widow, who is entitled to two undivided fifth parts of one undivided moiety of the lands of Munganstown, in the County of Westmeath, held under lease bearing date the 8th of July, 1719, tender to you, as solicitor for Thomas James Smyth, Esq., the landlord of said lands, the sum of £65 19s., being the amount of rent, renewal fines, and interest due to him out of said lands, as per account annexed, and I hereby, on the part of said Harriet Colclough, nominate the life of the Prince of Wales in the place and stead of Beauchamp Colclough, deceased, one of the lives in the last renewal of said lands; and I hereby require the said Thomas James Smyth to execute a renewal of said lands for the lives of her Majesty and the Duke of Cambridge, being the surviving lives in the last renewal of said lease, and for the life of the Prince of Wales now nominated; and in case the said Thomas James Smyth, or you on his behalf, decline to accept said sum, and to grant said renewal, this notice will be made use of in any proceedings which may become necessary for the purpose of enforcing such renewal. Dated this 30th day of January, 1860, &c.

"Amount of renewal fine due on the death of said Beauchamp Colclough, who died 26th November, 1858 . . . £30 19 2

"Interest thereon from said day to 1st February, 1860 . . . 2 5 4

32 14 6

"Amount brought forward, £32 14 6
"Half-year's rent due out of said lands to 1st November, 1860 33 4 6
65 19 0"

The petition then stated the service of the above notice, and tender of the above amount, and a refusal to accept it by Messrs. Tyrrell and Stannell, and prayed as already stated. The respondent, in his answering affidavit, raised three grounds of defence. First, he objected that the petition was defective, for want of parties, all the persons in whom the lessee's interest was vested not being made parties to the cause petition. Secondly, he admitted the renewals of 1803 and of 1828, but charged that the Beauchamp Colclough, the life named in those renewals, was not Beauchamp Colclough the second, who died in 1858, as before stated, but Beauchamp Urquhart Colclough, son of Beauchamp Colclough the first, and who was, at the date of the said renewal, called Beauchamp Colclough of Sion, in the County of Carlow, and which Beauchamp Urquhart Colclough died in 1845, and the respondent charged that the petitioner well knew that the fact was so, but made the statement contained in the petition for the fraudulent purpose of depriving the respondent of the renewal fines and interest, to which he would be entitled in the case of a *cestui que vie*, having died so far back as 1845. Thirdly, he stated the following circumstances:—That some months previous to July, 1859, he, being the owner in fee of the lands, made search for documents concerning them, and not having discovered any counterpart of any renewal subsequent to that of 1803, directed his solicitors to make inquiries as to the persons in whom the tenant's interest under the original lease was then vested; that his solicitor was unable to discover in whom that interest was vested, save that he was informed that M^cCarthy Colclough, the son of Henry Colclough, claimed some interest therein; that thereupon the respondent was informed by his solicitors that all or some of the lives in the renewal of 1803 had expired, and that, in consequence of the difficulty in discovering the tenant, or assignee of the tenant, under said lease and renewal, so as to make a demand upon such tenant or assignee, of the fines due out of the lands, it would be necessary for the respondent to make a demand upon the lands under the 19 & 20 G. 3, c. 30, s. 2, from the principal occupiers of said lands, and that a notice of the demand should be inserted for two months in the London and Dublin Gazettes; that thereupon the following notice was prepared:—"To all whom it may concern. Take notice that I demand all fines due and payable under a lease of the 8th July, 1719, out of All That the town and lands of Munganstown, situate in the barony of Ferhill and County of Westmeath, and that a renewal lease be taken out within three months from this date to save a forfeiture of rights. Dated this 26th day of July, 1859.—Thomas James Smyth, Ballynegall, Mullingar." That this notice was served upon the occupiers of the lands, and a formal demand made upon them, upon the 26th of July, 1859, and that the notice was inserted in the Gazettes during the months of August and September of the same year; that the respondent having been informed that Mr. Wm. Corbett, of 38 Kildare-

street was then, and had for some time been acting as the general agent of the parties claiming to be entitled to the tenant's interest under the original lease, the respondent's solicitor tried ineffectually to obtain an interview with him; that then hearing that Mr. McCarthy Colclough, the brother-in-law of the petitioner, claimed an interest in the lands, the respondent's solicitor wrote to him, inclosing a copy of the notice of the 26th July, and apprising him that a demand had been made upon the lands; that a copy of the notice was also served upon the receiver in a cause of *Rorke v. Rorke*, which, it was thought, had reference to some interest in the lands, and that on the 3rd August, 1859, the respondent's solicitors caused a copy of the said notice to be served upon the said William Corbett, by delivering to and leaving a true copy of the notice with his woman-servant, at his residence. The respondent then charged that the said William Corbett was the agent of the petitioner, among others, for the lands of Munganstown, and that even if it had been incumbent upon the respondent to have served a copy of the notice at Sion, in the County of Carlow, (the petitioner's residence), which, however, he insisted it was not, that the service upon Mr. Corbett was, in fact, service upon the petitioner. He also charged that the said petitioner, either through the said William Corbett, or by some other means, had long, previous to the month of January, 1860, sufficient notice of the demand of fines out of the lands by the respondent. He also charged that no tender had ever been made of the renewal fines actually due, inasmuch as they ought to have been calculated from the death of Beauchamp Urquhart Colclough in 1845, and also that an unreasonable time had elapsed from the demand on the 26th July, 1859, without the payment to the respondent of the renewal fines, interest, and rent by any person whatever, and that an unreasonable time had elapsed from the aforesaid demand upon the lands, on the 26th July, 1859, long previous to the 30th January, 1860, the day before the filing of the petition. The petitioner in an affidavit offered evidence to shew that the life in the renewals was as she had asserted in her petition, that of Beauchamp the second. She denied that she had got any information as to the demand upon the lands previous to the month of December, 1859, and she also denied that Mr. Kernaghan had ever acted as her solicitor. Upon the first hearing the Master of the Rolls held that the suit was defective for want of parties, but gave leave to amend. The new parties added set up various cases by their affidavits as to the interests which they claimed in the lands, but it is unnecessary to go into those cases at present, as nothing turned upon them. The cause now came on in its amended form for another hearing. There had also been a cause petition filed by Mr. McCarthy Colclough, but he having died, that suit had abated.

F. Walsh, Q.C., and *John Robinson* for the petitioner, *Mrs. Colclough*.

Brewster, Q.C., and *Chaworth Ferguson* for the respondent, *Mr. Smyth*.

Richey for other parties.

The authorities are referred to in the judgment.

January 13.—THE MASTER OF THE ROLLS delivered a written judgment, in which, having stated the facts of the case, he said that both the present suit, and the suit of *McCarthy Colclough* had been defective for want of parties, and that on the first hearing the suits had stood over. Mr. McCarthy Colclough having since died, his suit had abated, and would not be proceeded with. In the present case leave had been given to amend, and amendments had accordingly been made. The first question was as to the matters of fact. Evidence had been given to shew that Beauchamp Colclough, the husband of the petitioner, was the life in the renewals, and he would take it that the fact was so. The next question was, whether the right to a renewal had been forfeited. His Honor read the affidavit of the respondent, *Thomas Smyth*, and the affidavit in reply of the petitioner, and then said that s. 2 of the Tenantry Act, 19 & 20 Geo. 3 (Ir.) provided that "in case the landlord shall find any difficulty in discovering his tenant or the assignee of such tenant, so as to make a demand on such tenant or assignee; then, and in every such case, a demand made of the said fine on the lands from the principal occupier of the same, together with notice of such demand, to be inserted for the space of two months in the London and Dublin Gazettes, shall be considered to all intents and purposes a demand within this Act." The proceedings, therefore, which had been taken in the present case were not sufficient to work a forfeiture unless the respondent had some difficulty in discovering the tenants. The respondent had succeeded to the property in 1855, and had received the rents, and those rents had been paid to him by Mr. Wm. Corbett. A demand of fines upon an agent was sufficient—*Galbraith v. Cooper* (8 H. of L., 315). He was, therefore, of opinion that the respondent was bound to serve the notice on the person who paid the rent to him. He thought that service on William Corbett was sufficient, but that the Gazette Notice and demand upon the lands were not so. It would be unreasonable to hold that where the landlord knew that there was an agent, he should be able to create a forfeiture without serving that agent. The service upon William Corbett was upon the 3rd August, 1859. It might be a question whether that service was sufficiently effected, but at all events it was not earlier than the date just stated. The question then arose whether the fine had been neglected to be paid within a reasonable time within the meaning of the first section of the Tenantry Act. What was a reasonable time must in all cases be considered according to the circumstances—*Jackson v. Saunders* (1 Sc. and Lefr. 461). He did not think that the case of *Long v. Long* (10 Ir. Ch. 406), applied here, and the only question was whether the lapse of a period of less than six calendar months was sufficient to authorize the court to declare that a forfeiture had been incurred. Upon the whole he was of opinion that the right to a renewal had not been forfeited, but that, considering the frame of the suit, and the length of time that had elapsed, the petitioner should pay the costs of the suit.

Court of Queen's Bench.

Reported by W. B. Miller, Esq., LL.D., Barrister-at-Law.

[IN CHAMBER.—BEFORE FITZGERALD, J.]

IN THE MATTER OF HENRY EVERARD.—Aug. 17 & 20.

Arrest—voluntary escape—Re-capture—Habeas corpus in vacation by a judge.

A. was arrested in Dublin, under a civil bill decree of the Recorder of Dublin, by two special bailiffs of the plaintiff in the decree. He was then taken, at his request, and with the acquiescence of the plaintiff, and in company of the bailiffs to Kingstown, to look for a friend to assist him in a compromise of the debt. Held, that a judge of the Queen's Bench has, in vacation, jurisdiction to order a writ of habeas corpus at common law, returnable immediately before himself.

Held also, that this was a voluntary escape on the part of the bailiffs, and that further custody was illegal, and there could be no re-capture.

THIS was a motion on behalf of Henry Everard, a prisoner in the Marshalsea, to make absolute a conditional order obtained on the 8th of August last for a writ of *habeas corpus*, directed to the Marshal in order that the prisoner should be discharged from alleged illegal custody.

John M'Mahon, for the motion, relied on the affidavit of the prisoner, from which it appeared that a civil bill decree had been made in the Recorder's Court, on the 26th July last, in a case of *Livingston v. Everard*, (the defendant being the present applicant), for £12 for debt and 10s. 10d. costs, and that on the day but one after the decree was had, the defendant in the civil bill, sent a friend (a Mr. Myers), to Livingston with a view of making a compromise, and that on that occasion an appointment was made for the defendant in the decree to meet the plaintiff at his house on the following evening at six o'clock, and that when, on that occasion, the defendant was within about twenty yards of the plaintiff's house in Cuffestreet, the latter pointed the defendant out to two bailiffs, who were in waiting, and who thereupon arrested him on the decree. That the defendant suggested that a gentleman at Kingstown might assist him in making a settlement, and the plaintiff offered to take £8 in cash and security for the balance, and consented to the bailiffs accompanying the defendant to Kingstown to effect the proposed arrangement, and that the defendant paid the bailiffs for going to Kingstown 10s. That on arriving there he found that his friend would not reach his house sooner than the arrival of the last train from Dublin, but that the bailiffs refused to wait for it, and that then the defendant insisted that he was discharged from custody, having been brought or allowed by them to go outside the jurisdiction of the Recorder. The bailiffs, however, by force, compelled him to return to Dublin, and kept him a prisoner that night in a private house, (as the Marshalsea was closed,) and lodged him on the following day in the Marshalsea. Mr. Myers, in two affidavits, confirmed the applicant as to the facts about the original arrest and the consent of the plain-

tiff to allow the defendant to go to Kingstown; but the plaintiff and the bailiffs, in their affidavits, denied that any trick was resorted to as to the arrest; but they admitted that the bailiffs were special bailiffs of the plaintiff, and that the plaintiff acquiesced in the defendant going to Kingstown.

W. Sidney, for Livingston, opposed the motion. The authorities cited and the arguments used are referred to in the judgment.

Cus. adv. vult.

Aug. 20.—FITZGERALD, J., having stated the foregoing facts, proceeded—Upon the conflicting affidavits as to the arrest, the applicant swearing that he was entrapped by Livingston, and the latter and the bailiffs contradicting it, I must, on this motion, take it that he was properly arrested, and that there was, as to it, no plot or contrivance, and the point on which the case stood over was one raised by Mr. Sidney, but about which I entertained no doubt; but I wished, from the importance of the question, that the authorities should be carefully considered, and the precedents examined; for if the judges of the Queen's Bench had, for any continuous time, exercised jurisdiction in such cases, I would be bound by the practice, and would not do any act which would abridge the right of the subject to have the legality of his imprisonment tried by *habeas corpus*. The question is, whether the Court of Queen's Bench, or a single judge in that court, has, in vacation at common law, jurisdiction to order a writ of *habeas corpus* to issue, to be made returnable before himself for the purpose of discharging from arrest a party confined under civil process. The case of *Page v. Williams* (1 Ir. C. L. R., 539,) was relied on by Mr. Sidney as deciding that a *habeas corpus* would not be issued in case of civil process, and the judgments of the Lord Chief Baron, and of the present Lord Chief Justice of this Court, were relied on; and if the case was in point, no matter what my own opinion on the matter might be, I would consider myself bound to follow the decision of a court of a co-ordinate jurisdiction. But the case is not, in my judgment, applicable to the present case. That was not a case of an application for a *habeas corpus* at common law, but was expressly under the 56 Geo. 3, c. 100, and the Exchequer had no jurisdiction at common law to issue a writ of *habeas corpus*, and that case only goes to this extent, that deriving authority under the statute, the judges were bound by the exception in that statute, viz., that it should not apply to cases of persons in custody under civil or criminal process; and that applied to both a judge sitting in Chamber and to the full court. But here, on the contrary, the application is made to a judge of the Court of Queen's Bench at common law for a writ of *habeas corpus*, and the question is, whether at common law I have jurisdiction in vacation to make the order for the writ, to be returnable before myself with a view to the discharge of the applicant. 4 Bac. Abr., 113, was referred to by Mr. M'Mahon, but that only applies to the case of parties unlawfully detained, who may have a *habeas corpus*; but page 117 does touch the point, where it is said, "But it seems that, by the common law, the Court of King's Bench could have awarded it only in term

time, but that the Chancery might have done it as well out of as in term, because that court is always open." But at page 140 we find the opinions of the judges given *seriatim* to questions proposed to them by the Lords, and their opinion was, that the writ may issue in vacation by a fiat of a judge of the King's Bench, returnable before himself, whether the cause of detention arose in civil or criminal cases. *The Canadian Prisoners' Case* (5 M. & W., 32,) was also referred to, and Lord Denman gave judgment to the same effect. That was a case of criminal process; but his opinion is, that whether the process is civil or criminal, the party may have the writ in vacation. As to the precedents in this country, he had directed a search to be made, and it appeared that, on the 12th December, 1846, Chief Justice Blackburn (the present Lord Justice of Appeal), sitting alone in Chamber in vacation, made a conditional order for a *habeas corpus* for the discharge of William Montgomery Hamilton, in custody, under civil process for £15 13s. 7d., which was made absolute. He claimed exemption from arrest as a soldier in the East India Company's Service, and that he could not be arrested for a debt less than £30. Also, on the 23rd October, 1852, in the matter of a person named Burke, in custody in the marshalsea for debt, a similar order was made in vacation by Judge Crampton, and the ground there for the discharge was, that there was fraud and trickery on the part of the officer arresting, who, by false pretences, succeeded in inducing Burke, to drive with him across the boundary between two adjacent counties, and so got him within his jurisdiction. Also, in the case of Mrs. Marcella Heron, a married woman, on the 11th August, 1855, the present Lord Chief Justice Lefroy made a similar order. She had been induced to join her husband in accepting bills, and a decree had been obtained by some means against her, under which she was arrested, but she was discharged in vacation. Also, in February, 1860, in the case of Peter M'Dona, who was under arrest in Enniskillen under a civil bill decree, an order was made by Judge O'Brien, in vacation, but, by consent, the man was discharged before the writ issued: and lately, in the case of one Thomas Fitzgerald, an application was made to myself, when sitting in court, and neither counsel, nor any other member of the Bench, made any objection to my order, though the arrest was under civil process. The case of bankrupts who were under arrest for giving unsatisfactory answers had also been referred to, but as to them it might be said that they were *quasi* criminal cases, and did not so strongly apply. Those authorities and precedents, however, have satisfied me that, by virtue of the common law jurisdiction, the Court of Queen's Bench, or a judge of that court, in vacation, may issue the writ returnable before himself immediately, in order to decide whether the custody be legal or illegal. The next question is, whether the applicant here is in lawful custody. It is clear that the bailiffs who made the arrest were special bailiffs of Livingston, and that the latter himself acquiesced, at least by his silence and conduct, in the bailiffs taking the applicant to Kingstown, but as such special bailiffs they superseded the sheriff, and became, and were the agents of Livingstone.—*Ford v. Leech*

(6 Add. & Ell., 699), and the result would have been the same, if Livingston had not known what happened. But having taken the applicant to Kingstown, the law is clear that there was then a voluntary escape—he was no longer in their custody—their authority had ceased, and therefore the custody was illegal. The next question is, had the bailiffs authority to recapture or detain the applicant. The arguments of the counsel for Livingston, that the defendant was estopped, or that there was condonation, cannot be sustained. Two authorities are in point to show that recapture is illegal, viz., *Featherstonehaugh v. Atkinson* (Barnes, 373); *Filewood v. Clement* (6 Dowl., P.C., 508); and also Lord Denman's opinion in *Constant v. Chapman* (2 Q.B., 788). I do not give any opinion in this case whether the Recorder has or has not jurisdiction; but I hold that, even if he has, a party is not to lie in goal until the next sessions to make his application. It is his right to come here to seek for his discharge from illegal custody. I, therefore, make absolute the conditional order.

It was then consented that the applicant, without any writ issuing, be discharged, he not to bring any action, and Livingston to abandon his decree, the applicant not getting costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

THELWALL v. YELVERTON—May, 1, 2, 3, 5, 1862.

The doctrine of foreign law—Construction of 19 Geo. 2, c. 13—Collateral Findings.

Upon the trial of an issue whether or not goods had been supplied to the defendant's wife, evidence was given of the fact of a Scotch marriage, and conflicting professional evidence upon the Scotch Law of marriage. Held, that the judge was right in leaving the entire question as a question of fact to the jury, and that he ought not to have decided the law of Scotland in those respects in which the professional witnesses differed; nor to have applied it to the facts of the case in those respects in which they agreed so as to give the jury a direction.

Upon the question of the validity of an Irish marriage which again depended upon the question of the defendant's religion, during the twelve months immediately preceding its celebration, it was proved that the defendant was born and brought up a Protestant. Held, per Monahan, C. J., that occasional attendances at places of Roman Catholic worship, and statements respecting his own religious belief made by him in private conversations, the whole of which occurred within the twelve months, together with the representations of himself given by him to the officiating priest, at the time of the ceremony, were evidence from which a jury might infer that he had been a Roman Catholic throughout the twelve months.

And, per Keogh and Christian, J. J., that the above constituted no evidence to go to a jury, and that the judge ought to have directed them that the defendant had not ceased to be a Protestant.

The 19 Geo. 2, c. 13, in common with the penal code, generally, regarded men theologically as well as politically, and by the designation Protestant meant a person who did not believe in the doctrines of the Roman Catholic religion, per Monahan, C. J.

The 19 Geo. 2, c. 13, in common with the penal code, generally, regarded men politically and not theologically, and by the designation Protestant meant a legal Protestant or one born and brought up a Protestant, or who, having been born and brought up a Roman Catholic, had filed a certificate of conformity, and by the description of one "who hath professed himself to be a Protestant," it meant a Roman Catholic who had not filed a certificate of conformity, but by some open and unequivocal religious act had demonstrated his non-adherence to the tenets of the Roman Catholic Church, per Keogh and Christian, J. J.

The jury returned as their verdict that they found a valid marriage had taken place in Scotland between the defendant and his alleged wife, and that they also found a valid marriage had been celebrated between the same parties in Ireland, and the judge entered these findings upon the record. Held, per Monahan, C. J., that in the event of all the exceptions which related to the former of these marriages being over-ruled, and any of the rest allowed, the plaintiff would be entitled to retain his verdict.

And, per Christian, J., that the judge ought not to have inserted these findings upon the record, and that the court, ignoring their existence upon the argument of the bill of exceptions, was bound to award a venire de novo in the event of any of the exceptions being allowed.

THE action had been brought to recover a sum of money alleged to be due from the defendant to the plaintiff on account of furniture, board, lodging, and necessaries supplied to the defendant's wife. The defences to the various counts were simple traverses, and the issues were in the terms of the defences. The substantial question was whether the lady to whom the necessaries had been supplied was the wife of the defendant. At the trial before Monahan, C. J., at the Hilary After-Sittings, 1861, there was evidence given of two ceremonies, the one performed between the parties themselves in Scotland, in April, 1857, the other celebrated by a Roman Catholic priest, in Ireland, on the 15th of August in the same year. The Chief Justice told the jury that in order to find a verdict for the plaintiff, they must first ascertain that a valid ceremony of marriage had been performed between the defendant and Maria Theresa Yelverton otherwise Longworth, the lady to whom the plaintiff had supplied the necessaries in Scotland; or that they must ascertain that a valid ceremony of marriage between the parties had been performed in Ireland. In regard to the latter he told them that it appearing by the evidence that the defendant was born and brought up a Protestant, he was presumed to continue such and therefore that in order to their finding the Irish ceremony to be a valid marriage, they must first be satisfied that more than twelve months before it he had changed his religion, and continued to be a Roman Catholic during the twelve months and that if he professed himself a Pro-

testant within the twelve months, the marriage would be null and void; and the profession of Protestantism he defined to be the doing of any unequivocal religious act inconsistent with being of a different religion. The law of Scotland on the subject of marriage as well as the fact of the alleged Scotch marriage, the judge left to the jury, there having been professional evidence of a conflicting character given at the trial; and he further told them that if they found the fact of the alleged Scotch marriage, they need give themselves no further trouble in relation to the ceremony performed in Ireland. The jury returned as their verdict that they found a valid marriage had been contracted between the parties in Scotland and that they also found the ceremony in Ireland to constitute a valid ceremony of marriage. The defendant tendered the five following exceptions to the charge, 1, That upon the contradictory evidence given at the trial the judge should have determined the Scotch law himself, and should have told the jury that under the circumstances of the ceremony no person having been present, and it not having been evidenced by any writing, nor performed with the intention of fully and completely perfecting the relation of husband and wife, such a ceremony did not constitute a valid marriage. 2, That the judge should have told the jury that, as it appeared by the evidence of Theresa Yelverton herself, that at the time of and after the alleged mutual acknowledgment, said Theresa Yelverton considered herself his wife by the law of Scotland, but not in fact, as she had scruples of a religious nature—he insisting on the rights of a husband which she would not allow, until a further ceremony by a Roman Catholic clergyman—such alleged mutual acknowledgment did not constitute a valid marriage. 3, Because the defendant required the judge to tell the jury that to constitute a ceremony of marriage celebrated in Ireland by a Roman Catholic priest, it was necessary that both parties for twelve months previous to such ceremony should have uniformly, uninterruptedly and publicly professed the Roman Catholic religion, and as there was no evidence of such profession by the defendant, the ceremony alleged to have been performed by the Rev. Mr. Mooney, between the parties did not constitute a valid marriage, which he refused to do, and left the case to the jury. 4, Because the defendant required the judge to tell the jury that if they believed that within twelve months previous to the ceremony performed by the Rev. Mr. Mooney, the defendant attended Divine worship in the Protestant Episcopal Church in Scotland, and in the Established Church of England and Ireland in Ireland, and that he did so as a professing Protestant, then such ceremony did not constitute a valid marriage, which he refused to do, and left the case to the jury. 5, Because the judge told the jury that the profession of Protestantism was the doing of any unequivocal religious act inconsistent with being a Roman Catholic; whereas, he should have told them, that if the party whose religion was inquired into had held himself out by word or act to others as a Protestant within twelve months before the celebration of the matrimonial ceremony by a Roman Catholic priest, such party was a professing Protestant within the meaning of 19 Geo. 2, c. 13.

H.P. Jellett (with him *J. T. Ball, Q.C.*) in support of the exceptions.—The questions upon these exceptions concern the validity of the two marriages. I begin with the first of them which, together with the second, is pointed to the Scotch marriage. Mrs. Yelverton gave the following evidence on this part of the case: that during an interview between her and the defendant in Edinburgh the latter took from a side-table a small prayer book and read through the marriage service and directed her to read it also; that no witness was present; that she then opened a door and said to Miss M'Farland, with whom she lived, "we have married each other;" that upon this he wanted them to go to some hotel in Loch Lomond and live as man and wife, and said if they acknowledged themselves as such before the owner of the hotel it would be sufficient; that she refused to do so, and would not allow him to have the rights of a husband without a religious ceremony; that she considered herself bound to him by the law of Scotland; that her conduct in this was actuated by the belief she then entertained, but that she would act differently now, for she had been since informed, by Roman Catholic priests, that co-habitation, under such circumstances, would not be a mortal sin. The plaintiff produced a Scotch advocate who deposed, that consent alone constituted a Scotch marriage; that no ceremony, no co-habitation, no witnesses were necessary, and that a series of letters alone would prove a marriage, but that the correspondence must proceed on the supposition of a marriage, and that concubinage would not prove it; that there were three kinds of irregular marriages in Scotland: 1, habit and repute; 2, promise followed by copula; 3, acknowledgment *per verba de presenti*; that the last required no writing to substantiate it, and that the refusal to co-habit afterwards was not evidence in disproof; that a ceremony in Ireland would be proof from which a Scotch Court might infer consent at some previous time, but that a mere consent out of Scotland would not be sufficient. The defendant produced an advocate who agreed with the former, that an intention to contract a binding and irrevocable marriage was necessary; but stated that there was no such marriage in Scotland as marriage *per verba de presenti*, without one or more witnesses, or else a writing or written admission by the parties; that in the absence of a writing the presence of a witness was not merely evidence, but was essential to the validity of the marriage; that such a marriage, without one or other of these requisites, had never been proved, and that Lord Monboddo had mentioned a case where an attempt to rely on it in a Scotch court had failed. The Lord Chief Justice told the jury that he had looked into the authorities referred to by the witnesses and was unable to come to any conclusion on the subject; that he did not wonder there was a difference between them; that, on the whole, he attached more weight to the evidence of the plaintiff's witness; that the jury must themselves decide what was the law of Scotland on the subject of marriage; that if they held the refusal to cohabit to be evidence that there was not an intention on Mrs. Yelverton's part to be married, they should decide against the Scotch marriage; but otherwise, if they held that this refusal did not show the absence of such an intention.

Now, I argue that upon this conflicting evidence the judge was bound to have himself decided the question of Scotch law. So Lord Stowell in *Dalrymple v. Dalrymple* (2 Hag. Cons. Cas. 81). There the judge, in a great measure, overruled the law of Scotland as deposed to by some of the witnesses. [*Christian, J.*—There the judge was judge of the facts as well as of the law.] In *Beamish v. Beamish* (6 Ir. Com. Law Rep. 213), Monahan, C.J., in giving judgment, refers to *Dalrymple v. Dalrymple* as follows:—"Lord Stowell, in that case, thought that his duty was to ascertain, as best he could from the materials before him, what the law of the country was in which the alleged marriage was celebrated. Accordingly, he states, in his judgment, three classes of authorities from which he derives his knowledge:—first, the opinions of text-writers on the subject; secondly, the opinions of advocates and judge's examined as witnesses in the case upon the question; and thirdly, the authenticated or ascertained adjudication of the tribunals of Scotland upon these subjects." And the evidence of Sir Ilay Campbell given in *Dalrymple v. Dalrymple*, at page 139 of the Appendix to 2 Haggard's Consistory Cases is quoted a little further on:—"An irregular marriage may be constituted, or rather, it may be said, proved in various ways:—first, by co-habitation as husband and wife at bed and board, and general habit and repute. This has even been sanctioned by statute, and forms a presumption so strong scarcely to be called in question. Secondly, by promise *de futuro* and *copula* following upon it; because the engagement, though having a reference to future time, is supposed to be perfected by the act of consummation, and rendered a present contract, if there be no middle impediment to bar the claim. Thirdly, by formal acknowledgment *per verba de presenti*, either in writing, or declared before witnesses, though not in the presence of a clergyman; but these must appear to have been made with the deliberate intention of living together as husband and wife, and must be attended with personal intercourse, if not subsequent, at least prior." The same principle, that when the evidence of the experts is in collision, the judge is bound to decide the law for himself is involved in *Earl Nelson v. Lord Bridport* (8 Beavan, 527.) At page 537, Lord Langdale, speaking of Lord Stowell in *Dalrymple v. Dalrymple*, says:—"I understand him, not to have considered any authority, opinion, or passage not distinctly referred to by the witnesses, and so not to have looked farther than he considered the evidence to have fairly led, and yet, to have gone beyond the evidence, in considering, for himself, the effect of the authority referred to, with the view of acquiring for himself notions, by which he might be better able to decide upon the effect of the varying or obscure testimony of the witnesses;" and at page 560:—"I have endeavoured, in the consideration of this case, to apply the principles, to which I adverted in giving my opinion upon the exceptions which related to the admissibility of evidence; where the testimony itself has appeared to require it, I have cautiously referred to those authorities to which I was distinctly led by the testimony." The second exception means this, that where the foreign law is not contradictorily laid down, the judge ought to apply

that law to the facts of the case, and as the experts agreed here that an intention to contract a binding and irrevocable marriage was necessary to make the marriage, the judge should have told the jury there was not evidence of a marriage so made, as by the evidence it appeared that Mrs. Yelverton did not consider herself the defendant's wife. Her own testimony is that, in a conversation, the defendant said to her that in matrimony the parties conferred the sacrament upon themselves, and that the priest was only present to see that all was right; while she maintained, on the other hand, that the priest conferred the sacrament. And in a letter, written afterwards, in reply to one from the defendant congratulating her on being married to Mr. Shears, and produced at the trial, she says:—"You know you are, you always have been free." I am aware that, at the trial, Mrs. Yelverton explained this to mean that the world did not know what had passed between them; but these facts, along with those I have before repeated, I insist to be evidence that she had no such conscious intention at the time of the Scotch ceremony as would make a valid marriage. I come now to the third and fourth exceptions, which, together with the fifth, concern the Irish marriage. The 9th Wm. 3, c. 3, was the first of a series of statutes. It is no longer law, but it was law when this 19th Geo. 2, c. 13, upon which the present question turns, was passed, and I quote it to show the policy of all the subsequent acts. The first section imposed severe disabilities on any Protestant woman who should marry a man who was not a known Protestant, and it imposed a penalty on the priest who should marry them. The expression "known Protestant" is remarkable, and as evasions were likely and became frequent, so the language of the succeeding acts increased in stringency. The 2nd Anne, c. 6, s. 1, enacted that "if any person or persons should seduce, persuade, or pervert any person or persons professing the Protestant religion to renounce, forsake, or abjure the same and to profess the Popish religion," both the seducer and the convert should incur the penalty of præmunire. The 6th Anne, c. 16, s. 6, provided that if any Popish priest celebrated matrimony between two persons, knowing at the time that either of them was of the Protestant religion, he should suffer the penalties and forfeitures of a Popish regular. The 8th Anne, c. 3, s. 26, required the priest so celebrating to produce and prove a certificate, under the hand and seal of the parish minister, that the party was not of the Protestant religion, and in default of this it concluded him to have known what he was and to have incurred the penalties of the last statute. Next came the 12th Geo. 1, c. 3, which commences thus—"Whereas clandestine marriages are, for the most part, celebrated by Popish priests and degraded clergymen, be it, &c., that if any Popish priest, or reputed Popish priest, or person pretending to be a Popish priest, or any degraded clergyman, or any layman, pretending to be a clergyman of the Church of Ireland as by law established, shall, after, &c., celebrate or take upon him to celebrate, any marriage between two Protestants, or reputed Protestants, or between a Protestant, or reputed Protestant, and a Papist, such Popish priest, &c., shall be, and is hereby declared to

be, guilty of felony, and shall suffer death as a felon, without benefit of the clergy, or of the statute." I shall now read the 1st section of the 19 Geo. 2, c. 13, by which this Irish marriage stands or falls—"Whereas the laws now in being to prevent Popish priests from celebrating marriages between Protestant and Protestant, or between Protestant and Papist, have hitherto been found ineffectual: for remedy whereof be it enacted, &c.—that every marriage that shall be celebrated after the 1st May, 1746, between a Papist and any person who hath been, or hath professed him or herself to be, a Protestant, at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be, and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." The 23 Geo. 2, c. 10, s. 3, preserves the consequence of felony in the priest, notwithstanding the nullity of the marriage. I have now gone through the penal code so far as it applies in the present argument. Thus, the Acts becoming gradually more stringent, this 19 Geo. 2, c. 13, made anything done by the Protestant within twelve months before, enough, if public, to render the marriage void. In *Kirwan v. Kirwan* (Batty, 712), the question left to the jury was, if, at any time within the twelve months, the man had professed himself a Protestant. What is the evidence of the religion of Major Yelverton? I take for granted you will assume his parents were both members of the Established Church. Archdeacon Knox deposed that he knew him since he was a boy; that he then went to his father's parish church; that he afterwards went to church; that after his brother's marriage in 1857, he saw him in the church at Belleisle during Divine Service. Captain Dwyer swore to seeing him in the same church twelve years ago, and likewise in 1857. This evidence is all one way. There is no necessity here to apply the test by what means a member of one church becomes a member of another church. *Kirwan v. Kirwan*, which will be relied on by the plaintiff, is inapplicable, because, from his early years, Major Yelverton was a professing Protestant. *Kirwan* was born a Roman Catholic, baptized a Roman Catholic, educated a Roman Catholic, attended, in his mature years, a Roman Catholic place of worship. [*Keogh, J.*—If the presumption be that Yelverton was a Protestant, what need to be insisting on acts proving he was one?] Because conversations of a contrary tendency are relied on upon the other side, and it was to meet this that we relied on these acts. The Lord Chief Justice said there was little dispute as to the facts in the Killowen Chapel, and that the only question was, whether within twelve months previous Yelverton had professed himself to be a Roman Catholic. We insist he should have told the jury the Irish marriage was void; and our fourth exception is, that he should have told them that if Yelverton had appeared in Church as a professing Protestant within the twelve months, the marriage was void. [*Monahan, C.J.*—What was intended by the charge was this, that the jury must be satisfied that more than twelve months before the marriage Yelverton had become a Roman Catholic,

and that any unequivocal act to the contrary, in the way of a Protestant profession within the twelve months, would be sufficient to disprove such change. *Christian, J.*—I understand the charge as the Lord Chief Justice has now put it, that he first left it to the jury to say whether Yelverton had changed his religion more than twelve months before, and that he told them if they were satisfied of that, they must then consider if he had done anything inconsistent with that profession within the twelve months.] Protestant includes everything in the realm not Roman Catholic. The profession must be uniform, continuous, without any break; a single inconsistent act is sufficient to avoid the marriage. We have evidence that in Malta there are Roman Catholic places of worship, where Major Yelverton might have gone, but went to the Protestant places instead. [*Christian J.*—Why, if, as you now contend, there was no evidence of Yelverton having ever become a Roman Catholic previous to a twelvemonth before the marriage, did you not ask the Lord Chief Justice to tell the jury so?] I think we did, in tendering this third exception. [*Christian, J.*—My difficulty is to find any evidence at all of Yelverton having changed his religion, if he ever did so, twelve months previously.] It is proved that he attended Protestant service on board the "Transit," and at Alderney, and that he read the service in the Windmill Camp in the Crimea. The chief evidence to the contrary of this is Mrs. Yelverton's. He returned to Edinburgh in October, 1856, and she did not return till the following February, and therefore she cannot give evidence of his profession of religion in the interval. Her evidence amounts to this, that the defendant went to Mass with her at Warrenpoint; that he told her he believed the doctrines of the Church of Rome, but did not practise them; that he was in the habit of making fun of the Protestant religion; that he said part of his family were Catholics, and that he had been originally a Protestant; that she believed he was a Roman Catholic, but never knew him to go to confession. In a letter of hers, bearing date the 10th July, 1857, occurs this sentence—"If safety is what you want, what I suggest is merely the same as being at Mass making you a Catholic." This shows her own view of the worth of that attendance. Miss McFarland deposed that in conversations upon religious subjects Yelverton always leaned towards Catholicity. The evidence of the priest at Killowen is this, that the defendant said, "I am not a Roman Catholic," upon which Mrs. Yelverton said, "He does not know his own mind; he is not yet confirmed;" that being asked what he was, he said, "I am a Protestant Catholic." By the 19 Geo. 2, c. 13, I contend there needed to have been a uniform, public profession of the Roman Catholic religion by both the parties for twelve months. [*Ball, J.*—Any authority for that? *Monahan, C.J.*—Suppose a person to openly profess himself a Roman Catholic, and then for twelve months to shut himself up in a room, and let no one ever see him, and at the end of the twelve months to be married by a priest, would that be a valid marriage?] I think it would. [*Monahan, C.J.*—Assuming the man was a Roman Catholic, where is the authority for saying that the question of what he did to contra-

dict that profession is not a question for the jury? *Ball, J.*—Do you say, if proved a Roman Catholic thirteen months before, there must be positive evidence of a continued uninterrupted profession for the twelve months?] That is not this case. I cannot deal with theories. [*Ball, J.*—I want to test your argument by the question.] The meaning of an exception calling on the judge to tell the jury there is no evidence to go to them, is considered in *Avery v. Bowden* (6 El. & Bl., 973, 974). Pollock, C.B., says, "Even in the case of a bill of exceptions, the evidence ought to be such as to support the issue, and not merely such as to suggest a conjecture." And Lord Tenterden is quoted by Cresswell, J., in the same case, as having said, that "If the evidence was such that the jury could conjecture only, but not judge, it ought not to go to the jury; that the onus was on the party offering the evidence, and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury." In *M'Mahon v. Lennard* (6 H. of L., 993), this is referred to, and called a reasonable rule. [*Christian J.*—The proposition you contend for, is, I think, contained in *Wheelton v. Hardisty* (8 El. & Bl., 232), and has been laid down in many cases, viz., that the judge should be satisfied in his own mind that there is what reasonable men would hold to be evidence.] *O'Connor v. M'Cann* (Milward's Reports, 204) decided what constituted a profession of Protestantism, the person having been born a Roman Catholic. In this case a reference is made to *Bruce v. Burke* (2 Add. 471). The profession of Protestantism is for the most part of a negative character. A large class of persons exists of whose religion it would be difficult to give any positive evidence further than that they are not professing Roman Catholics. Prove that Yelverton had changed his religion, and become a Roman Catholic, he having been born a Protestant, and then the charge of the Lord Chief Justice is perfectly right, being founded on the decision in *Kirwan v. Kirwan*. There the party was born a Roman Catholic, and the onus of proof was the other way. I do not read the judge's charge as assuming Yelverton had become a Roman Catholic. [*Christian, J.*—That question he left to the jury, to say whether he had or not. *Keogh, J.*—It will be said on the other side that upon your exceptions it is not open to you to say there was no evidence of Yelverton having become a Roman Catholic, because you did not ask the Lord Chief Justice to say that to the jury. *Christian, J.*—It is not open to you upon the fourth exception—it may be on the third.] If I succeed on one exception, and only one, there must be a *venire de novo*. The verdict of the jury is no part of the bill of exceptions.—*Lord Trimlestown v. Kemmis* (9 Clark & Fennelly, 749). *The Househill Coal and Iron Company v. Neilson* (9 Clark & Fennelly, 788), lays down that if, upon a bill of exceptions to the judge's charge to the jury, the superior court see that there was a misdirection calculated to mislead the jury in their verdict, the court has no discretion, but must allow the exception and direct a new trial, even though the verdict may be right. So, in *M'Mahon v. Lennard* (6 H. of L., 1006), Lord Cranworth says that, "If you can show that one exception out of one hundred

is good, there must be a *venire de novo*." With these two propositions I conclude—first, some or all of these exceptions ought to be allowed; secondly, if any one of them is allowed, there must be a *venire de novo*.

John F. Townsend (with him *James Whiteside, Q.C.*) contra.—I shall deal with the two marriages distinctly, entertaining no intention of giving up the Irish marriage, for it alone, if good, will sustain this verdict. The Scotch marriage was a question of foreign law, as in *Dalrymple v. Dalrymple*, and therefore was a question of fact for the jury. It is said the judge should have looked into and compared the cases referred to by the experts. I submit that this is what he did, and no exception was taken at the time. In *Dalrymple v. Dalrymple*, as *Christian, J.*, has observed, the judge was judge of the facts as well as of the law. In *Earl Nelson v. Lord Bridport*, no such rule was laid down as is here contended for. In *The Sussex Peerage* (11 Clark & Fin. 85) an opposite rule is laid down, that a professional or official witness, giving evidence as to foreign law, may refer to foreign law-books to refresh his memory or to correct or confirm his opinion; but the law itself must be taken from his evidence. *M'Cormick v. Garnett* (5 De Gex. M.N. & G. 278) goes to this, that "a question of foreign law, being one of fact, must be decided in each case on evidence adduced in it, and not by a decision or on evidence adduced in another case although similarly circumstanced." A writing is not necessary to the validity of a Scotch marriage—*Hoggan v. Craigie* (M'Clean & Rob. 965); *Honyman v. Campbell* (2 Dow. & Cl. 265). [*Monahan, C.J.*—I looked into the cases referred to by the Scotch advocates, and came to the conclusion that they left it a very moot and unsettled point, but I inclined to think the writing was not necessary, and was confirmed in that opinion by the answer given by the defendant's witness, Mr. Patterson, to a question put by myself.] Upon the second exception I refer to Swinburne on Esponsals, section 4. Upon this was founded *Dalrymple v. Dalrymple*. The marginal note in *Bell v. Graham* (13 Moore's P. C. Cas. 242,) runs thus, "Held, that the marriage (a Scotch marriage) was valid by the *lex loci contractus*, there being reasonable evidence of the intention of the parties to contract *ipsum matrimonium*; and further, that as there was a mutual declaration of present marriage, it was immaterial whether the man had some other motive beside marriage;" and in giving judgment Lord Cranworth says, "the circumstance of their not cohabiting together in the ordinary mode is immaterial. Unquestionably if there had been a reasonable doubt as to the *ipsum matrimonium*, it would have been to be taken into account, but we do not think it outweighs the other circumstances. What may have been the motives which animated the appellant on this occasion we cannot conceive; but there might be motives which would make him wish to marry, and yet keep the fact concealed from the public; but what these motives were is immaterial, if it be the fact that he did actually contract matrimony with the respondent." And now the first of these exceptions relating to the Irish marriage is too large, for it would embrace born Roman Catholics as well as converts; and it would also em-

brace the case of a Hindoo baptized, and then becoming married, against which I see no objection. *Stedman v. Powell* (1 Addams, pp. 58, 65) proves that it is not necessary in all cases to show twelve months' open profession, for that the presumption may be in favour of the party being of such a religion. So *Bruce v. Burke* already cited. There is no definition of what is a profession of Protestantism in any of the statutes quoted on the other side. In *Buller v. Mountgarret* (7 Ho. of L. 647) it is laid down that an exception must be proved in the exact words in which it is taken. [*Christian, J.*—Give me any evidence that at any time, as early as 1856, Yelverton had become a Roman Catholic.] The conversations between him and Mrs. Yelverton in which he stated he had become one. There is no exception here such as is sought to be argued. *Avery v. Bowden* was reserved by consent, and therefore does not apply to this, which is the case of a bill of exceptions. *Kirwan v. Kirwan* defined a profession of Protestantism to be the doing any unequivocal religious act inconsistent with being a Roman Catholic.

James Whiteside, Q.C.—The evidence of Mrs. Yelverton to prove a contract is infinitely more precise than that to be found in any of the cases referred to, for the words were the words of our prayer-book. There is no authority for the proposition that because there was a conflict of evidence the judge was bound to decide the question of Scotch law himself, nor to the present moment do I know what the Scotch exceptions mean. The general rule is admitted, but some distinction insisted on in opposition to what is laid down in all the cases and by the House of Lords. I never knew a case in which there was not a conflict of testimony, and what will you do with it? Why, send it to the jury. There is a great distinction between exceptions to a charge and exceptions to evidence. Three times over the judge told the jury they need not find the Irish marriage if they found the Scotch marriage. The law of Scotch marriages and the fact of a Scotch marriage were both left to the jury, and in no other way could the question have been left to them. In *Huber v. Steiner* (2 Scott, 326), Tindal, C.J., delivering the judgment of the court says "the distinction between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by our English courts of law, is well known and established, viz.—that so much of the law as affects the *rights* and *merit* of the contract, all that relates *ad litem decisionem*, is adopted from the foreign country; so much of the law as affects the *remedy* only, all that relates *ad litem ordinationem* is taken from the *lex loci* of that country where the action is brought." *Bain v. Whitehaven and Furness Junction Railway Company* (3 Ho. of Lords, 1); is an authority on both points, the proof of foreign law, and the construction of the bill of exceptions. In *Corry v. Cremorne*, I was myself counsel, and the Lord Chancellor held that the Scotch marriage was to be proved by the evidence of an advocate. The law of Scotland on marriage will be found in *M'Adam v. Walker* (1 Dow. 148). In *Honyman v. Campbell*, (2 Dow. & Clark, 281), upon appeal to the House of Lords the Chancellor says, "a promise, like all other facts, may

be proved by direct evidence, or by circumstances. It may be proved by witnesses who heard it given, or by writing; but a promise may be proved without these things. It may be inferred from circumstances which may be proved by witnesses or by writing." In *Beamish v. Beamish* (11 Ir. Com. Law Rep. 530) Willes, J., speaking of the general law of Western Europe says, "Even if there were no witnesses present at such a marriage, that created a difficulty of proof only, and did not affect its validity." The defendant's witness, Mr. Patterson, endeavoured to show that this contract could not be proved as any other contract, until the Lord Chief Justice asked him if the husband died after such a marriage, and a question of inheritance arose, would the lady be a witness to prove the marriage, and he admitted that she would. It is a waste of words in a court of law to insist that the judge must put the question to the jury in a particular form. He is not bound so to do. This first exception is a criticism on the evidence, not an objection to the charge. It means that the judge ought to have done the very thing he ought not to have done, viz., decide the law of Scotland. The second exception runs thus—that the judge should have told the jury that, as it appeared by the evidence of Theresa Yelverton herself, that at the time of and after the alleged mutual acknowledgment, said Theresa Yelverton considered herself his wife by the law of Scotland, but not in fact, as she had scruples of a religious nature—he insisting on the rights of a husband, which she would not allow, until a further ceremony by a Roman Catholic clergyman: such alleged mutual acknowledgment did not constitute a valid marriage. Upon this let me refer you to *Piers v. Piers* (2 Ho. of Lords, 371). There Lord Brougham says "It is a constant course with persons who solemnize irregular marriages, which though irregular, are perfectly valid and perfectly legal; and against which nothing either of presumption or of law, can be alleged, it is a constant course for them afterwards, needlessly, superfluously, and in my opinion, irregularly, to solemnize what is termed a regular marriage in *facie ecclesie*. I say "irregularly" for an obvious reason, because if the first marriage is valid, the second marriage becomes an irregular marriage. The second marriage is a mockery; because, for two persons who are single to marry is intelligible; but for two persons who are already married to marry is a mockery, and I may almost say a profanation of a very solemn rite of the Church; therefore, though I do not consider that that acting is at all to be commended, yet it is constantly had recourse to. It is a constant practice for persons in a certain station of life, who make what is commonly called a run-away or irregular marriage, afterwards to marry in *facie ecclesie*, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may have arisen." So here I say when the Scotch marriage is proved, the Irish ceremony becomes mere surplusage. Here as in similar cases it is had recourse to; not to validate the marriage, but to satisfy the scruples of the woman. The defendant insists that when we have proved one marriage, which is not a collateral issue, but goes to the very point of the whole case; yet be-

cause a fresh ceremony is had recourse to, he is to get a *venire de novo*, and upset this verdict. But the first irregular marriage is not affected by the proof or disproof of the second. *Utile per inutile non vitiatur*. 2 Coke upon Littleton, 227 a., *Dowdale's Case* (6 Rep. 350); Bac. Abridgment, vol. 8, p. 117; 21 Viner's Abridgment, 436, 437; *Bridges v. Saer* (4 Mod. Rep. 89) where the plaintiff prescribed to have a common for sheep, and the jury found he had common for sheep and also for cows; and the verdict was objected to, but it was adjudged for the plaintiff. *Tonkin v. Crocker* (2 Lord Raymond, 865). These authorities shew that surplusage in a verdict does not upset or vitiate it. [Keogh, J.—If we are to reject one finding, why not the other as well?] Because the one is surplusage, the other is not. The second marriage is not the subject of an exception at all; because the finding it is irregular. *Sir Rowland Heyward's Case* (3 Dyer, 372 a.); *The King v. Ward*, (6 Nev. & Man. 38); *Palmer v. Gooden* (8 Mee. & Wel. 890); *White v. Sharp* (12 Mee. & Wel. 712); *Duke v. Forbes* (1 Exchequer, 356) all go to establish that pleading, finding and verdict may all be surplusage; and on that ground be rejected. [Monahan, C. J.—No doubt surplusage may be rejected, the question is whether collateral findings are surplusage.] A counsel is not entitled to tell the judge to say certain words to the jury, provided he substantially leaves the proper questions to them. Upon this ground all the exceptions are bad. In *Ball v. Mannin* (S. & B., 461), Lord Tenterden says, "if the counsel mean to object to the direction of the learned judge, that it is too vague, and so general as to be capable of misleading the minds of those for whose instruction and information it was intended, he ought distinctly to make that a point of his exception, in order to give the judge an opportunity of explaining himself more fully, and explaining any incorrect expression that may have fallen from him in the course of his address to the jury." In *Scanlan v. Seals* (5 Ir. L. R., 158), this decision of the House of Lords is referred to and acted upon. In *Power v. St. George* (11 Ir. Law Rep., 110), Lefroy, B. says, "if the judge in terms calls the attention of the jury to the questions to be decided by them, if the terms of the judge's charge are large enough to embrace them, is the defendant entitled to select a single item, and call on him to put that as a distinct question to the jury? I hold that he is not—totally denying the right of the defendant, where there was a comprehensive charge embracing the question which he desires to have put to single out a particular item, and to say, "You must give a special charge on that point." In *Rutter v. Chapman* (8 M. & W., 62), Williams, J. says, "I entirely agree in the opinion with (I believe) the whole of my learned brothers, that we are bound to look at what appears from the record to have been propounded to the learned judge at the trial, his direction thereon, and the precise exception thereto, without noticing any other facts or circumstances whatever;" and at page 73, Patterson, J. says, "If the Judge's charge did withdraw the question from the jury, and so was wrong, the exceptions do not point out that objection, and the plaintiff is not at liberty to avail himself of it." So Tindal, C. J., at

p. 100; so Lord Chelmsford in *Buller v. Mountgarret*. We have heard much upon the sufficiency or insufficiency of the evidence, but there is no exception on this ground. How can any member of the court who did not try the case, form any idea of the value of a piece of evidence? and according to *Lord Trimlestown v. Kemmis* (9 Cl. & F., 749), if there be any evidence at all, the case must go to the jury. I next mean to argue that there was evidence to go to the jury that Yelverton had become a Roman Catholic twelve months previous to the Irish ceremony. In the first place he acquiesced in Mrs. Yelverton's refusal to be married in the Greek Catholic Church at Balaklava. In the next place he said to her in Waterford, "I have been looking for a priest to marry us." A third proof will be found in Mrs. Yelverton's account of the ceremony at Killowen. Fourthly, according to her testimony, he went to a Roman Catholic Chapel twice in Edinburgh and once in Warrenpoint, and went through the ceremony at the latter place. Fifthly, on the same authority, Yelverton told her he was a Roman Catholic, and told her some of his family were Roman Catholics, and was in the habit of making fun of the Protestant religion,—add to which, that on the trial he admitted his grandmother to have been a Roman Catholic. Sixthly, because he was seen in uniform at a Roman Catholic chapel, where he did not go with the soldiers, nor in courtesy to Mrs. Yelverton. Seventhly, because he said to Mrs. Yelverton in Edinburgh that in matrimony the parties conferred the sacrament upon themselves, thereby displaying his knowledge on the subject. Eighthly, because when the lady asked him how he had been baptized, he said he did not remember; and in answer to a question about confirmation, he replied that he did not believe in the Protestant religion, and that he never did, and he also told her that he believed in the doctrines of confession and absolution. Ninthly, because Miss M'Farland deposed that he evinced a leaning towards Catholicism. Tenthly, because, even according to Mr. Mooney's account of the ceremony at Killowen, the defendant at first gave the evasive answer, "I am not much of anything," and then declared himself a Protestant-Catholic. There was no question for the jury in reference to the defendant's acts within the twelve months, unless they first found he had become a Roman Catholic, and the charge of the Lord Chief Justice told them that the presumption was in favour of his being a Protestant, as he had been born one. The third exception is conceived erroneously, because it proceeds on the assumption that there was not a valid marriage where there was a marriage perfectly valid by the common law. On the defendant lay the onus of showing its invalidity—*Steadman v. Powell* (2 Ad., 58), *semper presumitur pro matrimonio*. None of these penal acts involves an uninterrupted and continuous profession. The fifth exception I consider the important one, because it concerns the interpretation of the word profession. [*Christian J.*—I consider the Lord Chief Justice did here what was done in *Kirwan v. Kirwan*, and told the jury, if they assumed Yelverton to have become a Roman Catholic, that such and such acts constituted profession.] The whole of the defendant's argument is an attack upon *Kirwan v. Kirwan*.

[*Ball, J.*—The words in the fourth exception are not, "attending at Church," but attending at Church as a professing Protestant.] But I have already shown that a judge is not to be required to state written words to the jury, if he has substantially and accurately stated the law. Dr. Johnson's first definition of "profess" is, "to declare himself in strong terms of any opinion or character." 2. "to declare openly." 3. "to enter into a state of life by a public declaration." I take declaring and professing to be the same thing, and that the latter does not mean creeping into a church. We are told that the declarations and the conversations of Yelverton do not prove his religion. In Carrington's Supplement to the Criminal Law, 254, we have the case of a person who was tried for bigamy at the Ennis Assizes. He had stated on his first marriage that he was a Roman Catholic, and he was married by a Roman Catholic priest to a Roman Catholic woman. Upon his trial, his counsel argued that he gave a false account of himself, that he was a Protestant all the time, and the first marriage void. The Lord Chief Baron told the jury that this was sound law, and he left to them to say whether he was a Roman Catholic or not at the time. The jury believed the account he gave of himself—believed he was a Roman Catholic, and convicted him; that was *Rex v. Hanley*. In *Reg. v. Orgill* (9 Car. & Payne, 80), Alderson, B. says, "If the prisoner at the time of his marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his Protestantism as a defence to this charge." In *The Queen v. Burke* (5 Ir. Law Reports, 549), Burton, J. speaks as follows, "Supposing the case to be one in which it would be necessary to consider the questions, I should be disposed to hold that such a declaration made in order to the celebration of the marriage, and made to the person who was to celebrate, and by which he was induced to celebrate it, would, on an indictment for bigamy against a party making such a representation for the purpose of obtaining the celebration, conclude that person from denying the truth of the representation so made, and thereby invalidating the marriage celebrated on the truth of that representation. It will be said that bigamy and nullity of marriage are two different things, but see the case of *Bruce v. Burke* already cited. *O'Connor v. M'Cann* has been cited on the other side, and why I cannot tell. It was decided by the late Judge Radcliffe, and the first thing he did was to lay down that *Kirwan v. Kirwan* was sound law. But what were the facts in *O'Connor v. M'Cann*? That Mrs. Forbes, who was born a Roman Catholic, and died a Roman Catholic, had more than twelve months before her second marriage, stated herself to be a Protestant in a Chancery affidavit for the purpose of being appointed guardian to her children; but she never went to church, never did any religious act as a Protestant, never was reputed such, and the judge was asked to assume a profession continuing into the twelve months. *Semper presumitur pro matrimonio*; it lay on the promonent to prove Protestant profession, and she had nothing to go upon except this affidavit, encountered by a quantity of evidence the other way. Judge Radcliffe says the profession is to be evidenced by some

act of outward conformity, public and notorious. He says there must be some public and unequivocal act of a devotional nature, showing an adherence to the Protestant faith. [*Monahan, C.J.*—What I did was to leave it to the jury to say what was a devotional act inconsistent with being a Protestant]. *Swift v. Kelly* (3 Knapp's P. C. Cas., 257); *Fields Marriage Annulment Bill* (2 H. of L., 48). Let me add that the Bill of Exceptions in England is only appended to the postea; here it forms part of the postea itself, and being the postea it is within the jurisdiction of the court, and can be amended. [*Christian J.*—Agreeing with what you say as to the judge being only obliged to state substantially the law, and not in the words asked for, I wish for the sake of argument, and without expressing an opinion, to throw out the supposition that for want of sufficient direction on the part of the judge, the jury may have found in this instance what, if not wrong in law, is yet wrong in fact. The Lord Chief Justice does never direct the jury to what the evidence, that Yelverson had more than twelve months before become a Roman Catholic, amounted. Now suppose we came to the conclusion that there was no evidence of that at all, we could not hold the judge's charge to be right. The defendant's counsel did not insist on this at the time; had they done so we should have a very different case to deal with, but the question is, were they bound to do so? Might they not have taken a safer course in tendering the third and fourth exceptions?] While I admit the Lord Chief Justice might have been asked to tell the jury there was no evidence of the defendant having become a Roman Catholic, I contend it is not now open to his counsel to argue this, because we are protected from their lying by at the time of the charge, and then taking us by surprise afterwards. [*Monahan, C.J.*—Is there any authority for saying that a judge is bound to comment on the evidence at all?] None whatever; nor until we overrule the doctrines of the House of Lords, is non-direction any ground of exception; nor, if there be a scintilla of evidence, can the judge withdraw the case from the consideration of the jury.

J. T. Ball, Q.C., in reply.—I shall begin with the exceptions which concern the Irish marriage. They have been argued on the other side as if they were intended to meet only one view of the charge. But one of them is fatal to the charge in any view. All terms relating to religion are necessarily ambiguous, because religion includes two things, internal belief and external profession. So the words Protestant and Roman Catholic are necessarily ambiguous. A man may be either, and profess the opposite from motives of his own. Take the two following illustrations:—Charles II. was the son of a Roman Catholic mother, and professed the Protestant religion all his life, yet was in heart a Roman Catholic, and when dying received the Sacrament from the hands of a Roman Catholic priest, as Macaulay tells us in his history. Again, there is the case of Meade the barrister (*Howard's Popery Cases*, 154), who, bred a Roman Catholic from his infancy, on the occasion of being called to the bar, underwent the religious requisites of receiving the Sacrament, filing a certificate thereof, taking the oaths of abjuration, allegiance,

and supremacy, and subscribing the declaration, yet was alleged to have never renounced the tenets of the Church of Rome, or desisted, when opportunity offered, from joining in her worship and ceremonies. Are you, then, trying upon this issue the internal belief of Major Yelverson, or his external profession? Under the marriage laws you cannot try the former: under the property laws it is otherwise, and for this reason, because though the policy of both was the same, the necessity of the case was different. Nor are these marriage statutes penal, as is supposed, but remedial and constitutional. The Legislature were astute in making persons Roman Catholics, when their object was to take from them their property, and give it to the Protestant. On the other hand, they were astute in making people Protestants, when there aim was to upset a marriage. The Oxford Tractarians will serve for another illustration. For many a day before they seceded from the ranks of the Church of England, by preaching and by their writings, they taught the several doctrines of the Church of Rome. But they were Protestants to the last, and from the day of their final abandonment; from their overt act of secession, and no sooner, does their Catholicism date. The object of this third exception is, to remove ambiguity out of the case by coercing a definition of Roman Catholicism. I will now read it—"The defendant required the judge to tell the jury, that to constitute a ceremony of marriage celebrated in Ireland by a Roman Catholic priest, it was necessary that both parties, for twelve months previous to such ceremony, should have uniformly, uninterruptedly, and publicly professed the Roman Catholic religion, and as there was no evidence of such profession by the defendant, the ceremony alleged to have been performed between the parties did not constitute a valid marriage." The word "uniformly" is pointedly put to oppose "fluctuating." The statute says, 1. The party must be a Roman Catholic, when married. 2. He must have been one for twelve months. 3. He must profess publicly. 4. He must profess uniformly, and without lapse. Upon the origin of the word "Protestant," I refer to the second volume of Robertson's "Charles V.," page 327—"On that account they were distinguished by the name of Protestant, an appellation which hath since become better known, and more honourable by its being applied indiscriminately to all the sects of whatever denomination which have revolted from the Roman See." I adopt that definition of Protestantism, and in the light of it, I assert that Hume and Gibbon were Protestants, and that our laws know no other distinction in the realm than Protestant and Roman Catholic. We have been treated to the case of a Hindoo, but I doubt if the laws recognize any classes except these two. The Irish Act, 6 Geo. 1., c. 5, was passed to give relief to Protestant dissenters, and incorporate the statutes of Elizabeth, and it shows that external profession was what was meant. In the 6 Anne, c. 16, s. 6, which inflicted the penalties and forfeitures of a Popish regular on any priest who should marry a Protestant and Roman Catholic, the words are, "knowing that at the time of such marriage they or either of them is of the Protestant religion." How could the priest know the secret

belief of the parties? So, in the 8 Anne, c. 3, s. 26, where he is required to have a certificate from the parish minister that the party is not of the Protestant religion, can the parish minister be understood to certify to the secret belief? So, in the 12 Geo. 1, c. 3, s. 2, the justices of the peace are empowered to summon any person suspected of having been married by a priest, and to interrogate him upon oath as to what?—"what religion the person or persons so married *professed*." So, this moribund statute, the 19 Geo. 2, c. 13, *ex vi termini*, incorporates every preceding Act. It commences by saying, "Whereas the laws now in being to prevent Popish priests from celebrating marriages between Protestant and Protestant, or between Protestant and Papist, have hitherto been found ineffectual," and it goes on to invalidate every marriage celebrated "between a Papist and any person who hath been, or hath *professed* him or herself to be a Protestant at any time within twelve months before such celebration of marriage, if celebrated by a Popish priest." Nor need this adherence to the Protestant religion be evinced by religious acts. Gibbon, the historian, took the Popery oaths, and sat in the House of Commons, though he was a consistent deist. No need to attend a place of Protestant worship. If I am right in this, then the word "*professed*" is rightly in the exception. I need not cite the ecclesiastical decisions, because in them the judge is judge and jury, and no one can tell whether his judgment has gone upon the law or the facts; besides, there is a rule that his conscience must be satisfied, or else he is to do nothing. I, therefore, know of no case but *Malone v. O'Connor* (6 Irish Law Recorder, N.S., 191). That was a suit in equity, and the Chancellor directed an issue to try, whether the plaintiff was the heir-at-law of Richard Malone, deceased? Richard Malone and the mother of the plaintiff had been married by a Roman Catholic priest, and, on a motion by the defendant to set aside the verdict, Lord Plunket says at page 200—"The really important question which remains to be tried is this—Supposing that there was a marriage in fact, what was the religion *professed* by Richard Malone for twelve months previous to that marriage?" This exception is in these words of Lord Plunket, and is fortified by the fact that every Irish statute has selected the word "*profess*." [*Christian, J.*—Do you contend that if Yelverton had professed himself a Roman Catholic more than twelve months before the ceremony, and did nothing during the twelve months, this would be within the statute?] No, because until he did something of a contrary character, it would be presumed that he remained the same. [*Christian, J.*—Does not that point to belief rather than profession?] No, because few men are every day discoursing of their creed. I do not mean a man is to be renewing his profession day by day. A man cannot, in this sense, profess two religions. The word "*uninterruptedly*" is put purposely to prevent its being left to the jury to say whether Yelverton was more of a Protestant or a Roman Catholic. I give you the analogy of a domicile: if a man, by an unequivocal act, showed the *animus revertendi* was gone, the presumption would continue until some unequivocal act of a contrary character was done. [*Monahan, C.J.*—Do you hold that the party's words, his

statements on the subject of his religion, are to go for nothing?] No; they might be evidence of profession in certain cases. In the case in Carrington and Payne, which has been cited, and which is the only one that makes against me, there was proof which is not here. The exception then states that, in that view of the law, there was no evidence to go to the jury. There was evidence if I have not stated the law truly, but none otherwise. I cannot, for the present, and I shall not make use of any of the defendant's evidence, for I must show, from the plaintiff's own case, that there was no evidence. When, in answer to a remark about being confirmed in the Protestant religion, Yelverton replied—"I do not believe in it, and I never did;" and, assuming that by "*it*" he meant the Protestant religion, his meaning is, I did never believe in it, *although* I am a professed Protestant. His meaning is, that he was drawing a contrast between his belief and his profession. Therefore, the Lord Chief Justice was right in what he did, and there was evidence to go to the jury if religious belief was the point in question. But if profession was the question there was none. Miss M'Farland deposed that Yelverton evinced a leaning towards Catholicism. Does a Roman Catholic lean towards Roman Catholicism? Is not this the description of a fluctuating Protestant? The plaintiff swears he heard the defendant say that Protestant missionaries did a great deal of mischief. Is this a rare belief amongst Protestants? He is said to have gone to chapel twice in Edinburgh, and once at Warrenpoint, and to have admitted to the plaintiff that he must have been seen at a Roman Catholic Chapel. No one but Mrs. Yelverton gave evidence that he ever said he was a Roman Catholic; and in one of her letters to him occurs the passage already quoted, "if safety is what you require, what I suggest is no more than being at mass making you a Catholic." In fact upon the history of their intercourse, Mrs. Yelverton appears the religious seducer, and Yelverton the seduced party, within the meaning of that repealed statute (2 Ann, c. 6) which inflicts the penalty of præmunire on both. That statute is repealed, but its policy remains. I rely on two facts which will not be controverted, that Yelverton's religion of origin was Protestant, and that he was a Protestant officer in the army. This is like the domicile of origin: we have it from himself that his father and mother were and are Protestants; that he was and is one, that in the spring of 1857 he attended the Protestant service at Leith, with the men, and that a Roman Catholic officer is not bound to do this. We have Archdeacon Knox's evidence of his religion as a boy, and as a grown up man we have Captain Purvis's evidence of his Protestant attendances at Malta; Major M'Kay's evidence, who had known him before he entered the army as well as afterwards. There is a vacant space of three months from the 1st of July to the 1st of October, 1856, the men having preceded him in their return from the Crimea. We have it from Sergeant Mowlds, that he heard him read the Protestant service at the Windmill Heights; and that there the Roman Catholic soldiers had chaplains of their own; and from Quartermaster-Sergeant Brydoun that he never knew a Roman Catholic officer read the Protestant service. With the exception of

his sojourn in New Zealand, I cover this man's life from birth to marriage with a profession of Protestantism, broken by what?—by conversations with one solitary being in the universe, Mrs. Yelverton. [*Monahan, C. J.*—I will tell you what was passing through my mind—I did not consider I was warranted in withdrawing the question from the jury, there being a scintilla of evidence. Assuming the possibility of the jury finding the defendant was a Roman Catholic, I said to them that would not suffice, if within the twelve months the acts which I selected and referred to, proved an opposite profession; and I was never more surprised than to find the jury pronounce him a Roman Catholic. I took the definition of a profession of Protestantism from Batty's Reports.] If the Lord Chief Justice had used the identical words which are in the 4th exception, would he not have been right? I test it in that way: by receiving the exception he admits he did not use the words as put in it. There can be only *ita* and *non ita* answered by a judge when an exception is tendered to him. I must press this point; my exception ought to have been refused if the words or the substance of it had been given to the jury. We are told a counsel cannot call upon a judge to use certain words to the jury. This is a grave proposition, because there will be no redress. The judge may know the law perfectly, and may state it truly, yet he may not have the precise and apt words which the counsel is conscious of, and which he proffers for adoption. Or again, if, beneath a mass of impassioned oratory, harnessed with every appurtenance of emphasis and gesture, a brilliant advocate succeeds in smothering an isolated but most material fact, if the judge follows in the wake of the advocate, and buries that same fact beneath a heap of other matters in his charge, am I to be precluded from having that fact dragged out into the prominence it deserves? Suppose the case of a will being burned, and that the judge leaves out from his charge the question of *animus*, whether the will was burned *animo substituenti*, or *animo revocandi*. Suppose a judge reads the evidence all through, and never tells the jury that a particular fact in a particular aspect is decisive, is there to be no redress? This charge is deficient; it does not go far enough; it never avers these facts as an affirmative defence. In *Power v. St. George* (11 Ir. Law Reps. 104), Pigot, C. B., says,—“While we guard against a surprise, either upon the judge or upon the parties, by requiring that an objection to the charge should be precise and specific, it appears to me to be of no less importance to secure also to the parties the privilege of having a material question on which they rely, and which fairly arises on the evidence so left to the jury, as, if possible, to prevent all misconception; and I should be very slow to call in aid a general finding which, if there were no controversy, might in plain intentment be understood as including all the elements that were essential for the result at which the jury arrived for the purpose of helping the verdict by that intentment, where one of those elements was presented pointedly for consideration to the judge, and not by him so presented for their consideration to the jury.” [*Monahan, C. J.*—Is there any authority for this last proposition except the one you have

quoted?] There is none that I know of. [*Monahan, C. J.*—If the judge does not do his duty as an honest man the counsel will be without remedy; but I trust that the time will never come when an Irish judge will so far forget his duty as to misrepresent his charge.] [*Christian, J.*—That is an impossible case; but the judge might not remember all the words of his charge; and having been wrong at the time of delivering it, he might afterwards be wrong in his representation of it.] Attending church was either equivocal or it was unequivocal; and the supporters of this charge are in this dilemma, that if equivocal the motive should have been left to the jury; but if unequivocal, then the Lord Chief Justice should have directed the jury in reference to it. An act equivocal *per se* may be made unequivocal by motive. As I observed before, the act of profession need not be a religious one. It has been said that, in *O'Connor v. McCann*, Radcliff, J. I laid down that it must be of a devotional nature, public and unequivocal, and showing an adherence to the Protestant faith; but that case of *O'Connor v. McCann* must be taken according to its circumstances. Each case must be taken according to its own circumstances. In it the judge was judge of fact and law; and this applies to *Gibbons v. Gibbons* (7 Ir. Jur. N. S., 63). In Ireland there are 153 sub-denominations of Protestants. *Quodam ligamine ligatur, eodem s. luitur*. If the Lord Chief Justice told the jury that going to chapel, and the private conversations had with Mrs. Yelverton, might prove Yelverton was a Roman Catholic, should he not upon this principle tell them that going to church might prove he was a Protestant? But he asked them to find an unequivocal act within the twelve months, and not an unequivocal profession. What were the facts in *Kirwan v. Kirwan*? that Edmond Kirwan, the illegitimate son of a Roman Catholic mother was brought up a Roman Catholic, and married to a Roman Catholic by a Roman Catholic priest, he not having conformed to the Protestant religion as prescribed by the statute; and on the trial of an ejectment brought by a remainderman relying on such marriage as valid, evidence was given that he had on several occasions in several years, and also within twelve months before the marriage, attended at service in Protestant churches, and was by many considered a Protestant. There was hostile evidence that within that time he had attended at service in Roman Catholic chapels, and was by many considered a Roman Catholic. The plaintiff's counsel asked the judge to tell the jury that if they believed Kirwan was the son of a Popish parent and brought up a Roman Catholic, and a Roman Catholic previous to the marriage, they should find a verdict for the plaintiff, since, in that case, there was no evidence that he had at any time previous to the marriage conformed to the Protestant religion in manner by the statutes required, or that he had been or had professed himself to be a Protestant at any time within the twelve months. But the judge refused to do this, and told them if they believed he was brought up a Roman Catholic, and had been one previous to the marriage, that no statutable conformity was necessary to invalidate the marriage, and that there was evidence that he was a person who had professed himself to be a

Protestant at some time within the twelve months; but that they must find an unequivocal profession, such as receiving the Sacrament, or attending the religious rites of the Protestant Church, or performing acts of religious duty such as a Roman Catholic would not do. So it was an unequivocal *profession* Vandeleur, J. asked the jury to find and not an unequivocal *act*, as the Lord Chief Justice has done in the present instance. And in *Kirwan v. Kirwan*, the plaintiff's counsel took this exception, that the judge should have told the jury there was no evidence that Kirwan had performed any clear unequivocal *act* inconsistent with his being a Roman Catholic; and this exception, in common with the rest, was overruled. This charge assumes that Yelverton had become a Roman Catholic; and never before were the private declarations of a party laid to go as evidence of his religion. Let the second wife procure the best advice she can, let her avail herself of all possible precautions, how at a later period is she to know where she is if she may be turned into a concubine, and her children bastardized by the secret whispers of this man uttered long before? The Lord Chief Justice rightly told the jury that the doctrine of estoppel did not apply here: it could only apply in suits for jactitation of marriage. In the present instance the first wife might say Yelverton told me he was a Roman Catholic, and the second wife might say he told me he never was married; and so a jury would have to decide between the two estoppels. *Regina v. Orgill* is an erroneous decision. Alderson, B., fell into the same error as misled Sir Herbert Jenner Fust. As for *Rex v. Hanley* it is little worth. It is given in a treatise called a supplement, which was published in 1828, and purports to be a narrative of what took place in 1815. And, moreover, in *Rex v. Hanley*, *non constat*, the jury did not believe the Protestant witnesses. I must dissent from the observations of Monahan, C. J., in *re Darcy's Minors* (6 Ir. Jur., N. S. 36), where he says, "I can well understand how it could be argued that if a man represented himself to a woman whom he was about to marry to be a Roman Catholic, and made the same representation to the clergyman who was about to marry him, that if a question afterwards arose between himself and herself, and he wanted to get rid of that marriage upon the allegation that he was not a Roman Catholic, that an ecclesiastical or any other court should hold that he was stopped by his representation." That no exception lies for non direction has been laid down too broadly. The statement of Parke, B., in *Anderson v. Fitzgerald* (4 Ho. of Lo. 499), is referred to by Wightman, J., when speaking on behalf of the judges in *M'Mahon v. Lennard* (6 H. of Lo. 995), and these are his words:—"The omission to direct the jury upon a material point upon which the judge is required by the counsel to give a direction, may amount to a mis-direction, and may, we think, be made a ground of exception if the exception be properly framed; and as we think that the learned judge ought to have directed the jury as requested, and that the actual direction, as well as the request and refusal to direct as requested, appear upon the exception, it seems to us that this exception may be maintained." The first exception I will not press

upon the court. Lord Brougham's observations in *Swift v. Kelly* (3 Knapp's Privy Counsel Cases, 289) do, indeed, go the length of its requirements. Speaking of lawyers called as witnesses to state the law, he says, "If they differ we are left to weigh the testimony of one against another as best we can, or they may assign the reasons on which their statement is grounded, and then we are not bound by the opinion they give, but may examine the reasons; and being as it were admitted to see the particulars of the calculation and not merely the result, we may form an opinion for ourselves." The conclusion drawn by Willes, J., in his judgment in *Beamish v. Beamish*, where he quotes the *Corpus Juris Canonici*, is without authority. He is in reality giving a digest of much that has been lately published from the State Paper Office. I only regret that here and now the Lord Chief Justice should have discarded his own able judgment in that case. But this exception can only properly be argued before the House of Lords. The second exception is this; that the judge should have told the jury that as it appeared by the evidence of Theresa Yelverton herself, that at the time of and after the alleged mutual acknowledgment, said Theresa Yelverton considered herself the defendant's wife by the law of Scotland but not in fact, as she had scruples of a religious nature—he insisting on the rights of a husband, which she would not allow until a further ceremony by a Roman Catholic clergyman, such alleged mutual acknowledgment did not constitute a valid marriage. Mrs. Yelverton deposed that the defendant went to a table and took a book from it; and that she went to his side, and he read the marriage ceremony, and said, "This makes you my wife according to the laws of Scotland," that he then wished to go to some hotel near Edinburgh, and said to her, if they acknowledged themselves as man and wife before the master of the hotel that would be sufficient. And she further deposed that she would not have allowed Yelverton to have the rights of a husband without another ceremony, though she had since changed her views upon that subject. Granting then that the Scotch ceremony, as deposed to, was gone through, to make it a valid marriage the reading of the service must have been accompanied with an intention then and there to contract matrimony. I dwell upon the expression, "if they acknowledged themselves as man and wife before the master of the hotel that would be sufficient," as proof they did not then consider themselves married. I dwell upon her refusal to give to her alleged husband the rights of a husband without another ceremony, and upon the expression, "half-married," which she made use of in explaining one of her letters upon the trial. But what of the following passages in their correspondence in the interval between the Scotch and Irish ceremonies? Mistaking the meaning of some cards she had enclosed to him, he writes, "By your marriage you have earned my lasting gratitude, as, on reflection, I found that I had placed myself in a false position with regard to you, and one, of all others, the most painful to me, viz., that I had promised to you to do more than I could have performed when the time came." To which she replies, "Are you mad or am I? The first reading of your letter brought me to a stop, mental and phy-

sical: don't say it is a comfort for you to be rid of me. If it is, you know you are, you always have been, free." Is this the letter of a wife to her husband? "you know you are, you always have been, free." Why, the Queen of England could not then have separated them by the account she now gives. Upon the case made in this court they were at that moment united to each other for ever by the indissoluble ties of lawful wedlock. There remains but one other matter to be disposed of. It is the final question in this argument. If a judge introduces upon the bill of exceptions the collateral findings of the jury, can the plaintiff make use of them to estop from the consequences of the misdirection? These Scotch exceptions may be overruled; and if they are I have now to contend that, if any one of the Irish exceptions be allowed, I am entitled to a *venire de novo*. I admit that the first finding would be an estoppel in the event of any subsequent action being brought by the plaintiff; but if these findings were struck out, no one could say upon what grounds the jury found that Mrs. Yelverton was the defendant's wife. [Christian, J.—As between the parties, it is the judgment not the verdict which is the evidence on the estoppel.] I am arguing under the disability of having these findings on the record. [Christian, J.—The jury had no authority to find whether Mrs. Yelverton was married in Scotland or married in Ireland, but to find whether she was married.] The case of *Nepean v. Doe d. Knight* (2 M. & W., 894) is point blank in my favor. I will not go through the cases which have been cited of simple issues where surplusage was rejected. There is but the one case in point, and that is *Nepean v. Doe d. Knight*; and in that case cross bills of exceptions were tendered and sealed. Now, the fact that the party who got the verdict nevertheless had his bill of exceptions received, shows that that bill is to be received upon its own merits, not upon the merits of the action. The 13 Edward I., c. 31, which first gave the right to bills of exceptions, and the succeeding statutes on this subject, and the case of *Lord Trimlestown v. Kemmis* (9 Clar. & Fin. 749), entitle me to say these findings shall not stand in my way. There is more than a technicality involved in this question. If that were all, then technically I stand entitled to a *venire de novo*. But I demand it upon other and higher grounds.

Cur. adv. vult.

July 7.—The court differing in opinion, their lordships delivered their judgments *seriatim*.

CHRISTIAN, J.—This case comes before the court upon exceptions taken to the charge of the Lord Chief Justice in the month of March of last year. The question at the trial was if necessities had been supplied to the defendant's wife; and the plaintiff relying upon two ceremonies of marriage—the one alleged to have taken place in Scotland, and the other in Ireland,—the first two exceptions complain of the charge in respect of the former of these ceremonies, and the remaining three, there being five in all, are pointed to the mode in which it treated the latter. A question of novelty and importance arises in the event of all the exceptions which relate to one marriage being overruled and any of the rest allowed.

The alleged marriage in Scotland was a pure question of fact, viz., whether such a ceremony took place at all; and if so, whether it constituted a marriage valid according to the law of Scotland. These questions were left to the jury in a manner of which it is impossible for us to complain. The two exceptions both require a direction; and in whatever way the House of Lords may treat this verdict, I conceive that no such power or discretion as is suggested resides in this court; and on the validity of this alleged marriage in Scotland I, for one, have no intention of offering any opinion whatever. The two first exceptions must, therefore, in my judgment, be overruled. With reference to the third, fourth, and fifth exceptions, there is no dispute that on the 15th of August, 1857, a ceremony was performed by a Roman Catholic priest, which, if both parties had been of the Roman Catholic persuasion, would, beyond all question, have bound them to each other as man and wife; and I will take the liberty of adding, be the result of this case what it may, did bind them in honor, honesty, and conscience. The defendant, on his cross-examination, said that he and the lady knelt down before the altar, the priest standing inside; that before the priest he took her to be his wife, and she took him to be her husband. I regret that the court should be called on to look behind that ceremony. I regret the existence of an Act of Parliament which, in the course of the argument, was felicitously styled a moribund statute, but which, alas! is not moribund, but to all appearance as far from being repealed as it has ever been; an Act which has enabled the defendant to call upon a court of justice to ratify his assertion that a marriage thus contracted was not a marriage at all but a mockery and a fraud. I hope I do not transgress my proper province when I add this; that, let the result of this litigation, its ultimate and final result be what it may, though it be to establish that this man is bound by no legal tie, if he has a spark of honor or manhood in his nature he will make to this unhappy lady and those who, like the may plaintiff, have befriended her whatever reparation the new duties he has since contracted will allow him. If the result of the present judgment be, and what it will be I know not, that the verdict stand, I shall be most glad of that result. However, I have my own duties to perform; and not even to serve the interests of justice must law be strained and truth outraged. The fact of a ceremony of marriage being established, the burden of proof was cast upon the defendant. The last of a series of statutes which have been cited, the object of which was to deprive of power and property the adherents of a creed then believed to be in connexion with political purposes under the ban of the state, was the 19 Geo. 2, c. 13. By this statute every marriage celebrated by a Roman Catholic priest between a Roman Catholic and one who hath been or hath professed himself or herself a Protestant within twelve months previous, is rendered null and void. There are only two cases to be found on the construction of this statute,—*Kirwan v. Kirwan* (Batty, 712), and *O'Connor v. M'Cann* (Milw. 204). The latter contains the judgment of Radcliff, J., in which, speaking of the former, he says, "In the case of *Kirwan v. Kirwan*, it was strongly argued that the words in that Act, 'every person who hath

been, or hath professed himself or herself to be' a Protestant are synonymous; but the Court, and afterwards the Court of Error, were agreed that the Legislature contemplated not only one but two descriptions of persons; first, legal Protestants; secondly, professing Protestants, in contradistinction to legal, and avoided the marriage of a person of either description with a Roman Catholic, if celebrated by a Roman Catholic priest, i. e., the marriage with a Roman Catholic of one bred a Protestant and born of Protestant parents, or who had legally conformed from the Roman Catholic religion to the Protestant, and filed a certificate of conformity; and the marriage of one bred a Roman Catholic, and born of Roman Catholic parents, who professed Protestantism within the twelve months, though he or she did not legally conform and file a certificate of conformity." This carries with it the authority of the Court of Queen's Bench, and also that of the Prerogative Court; and by the principles here laid down I intend to be guided. The consequence is that the law might regard the same person as a Roman Catholic for one purpose and a Protestant for another; that the Legislature, so to speak, fastened on a minimum of Protestantism when marriage was the subject of its enactments; and on a minimum of Roman Catholicism when laying down the laws of property. There are two facts concerning this statute which must needs be dwelt upon. First, that whilst it contemplated this intermediate class of actual Roman Catholics who, being such, were treated as if they were Protestants, because they professed to be so, it did not recognise any corresponding class of actual Protestants who professed to be Roman Catholics. From this follows the inference that once a man is placed in the legal category of Protestants, nothing will take him out of it except his divesting himself of the character. What constitutes that legal transmutation is more easily asked than answered, and has never been established in any case except it be by the verdict in the present case. In the second place when the statute in question speaks of one "who hath been a Protestant," it means one whom external acts and facts prove to be so; it means a "legal Protestant," as Radcliff, J., in *O'Connor v. McCann*, significantly styled it. The law does not deal with men theologically but politically. It takes them as they stand, and goes not to their inward sentiments in order to class them. Human life affords neither the time nor the materials for investigations into the abstract belief which constitutes the Roman Catholic or the Protestant religion, or forms the faith of an individual. This view is corroborated by the method of proof by certificate pointed out in one of these statutes; it is corroborated by the language used in a recent decision in the Arches Court of Canterbury, I mean the judgment in the case of the *Rev. Rowland Williams*, which is only a week old, and of which, accordingly, we have no thoroughly authenticated report. But in such report as we have Dr. Lushington is made to use this language,—“What the law takes notice of in a clergyman is not his private opinion but what he publishes”—language, which is ten times over more applicable to a question of marriage than a question of clerical heresy. Here, then, is the root of the error into which the jury fell, that the counsel did not at the

trial sufficiently call the attention of the Court to this distinction. How far was this condition of legal Protestantism fulfilled in the present instance? As regards the lady it was adhered to plainly enough. She was not a legal Protestant. But what of the gentleman? Yelverton was born a Protestant and reared a Protestant. He was an officer, holding himself out to the world and the Government as a Protestant. Both his parents were Protestants; and his life is covered with a profession of Protestantism, deposed to by witness after witness. By birth, breeding, and practice, he was a perfect specimen of that which Radcliff, J., calls a “legal Protestant;” and the conclusion from this is, that *prima facie* the marriage is void. Can this conclusion be counteracted? If I have construed the statute rightly in one way, and one way only, and that is by proving that at some date earlier than the 15th of August, 1856, the defendant had put off his Protestantism and transferred himself from being a legal Protestant to being a legal Roman Catholic; and from that hour to the hour of the marriage continued without lapse to be such. How is this to be made manifest? mere profession occasional or interrupted will not do. It may be that a religious ceremony alone will make it manifest. The defendant's third exception does not go so far as to assert this, but it embodies two propositions, one of law and one of fact, that to constitute a ceremony of marriage celebrated in Ireland by a Roman Catholic priest a valid marriage it was necessary that both parties should for twelve months previous to said ceremony uniformly, uninterruptedly, and publicly profess the Roman Catholic religion, and that there was no evidence of this in the case of Major Yelverton. I am of opinion that this exception has been successfully vindicated in its every term; that the law is sound and the facts found; that if it fails at all it understates the truth, fortified as I am by the authority of *Kirwan v. Kirwan*. The parties must have been Roman Catholics for twelve months, and they must have been so uniformly and publicly. The case was put in argument of an individual secluding himself from all observation for twelve months; and the question was asked what religion will you give to him who thus for twelve months makes no actual profession? But the answer is easy, that such as he was before he withdrew himself from the gaze of men, such the law presumes him to continue. A barrister is none the less a barrister when in his study or recruiting himself amongst mountains of Switzerland. And so it is with religious profession. What evidence did the plaintiff give in fulfilment of this description as regards the defendant? No act or word of an earlier date than the twelve months. The proof rested solely on the testimony of the lady herself, and consisted of, first, his going to places of Roman Catholic worship three times; and secondly, of private conversations with herself. The defendant went to a Roman Catholic chapel twice in Edinburgh, and once in Warrenton. I shall not stop to inquire his motives in so doing; whether he went to worship or to dangle after the lady. I will assume it was to worship. But these acts fail in this; they do not relate backwards; they were done within the twelve months, and are nothing against the overwhelming evidence the other

way. As to his representations to herself, they amount to this; that up to the time of her being in Edinburgh she had not thought much about his religion; that he told her that part of his family were Protestants and part Roman Catholics, and that he himself was not a Protestant, and believed in the doctrines of her church but did not practise them; that he was in the habit of making fun of the Protestant religion; that she ever after believed him to be a Roman Catholic, though she did not understand him to go to confession; that when she asked him how he was baptized, he replied he did not remember; and upon her saying to him, "If you are not confirmed in the Protestant religion, you are not a Protestant if you do not believe in it," he made use of these words, "I do not believe in it, and I never did." She states her impression when at Naples to have been that he was a Roman Catholic; but there is nothing in that, because she does not give her reasons, and she and Yelverton were not together at the time. Now, the first thing to be observed is that neither has all this any relation backwards. Every expression was uttered within the twelve months, and resolves itself into *verba de præsenti*, every sentence except that one, "I do not believe in it, and I never did." Time is of the essence of the plaintiff's case, time of conversation, as much as the fact of conversation. It is said that all this makes a case to go to the jury that the defendant was always a Roman Catholic. That is the plaintiff's case if it mean anything at all. I stop not to comment on the word "it" in the sentence I have last referred to, or to ask whether it meant the Protestant religion or meant confirmation. I will take it that it meant the Protestant religion. But will this make the defendant a Roman Catholic? Surely not. In the eye of the law he was a Protestant. He may not have believed in the Protestant doctrines; he may have been a Deist, or an Atheist, but he was a "legal Protestant" as much as the Archbishop of Canterbury. Miss M'Farland deposes that Yelverton always leaned to Catholicity; that this out and out converted Roman Catholic evinced a leaning towards Roman Catholicism. The evidence of the priest who married them is that Yelverton told him he was not a Roman Catholic, but a Protestant Catholic. No Protestant person accustomed to the English language could frame a more explicit denial of his being a Roman Catholic. Everyone knows that the best of Protestants assert their title to be Catholics, as members of the Universal Church of Christ, and for distinction call the others *Roman Catholics*. And this is the plaintiff's own evidence. At the last moment when the defendant was about to be married he gives expression to the most thorough repudiation of Roman Catholicism. The question however, is this, whether there was a case to go to the jury, not whether the evidence preponderated one way or the other. Was there then a case to go to any rational jury? If it were necessary for the present purpose I should express my opinion upon the admissibility of this class of evidence, conversations with the woman to whom the defendant was about to be married. Suffice it to say that if the expressions uttered by the defendant were far more explicit than they are they would not make out such a case as

ought to go to a jury. What I have been saying may be summed up in these two propositions:—1. The case was brought within the statute, the 19 Geo. II, c. 13. 2. The plaintiff by his evidence wholly failed to take it out. I now turn to the charge and the exceptions. The charge is not as fully reported as might be desired; and I conjecture the reason to be that the Lord Chief Justice did not consider this the important part of the case, and did not expect the result. But after telling the jury that there was the presumption derived from Yelverton's birth and education, he leaves it to them to say whether or not he had become a Roman Catholic more than twelve months before the ceremony, and whether he did at any time within the twelve months profess himself to be a Protestant; and he defines that profession to be the doing of any unequivocal religious act inconsistent with his being of a different religion. If I am right there was error in this passage. It leaves to the jury to say if the defendant had ceased to be a Protestant and had become a Roman Catholic more than twelve months before, and whether he had done that which showed a return to the Protestant religion; and it pronounces the evidence to be such either way that they might find upon it; whereas, in my opinion, there was no evidence whatever to go to the jury from which they might find that the defendant had ceased to be a Protestant. The Lord Chief Justice should have told the jury what being a legal Protestant was, and should have told them there was no evidence to show that the defendant had divested himself of that character. There is non-direction here which amounts to misdirection—*M'Mahon v. Lennard* (6 H. of L. 996). I think there was also positive misdirection. The charge in order to be consistent should run thus,—you must first be satisfied that more than twelve months before the marriage Yelverton had become a Roman Catholic; you must secondly be satisfied that he continued to profess during the twelve months; and thirdly, I tell you there is no evidence of anything of the kind. The third exception, therefore, in my judgment ought to be allowed. The fourth exception ought also to be allowed. It runs thus,—that "the defendant required the judge to tell the jury that if they believed that within twelve months previous to the ceremony performed by the Rev. Mr. Mooney the defendant attended Divine worship in the Protestant Episcopal Church in Scotland, and in the Established Church of England and Ireland in Ireland, and that he did so as a professing Protestant, then such ceremony did not constitute a valid marriage." The point of this exception lies in the words "as a professing Protestant," which bring the case directly within the statute. The fifth exception proceeds upon a distinction more subtle than sound, and must be overruled. It is inconsistent with the reasoning which supports the third and fourth exceptions. The result of this would ordinarily be that a *verdict de novo* should be awarded, there being two exceptions out of five allowed. The question of novelty I spoke of arises upon this, that interposed between the bill of exceptions and the verdict, I find the answers of the jury to questions put to them by the Lord Chief Justice at the trial. The record informs me that the jury were of opinion there was a valid Scotch

marriage, and also a valid Irish marriage. Now, by the 28 Geo. III., c. 31, the bill of exceptions is in this country incorporated with the *postea*; and as observed by Parke, B., in *The Bank of Ireland v. Trustees of Evans's Charities* (5 Ho. of Lor. 407), a *venire de novo* is always issued for matter on the record. The plaintiff accordingly insists that he will be entitled to retain his verdict in the event of the exceptions relating to the Scotch marriage being overruled by the court, the finding on this marriage being on the record. The defendant, on the other hand, contends that the court cannot take cognizance of that fact; and that it is now uncertain what the verdict is based upon. A motion was lately made to expunge from the bill of exceptions these findings of the jury; and though I did not dissent from the judgment of the other members of the court on that motion, I expressly reserved to myself the right to decide on the propriety of introducing them upon the hearing of the bill of exceptions—*Thelwall v. Yelverton* (7 Ir. Jur., N. S. 264). There is no instance of what was done here; having been ever done before. I appeal to all the court and counsel who have known *Nisi Prius*, to say if they ever saw such a thing as the opinions of the jury put upon the record. It is contrary to the very principle of trial by *Nisi Prius*, which requires that the jury be unanimous upon the issues sent to them, and on nothing more. In the present instance it was the duty of the jury to find whether Mrs. Yelverton was married or not. It was no part of the issue sent to them to find the validity of any particular marriage. It has been suggested that this finding on the Scotch marriage will be conclusive between the plaintiff and defendant in any future action between them; but I do not think it will be any such thing, for it is only the opinion of the jury. In *Davies v. Lowndes* (1 Man. & Gran., 473), there were three collateral questions submitted to the jury, and they gave written answers; and it was attempted to have these three answers put upon the bill of exceptions for the purpose of preventing a failure, and the rule was discharged; and Tindal, C. J., in giving judgment says, at p. 483, "Although this application arises upon a writ of right, and a bill of exceptions has been tendered, we must be prepared to say, if the present application is to be granted, that in every civil action where the verdict of the jury depends, as it very often must, on the view which they take of several distinct points occurring upon the evidence, if the jury think proper to express to the court their finding of those distinct points as well as their verdict, such findings must be inserted in the *postea*, a course of proceeding for which no authority has been produced, and which has never obtained in practice. The same would be the necessary course to be pursued in criminal proceedings also; and to what inconvenience such a deviation from the regular established course would give rise will readily suggest itself when it is considered that it is to the verdict of the jury alone that the law gives absolute credit, being the finding of the jury on the precise issue which they are sworn to find." The only difference between the case in which these words were uttered and the present is, that the jury volunteered the answers without being asked for them. Will this constitute any real distinction

between the two cases? The Lord Chief Justice had a right to get these answers, and to put them on his note-book, to be made use of when called for by the court upon a new trial motion; but having done this he goes a step further, and inserts them upon the record. Of the case of *Nepean v. Doe d. Knight* (2 M. & W., 894), which has been cited as a precedent, all that can be said is that the point passed *sub silentio*; that this is the only instance; and that it was prior to the case of *Davies v. Lowndes*. I am of opinion that these findings must be rejected, and the case treated as if they were not there. I confess I cannot see the difference they make in the case by having their presence recognised. The plaintiff's counsel insisted strongly on the maxim, *utile per inutile non vitiatur*; but the question is which is *utile*? which is *inutile*? These findings stultify one another, and are mutually destructive. Finding the Irish marriage valid is *ipso facto* declaring there was no Scotch marriage; while finding the Scotch marriage does the same for the Irish marriage; a ceremony of marriage between two persons already married being a simple nullity. Are inconsistency and repugnancy the better for being put upon the record? This jury, carried away by I know not what, choose to disregard the direction of the judge to let the Irish marriage alone in case they found the Scotch marriage; and I can only account for this by supposing them to have got beyond control, and not to have known what they were doing. A reflection which does not tend to increase the value I should attach to any verdict they might bring in under such circumstances. The record so constructed presents as curious an appearance as the case which called it into existence; and if it goes before an English tribunal I apprehend that judicial criticism there will not be sparing of those comments, of which it is never very sparing, when it undertakes to pronounce upon the eccentricities of Irish procedure.

KEOGH, J.—The court are agreed in thinking that the Scotch marriage was a question of fact, and that the two first exceptions must be overruled. The third, fourth, and fifth exceptions turn upon the meaning of the words "who hath been or hath professed himself or herself to be a Protestant at any time within twelve months," in the 1st section of the 19 Geo. II., c. 13. This Act is one of a series of Acts extending over the reigns of William III., Anne, and the two first Georges; and its preamble states that the laws then in force to prevent Roman Catholic priests from celebrating marriages between Roman Catholics and Protestants had been found ineffectual. If I read English history aright, I am led to trace the parentage and pedigree of these Acts to the date of the Reformation and the predecessors of the Stuarts. Till then the Roman Catholic religion was the religion of the realm, at which time it ceased to be, and Protestantism occupying its place followed in the footsteps of its predecessor by making every desertion from its ranks a statutable offence. From the times of Edward VI. and Elizabeth every subject of the state was supposed to be a Protestant; and then it was that Protestantism made a fair commencement of its legal existence. I do not mean that Protestantism itself then commenced to exist, for in its noblest sense I conceive it to have always existed.

In the sense of a remonstrance against priestly intolerance I look upon it as coeval with Christianity. But it is with Protestantism in England, with legal Protestantism we have to deal, which did then commence its existence, and which armed itself with all the appurtenances of the criminal code. Nor was Roman Catholicism the sole object of its enactments, for Protestant dissent was equally under the ban of the law. Protestant dissent was in process of time tolerated; and this 19 Geo. II., c. 13, had but two classes to operate upon, viz., the Protestant of the state and the Protestant dissenter, whose existence was then recognised; and secondly, the Roman Catholic, who was not recognised except for the purposes of punishment and disability. The words "hath professed him or herself to be a Protestant within twelve months" must therefore have referred to Roman Catholics. The object of the Act was to invalidate the marriage of anyone who had not been a Roman Catholic for twelve months if married by a Roman Catholic priest. What then was the religion of Major Yelverton during the twelve months which preceded his Irish marriage? He was born a Protestant, baptized a Protestant; he was a Protestant officer, going with his Protestant friends and relatives, and seen by his Protestant pastor. He attended Protestant worship as a Protestant almost up to the date of the marriage; and in reply to the plaintiff's own witness, the priest, he said, upon the testimony of the priest, that he was not a Roman Catholic. When asked what then? he answered that he was a Protestant Catholic, meaning thereby, as I conceive, a Protestant, and yet a Catholic; a Catholic, and still a Protestant. Could anything be more overwhelming out of the mouth of the plaintiff's own witness? Protestants call themselves Catholics, as contradistinguished from Roman Catholics; and I know of no reason to prevent them from so doing, claiming as they do, as Christian, J., has observed, to be members of the universal church of Christ. Against this evidence there is the statement of the lady, who claims to be the defendant's wife, of private conversations had with him. But in *Kirwan v. Kirwan*, Vandeleur, J., required an unequivocal profession. In *O'Connor v. McCann*, Radcliff, J., said it would be monstrous to hold that a private verbal or written declaration would be sufficient to constitute a profession of religion. I agree with Radcliff, J., in that sentiment. If the doctrine advocated here were admitted, there would be no difficulty in laying hold of the smallest act or expression to constitute a man or a woman a Roman Catholic. If there was evidence here to go to a jury we shall be making the road to Catholicism easier by the statute rather than more difficult. There is no instance of a Protestant making his marriage valid by such a lapse into Roman Catholicism. The case suggested of a person secluded for twelve months is not this case. When it arises I shall know how to deal with it, but will not now be influenced by so whimsical a possibility. *Nolo sic sapere*. I wish not to be wise in such conceits. The third and fourth exceptions ought, in my judgment, to be allowed, and the fifth one overruled. I do not think that the findings of the jury ought to debar the defendant from all remedy upon this record; and on the whole I give my opinion in favor of a *venire de novo*.

BALL, J.—I shall not stop to consider what the world are agreed on, that the Popery laws are penal—*Smith v. Read* (6 Bac. Ab. 130). Much has been adduced at the bar which is foreign to the exceptions, and I shall not refer to it. This marriage in Ireland having been proved in fact, every presumption of law is in its favor—*semper presumitur pro matrimonio*. The House of Lords decided in *Anderson v. Fitzgerald* (4 Ho. of Lor. 499), that exceptions did not lie for non-direction on the part of the judge; and in *Ball v. Mannin* (Smith & Batty, 461), that it was the duty of the counsel to call the judge's attention to any matter on which a direction was required, in order that he might have an opportunity to express his opinion on the matter. This was upheld in *Mahon v. Lennard* (6 Ho. of Lor. 996), which so far qualified the doctrine as to lay down that non-direction might be a ground of exception if the exception were properly taken. In the present instance all the exceptions to the charge of the Lord Chief Justice, except the last, are defective in form, and on form must be overruled. They are taken for non-direction, not for mis-direction; and they omit to state what direction the Lord Chief Justice did give to the jury. There is no exception to the effect that there was no evidence that the defendant had ceased to be a Protestant and had become a Roman Catholic; and I therefore advisedly abstain from saying a word upon the want of such evidence, of which so much was made at the bar. With regard to the substance of the exceptions which concern the marriage in Ireland, this third exception means that, in addition to the instructions given by the Lord Chief Justice to the jury, he should have further told them that it was necessary the defendant should for twelve months have uniformly made a profession, and engaged in making public acts of profession. I do not understand what it means if it does not mean this. We are called upon to subscribe to this legal dogma of the necessity of this uniform, uninterrupted, and public profession. But no case, text-book, or even dictum of a judge has been produced to sustain this; nor, when judges were busy in administering this penal code, does this appear to have ever been the doctrine. I am at a loss to understand how the legal presumption of continuance can satisfy the terms of this exception. What is to be the amount of the profession, what the extent of the requisite publicity? With regard to the fourth exception, the judge is not bound to use words suggested by counsel when he has substantially and correctly put the question to the jury. The law on this point is distinctly laid down by Lefroy, B., in *Power v. St. George* (11 Ir. Law Rep. 110); and as I concur with the other members of the court in their judgment respecting the first and second exceptions; and as there remains only the fifth, which is admitted on all sides to be unsustainable, I am of opinion that all the exceptions should be overruled.

MONAHAN, C. J.—In the charge which I delivered to the jury in this case I informed them that I should require answers to the two questions,—was there a marriage in Scotland? Was there a marriage in Ireland? I told them that the first involved two questions in itself—the fact of the alleged marriage and its validity according to the law of Scotland; and that the validity of the Irish ceremony depended upon

the religion of the parties; and no one, as I conceive, except an astute lawyer, could misunderstand either the questions or the answers. My mind inclined to the exposition of Scotch law given by the plaintiff's witness; but I was clearly of opinion that to the jury it must go as a question of fact; and this, which applies to the first of these five exceptions, applies, in my opinion, more strongly to the second. I therefore concur with the other members of the court in holding that both these exceptions should be overruled. I come to deal with the remaining ones. The third exception is defective in form. It is taken for non-direction, not for mis-direction; and it fails to come within the class of cases referred to where this objection was removed by the form in which the exception was taken. It is not asserted by this exception that there was not sufficient evidence that the defendant had become a Roman Catholic; and, as plainly appears to me, no such question arises upon it. The counsel who took the exception, who prepared it, admitted that was not its meaning; and the counsel who argued it admitted that if internal belief were sufficient to prove religion there was evidence to justify the verdict. To make my own reasoning intelligible I must go over a few of the facts so often dwelt upon in the argument, and now so well known to everybody. A necessity which might have been obviated could I have anticipated the elaborate judgments which have been delivered. Mrs. Yelverton was the principal witness for the plaintiff; and she deposed that at the time of the ceremony the defendant said to the priest that he was a Catholic, but that he was afraid he was not a good one, but that he was no Protestant; that she saw him at Mass twice in Edinburgh; and that he went with her to a Roman Catholic place of worship at Warrenpoint; that he told her that part of his family were Catholics and part Protestants, and that he himself was a Catholic, and believed in the doctrines of confession and absolution; that he always made fun of the Protestant religion; and in answer to the words used by her, "if you are not confirmed in the Protestant religion you are not a Protestant if you do not believe in it," he said, "I do not believe in it, and I never did." If unexpected answers are given upon cross-examination, they cannot be withheld from the jury. The plaintiff gave some evidence, though not much, regarding the defendant's religion; he proved his statement that he had received a letter from his sister, saying she had heard he had become a Roman Catholic, and his remark, "I must have been seen at the chapel." In giving this to the jury I did not assume its truth. I have yet to learn that a judge is warranted in withdrawing a question from the jury upon the strength of his own fancy that the evidence preponderates one way or the other. There is the statement, "I do not believe in it, and I never did," to be taken in connexion with the other evidence of the defendant's religion. What is the law which governs this case? The 19 Geo. II., c. 13, is a very short statute. There is nothing in it to demand a uniform, uninterrupted, and public profession. But it is said that this is one of a series of statutes. The 4 Will. & Mary, c. 2, which is not a marriage act, shows, in my opinion, what was the difference meant between Protestants

and Papists. There is no definition of a Papist but the criterion laid down is this, that the party is to be tendered the declaration against Transubstantiation. This shows that the Legislature regarded internal belief and not external profession. The first of the Marriage Acts is the 9 William III., c. 3, whose 2nd section runs thus:—"Whereas the marriages of Protestant persons to and with Popish maidens have proved pernicious to the Protestant interest, it commonly happening such Protestant persons and their issues being influenced by such Popish wives are reconciled to Popery, be it enacted that in case any Protestant person shall marry any maiden without a certificate of her being a known Protestant, such person shall be deemed and esteemed to all intents to be a Papist, and be disallowed from being heir, &c., unless such person shall within one year procure such wife to be converted to the Protestant religion." The 2 Anne, c. 6, is entitled "An Act to prevent the further growth of Popery," and renders it penal for Papists to send their children out of the country. In neither of these is there any definition of a Papist or a Protestant. The next Act was the 6 Anne, c. 16, entitled "An Act for the more effectual preventing the taking away and marrying children against the wills of their parents or guardians." The next was the 8 Anne, c. 3, to explain and amend the Act to prevent the further growth of Popery. The next was the 12 Geo. I., c. 3, which enacted "That if any Popish priest, or reputed Popish priest, or person pretending to be a Popish priest, or any degraded clergyman, should celebrate or take upon him to celebrate any marriage between two Protestants or reputed Protestants, or between a Protestant or reputed Protestant and a Papist, such Popish priest, &c., should be guilty of felony and suffer death as a felon." The next was the 19 Geo. II., c. 13, the statute under discussion, and the last was the 23 Geo. II., c. 10. I cannot come to the conclusion that the principle was different when property was being legislated for and when matrimony was being legislated upon. I cannot find the doctrine in any case; and if we assume that being a Protestant was different from professing to be a Protestant, what can the former mean except believing in those doctrines which are not the doctrines of the Roman Catholic religion? In *Close v. Hamilton* (How. Pop. Cas. 30), a bill to perpetuate testimony of a person's being a Papist who had been always esteemed a Protestant was allowed ten years after his death. I refer also to *Tisdal v. Quin* (How. Pop. Cas. 40), and in *Swan v. the Governors of Stephens' Hospital* (How. Pop. Cas. 136), the inquiry directed by the court was "whether Edward Cusack was at any and what time a Papist or person professing the Popish religion" Cusack was born and bred a Protestant; he was what I have heard called here to-day, "a legal Protestant;" and the inquiry was this, was he in truth a Papist? I conceive belief was taken to be the test there. Not one of these cases lays down any such doctrine as is contained in the third exception. I come now to the cases on marriage, the principal one being *Kirwan v. Kirwan*. I learn for the first time in the present case that it is harder to prove a man a Roman Catholic than a Protestant. That which will prove a Ro-

man Catholic to have become a Protestant will, in my judgment, prove a Protestant to have become a Roman Catholic. In *Kirwan v. Kirwan*, the evidence left it in doubt what was the religion of Edmond Kirwan at the time of his marriage with Celia Hopkins. The jury found the marriage void, but it is impossible to tell upon what grounds; and if I were to come to any conclusion upon the evidence it would be that Edmond Kirwan was in fact a Protestant. In *Bruce v. Burke* (2 Ad. 471), the distinction does not exist which is taken between *Kirwan v. Kirwan*, and *Thelwall v. Yelverton*, that Kirwan was originally a Roman Catholic, and Yelverton originally a Protestant; for Burke was originally a Protestant. There is no such doctrine as that of legal Protestantism in *Kirwan v. Kirwan*, nor anywhere but in the words of Radcliff, J., who, in *O'Connor v. McCann*, professes to find it in *Kirwan v. Kirwan*, where I myself cannot find it. Neither can I follow the reasoning of this judge when he suggests that Margaret Forbes, although a Roman Catholic in heart yet somehow believed she was a professing Protestant. I can understand well enough that she told a lie, and said she was a Protestant when she had no notion of becoming one. I may also mention *Rez v. Hanley* (Car. Sup., 254), and *Regina v. Orgill* (9 Car. & Payne, 80). If this third exception is to be literally construed, it follows that if a man recants in private, and attends to the religious duties of a Roman Catholic for twelve months, because he has not for those twelve months uniformly, uninterruptedly, and publicly professed the Roman Catholic religion, he is a Protestant within the meaning of the 19 Geo. II., c. 13. The first objection to the fourth exception is, that like the third, it is for non-direction, which, according to *Anderson v. Fitzgerald*, is not matter of exception. It was not my province but the province of the jury to give a character to the defendant's attendances at church. Ambiguity in the judge's charge may be ground for a new trial motion, which is very different from arguing a bill of exceptions, because in the former case the entire merits are before the court, which can decide whether the jury were misled or not. I am of opinion that all these exceptions should be overruled. But I do not think it right to stop here without expressing my belief that the allowance of some of these exceptions should not entitle the defendant to a *venire de novo*. A valid Scotch or a valid Irish marriage would support the plaintiff's case. I asked the jury if there had been a marriage valid according to the law of Scotland, and they replied, "We do think there was." I asked it in the presence of the parties, who took no exception to my so doing, but who have excepted upon other grounds. Is their answer rightly upon the record? If it be no one can doubt that the plaintiff ought to retain his verdict. *Davies v. Lowndes* differs in three respects from the present case. In the first place it was a writ of right; secondly, no questions were asked of the jury, but they volunteered their answers; and thirdly, the motion was made to introduce these answers, which till then were not upon the bill of exceptions. In the present instance (7 Ir. Jur., N. S., 260) there was a motion to expunge them. I did that which, if necessary, could have been corrected in a court of error. But it

is insisted that no case of the kind has ever occurred. It seems to me that one who runs may read, that the case of *Nepean v. Doe d. Knight* (2 M. & W. 894) is an intelligible precedent. That was an ejectionment, in which two questions were raised at the trial; and the judgment of the Court of Error goes on to state that the jury found that it was not proved that Matthew Knight was alive within twenty years; but that it did not appear that there was an adverse possession of twenty years. If Lord Denman did not get this information from the record, will any one tell me where he did get it? He may have been all wrong in what he said, and he seems in opposition to *Davies v. Lowndes*; but his words are these, that "if the judge's direction was also wrong upon the first point, the lessor of the plaintiff would be entitled to retain the verdict although he obtained it on another ground." This procedure, therefore, does not shock the feelings of some of the English judges; and till the higher authority shall inform me to the contrary, I shall not cease to consider that what was done in the present case was done upon the principles of the highest justice, and so, as I should hope, according to the common law.

The court being equally divided, the exceptions were overruled, and there was

Judgment for the plaintiff.

[*Note by the Reporter.*—The grounds of the foregoing judicial divergence being speculative and attractive, it is suggested that the distinction, for purposes of legal classification, between external profession and internal belief, however plausible and self-commending, is in its operative vigor the growth of the present century, and must not be remorselessly assumed when construing a statute so old as the 19 Geo. II., c. 13. An obsolete preface to the Book of Common Prayer, together with the language of a portion of this series of statutes, and the reasoning exhibited in some of Howard's Popery Cases, combine to indicate that the confusion and intolerance which begot the penal code, were, in a degree, strangers even to the idea of this distinction existing in fact, and had altogether failed to draw the ineradicable line discerned by the criticism which abdicates on behalf of the temporal Legislature the functions of a conscientious inquisition. True it is that Acts of Parliament again and again made obstructive Roman Catholics; but these instances, so far from dignifying the legislative *animus* of the period with a systematic foresight, may be the exceptions which prove a contrary rule, which prove that in the inception of the Popery laws a legal Protestant and a real Protestant were one and the same thing. What makes a legal Roman Catholic of one born and bred a Protestant is a question left unanswered in the judgment of Christian, J. What the condition may be, his lordship says, I do not know; but whatever it be, I do know that the defendant, Yelverton, had not fulfilled it. If the precise case which here occurred was never legislated for in terms, is there any obstacle sufficient to prevent a judge from falling back upon the original identity of real and legal Protestant? Is the policy of the Popery laws sufficient? Is a tenderness for the flaws of that code sufficient, which, after all its minute amendments, le-

queathed a *casus omissus* to posterity? The judgment of Christian, J., would deprecate from the charge of conscientious meddlings all the laws of the last century; but the argument of Ball, Q.C., concedes that if the question were one of property, an inquiry into the belief of Major Yelverton would be quite legitimate. In *Swan v. The Governors of Stephens's Hospital* (How. Pop. Cas. 136), Lord Hardwicke reasoned upon the motives of Edward Ousack in taking the Sacrament. In *Bruce v. Burke* (2 Add. 471) Sir John Nicholls dilated on the amount of credit to be given under the circumstances to statements of conversations had with one of the witnesses, but did not pronounce the evidence inadmissible. And the parentage of Burke he held to be corroborative of his being of the Catholic persuasion. He did not say conclusive. In *Smith v. Read* (6 Bac. Ab. 130), a discovery was sought for on the ground that it was difficult to prove the party a Papist at law. The language of Dr. Lushington in the case of the Rev. Rowland Williams, in this light will seem, instead of being ten times more applicable to the present case, not to be applicable at all, or applicable only in proportion as it is inapplicable to the case before him. For the act of publication is the subject matter of that suit, as any one can see by consulting the printed edition of Mr. Fitzjames Stephens's speech. It is asked how a priest could know or a clergyman certify to the secret belief. The question reminds one of the opening sentences in Butler's Analogy. The certificate was some evidence that the party did not attend the church which was some evidence that he was in heart a Roman Catholic, primary evidence, perhaps, of the former fact, of the latter secondary, but in both possessing that ingredient of probability upon the recognition of which all laws and all society are constructed. It may be that the Legislature assumed sincerity to be the rule, hypocrisy the exception. It may be that the defendant, Yelverton, was neither a legal Protestant within the Property Acts, nor a professing Protestant within the 19 Geo. II., c. 13, but a reputed Protestant within the 12 Geo. I., c. 3. This Act does not avoid the marriage, but visits the priest with felony. If there be no rule of law which absolutely precluded the admission of the defendant's statements, it remains to be seen how the Lord Chief Justice could have withdrawn from the jury the scintilla of retrospective evidence contained in the words, "I do not believe in it, and I never did." Nor is the case at all parallel to the illustration given in *Avery v. Bowden* (6 EL & BL 973), where Pollock, C. B., said that he did not know that if a witness deposed to a circumstance having happened on a Tuesday or Wednesday, that would be any evidence to go to the jury that it happened on the Tuesday. Of course it would not; and for this reason, that in the ordinary affairs of life such a statement, unsupplemented by any fact, would carry no moral conviction to the breast of an individual. But that is very different from a wife saying of her husband, "He told me that he did not believe in the Protestant religion, and that he never believed in it so long as he remembered." Much stress is laid by Keogh, J., and Christian, J., on the testimony of the Roman Catholic clergyman; but this is admitted by the latter learned judge to be, and

plainly is, irrelevant in an argument that there was no case to go to the jury. The latter did not appear to credit this witness, judging by their questions at the time of the trial. Again, can it be said that the direction which the Lord Chief Justice did give to the jury, as well as the request and refusal, appear on the face of the third and fourth exceptions?—*M. Mahon v. Lennard* (6 Ho. of Lor. 996), if not, there is no answer to the allegation that they are defective in form. The third exception, it is submitted, would run better without the words "uniformly" and "publicly," which either mean more than the statute meant, and so mislead or else mean nothing, and so are surplusage. In *Malone v. O'Connor* (6 Ir. Law Rec, N. S., 191), two of the jury applauded the counsel's speech by clapping their hands; but neither Lord Plunkett, who directed the issue, nor the House of Lords, considered this sufficient cause for sending the case to another county. And the former sympathized with the feelings of the jury while he mildly reprehended their expression of them. The first remonstrance of Keogh, J., against the supposition that the jury in the present instance were at liberty to compound their differences, and out of two half marriages to make one whole one; and his avowal that he would send back a verdict so constituted if it were brought in to him, passed away amidst the subsequent discussion, and he himself agreed to overlook the separate findings of the jury; yet the reflection of a later period may perhaps ask itself if this was not sound sense, and if, despite the observations of Tindal, C. J., in *Davies v. Loundes*, the genius of the common law ever contemplated a unanimity composed of elements not various but repugnant, and wherever credible, admitted to mutually exclude each other.]

Consolidated Chamber.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

[BEFORE BARON DEASY.]

SHEA v. M'DONNELL, 5th Sep.

Renewal of Habere.—Negotiations.—Notice of Motion.

A writ of Habere will not be renewed without notice of motion for that purpose, where negotiations for a compromise have been pending between the parties, though it is sworn that such negotiations have terminated without effect.

T. Purcell moved, without notice, to renew a writ of Habere. The affidavit stated that there had been some negotiations between the parties as to an amicable arrangement, but it added that such negotiations had finally ended on the 30th of August last, when the terms offered by the plaintiff had been declined by the defendant.

DEASY, B.—You must give notice of this motion. The tenant has been all this time dealing with the crops, on the expectation that the negotiations would have led to a compromise of the ejectment and to his continuing the tenant, and he may have some answer to give to the motion.

No rule.

GARNETT v. O'CONNOR.

Bill of Exchange Act.—Leave to appear and defend.—Affidavits in reply.

Leave to appear and defend will not be granted unless the defendant's affidavit discloses facts which would constitute if proved a valid defence, or unless the money is brought in. The mere belief of the party that the plaintiff is not a bona fide holder and had notice of an agreement with a former holder not to look to the defendant for payment is not enough, when contradicted by affidavits in reply.

T. Purcell, for the defendant, moved on notice (by direction of his Lordship, on the last motion day,) for liberty to appear and defend the action.—The action was brought by the plaintiff as indorsee of several bills of exchange and promissory notes against the defendant as prior indorser. The defendant's affidavit relied on an alleged agreement made in April last with a Mr. Brokenshir, as manager of a Provincial Discount Company, that the defendant should act as agent of that concern in Ennistymon and Kilrush, in Clare, and that as such agent he would endorse all bills and notes discounted in his branch, but that there was an express arrangement that he, as such agent, would not be held liable for such endorsements, and that the company would never look to him for payment, but would protect him from any loss thereby incurred, and then he stated on his belief that the plaintiff was in league with Brokenshir and the company, and that he had given no consideration for the bills or notes, and was not a *bona fide* holder of them, and had notice of such agreement with Brokenshir, but the defendant had not acted as agent, and he believed that the company was a fiction. The bills and notes were, however, endorsed by the defendant, and also by Brokenshir, who endorsed them to the plaintiff. Counsel contended that the plaintiff had no right to file affidavits in reply, but should be confined to relying on any defects in the defendant's affidavit; he also relied on the analogous practice in cases of security for cost; *Nunn v. Gausse* (6 Ir. Jur., 268), and also on the cases of *Clay v. Turley* (27 L. J., N. S., Ex. 2), *Mathews v. Marsland* (ib. 148), each decided on the English Bill of Exchange Procedure Act, to show that where there was a possibility of a defence being proved, the court would allow the defendant to appear, and would not, on motion, decide on matters which were proper for a jury; *Febart v. Stevens* (30 L. J., N. S. 1.)

P. Barlow, for the plaintiff, relied on his right to use the affidavits, having got notice of the motion. From those affidavits, which entirely contradicted the defendant's case, it appeared that the plaintiff was an endorsee for value, and was entirely unconnected with Brokenshir or the company, and had no notice of any such alleged agreement.

DEASY, B.—On the defendant's own affidavit, there is no statement of any facts which constitute a valid defence as against the plaintiff, but there is as against Brokenshir, and all that is alleged to bring the plaintiff into privity with him, is stated only on the belief of the defendant, and it was on that ground that I desired notice of the application to be given in order

that the plaintiff should have an opportunity to contradict that statement, and he has fully denied that part of the case. It is perfectly clear that the defendant endorsed the notes and bills in order to get them discounted, and unless the money is brought in before the 1st of October next, I will not allow this experimental defence to be filed.

RULE.—If the amount for principal and interest due on the notes and bills be brought in on or before the first day of October next, liberty to the defendant to appear and plead, otherwise refuse the motion with costs.

NIXON v. LOGHLIN.

Garnishee order.—Rent in hands of receiver in Chancery.

A Garnishee Order will not be made on rent in the hands of a receiver in Chancery, appointed over the estate of a tenant of the defendant, nor against the tenant himself.

S. Curtis moved for a Garnishee Order to attach half a years rent in the hands of a Mr. Butler, who was a receiver appointed by the Court of Chancery in a certain matter in which a tenant of the defendant was a respondent, and over such tenant's estate; the receiver had admitted that he had received, and had in his hands, the half-year's rent, and was ready to pay it over on service on him of the order.

DEASY, B.—A receiver in Chancery is not a legal garnishee, he is not indebted to the tenant at all, he is only the officer appointed to collect the rents of his land and pay them as directed by the court.

Curtis then asked for an order on the tenant.

DEASY, B.—No; he has not the money in his possession, and as there is a receiver over his lands who has got the rent, he is not liable for and does not owe the amount to the defendant.

No rule.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE BERWICK, J.]

EX PARTE, CHARLEY, IN RE GUSTAVUS WILSON.

Composition under the arrangement clauses—New debts incurred pending payment of composition—Failure to carry out arrangement vesting the trader's property in trustees—Bankruptcy—Right of creditors to revert to their original debts.

Where a trader petitions the court under the arrangement clauses of the Act, with a view to pay a composition to his creditors by instalments, his proposal is accepted, and two of the instalments are paid. The trading in the meantime goes on, and the petitioner contracts debts with a new class of creditors, the credit having been given to him, and not to his trustees. Upon failure to pay all the instalments the case is turned into bankruptcy. The new class of creditors can have no priority over the arrangement creditors, although the goods supplied by them evidently aided to make the payments that took

place. Where the court confirms the resolution of creditors, and two instalments are paid under the arrangement, the creditors are remitted to prove for their original debts, giving credit for the payments received.

Heron, Q.C. with him Wilson, were for the assignees; Kernan, Q.C., was for Charley, who represented the new class of creditors. They cited *Cumber v. Warre* (1 Stran. 428); *Hassard v. Mars* (6 Hu. Nor. 440); *Ex parte Vere* (1 Rose, 281); *Evans v. Powis* (1 Excheq. 607); *Curlevis v. Clarke* (3 Excheq. 376); *Ex parte Wood* (2 Deac. & Chit. 508); *Ex parte Bateson* (1 Men. D. & De G. 299).

The facts appear in the judgment of the court.

JUDGE BERWICK, in giving judgment, said—This case comes before me on a charge filed by William Charley, who describes himself to be an inspector, on behalf of certain creditors of the bankrupt named in the charge, who claim to be paid their demands in priority to the other creditors of the bankrupt, and who further insist that such of his creditors as were parties to an arrangement heretofore entered into with him, should only be permitted to prove for the unpaid portion of the composition thereby agreed to be accepted by them in liquidation of their demands. The assignees of the bankrupt in their discharge submit these questions to the judgment of the court on the state of facts as appearing in the proceedings in this matter. It appears that Mr. Wilson was a trader, extensively engaged in this city in the business of a linen draper, and, being unable to meet his engagements, he, on the 4th April, 1860, presented a petition to this court, under the 343rd section of the Bankruptcy and Insolvency Act, for the purpose of laying before his creditors a proposal for a compromise of his debts, by paying a composition thereon of 12s. 6d. in the pound; and the statutable sittings having taken place, as provided by the Act, his proposal was approved of by the court and duly confirmed. It was to pay 12s. 6d. in the pound on all debts exceeding 10l. by equal instalments, at six, twelve, and eighteen months from the confirmation of his proposal, to be secured by his acceptances for the instalments to be passed to his creditors; and it was thereby arranged, in pursuance of a resolution to that effect, that his personal estate should be vested in two trustees named on the part of his creditors, jointly, with the official assignee, to secure the due performance of the arrangement. The bills of exchange for this composition, accepted by the trader, were handed to and received by his then creditors, and he continued to trade as before, remitting to the official assignee, through the said trustees, from time to time, certain sums of money, the proceeds of his establishment, towards providing the payment of the bills. In this manner the greater portion of the two first instalments were paid; but finding himself unable to continue his trade and pay the remainder of the composition, the said Mr. Wilson filed his petition in this court on the 7th of February, 1862, to be adjudicated a bankrupt, and by order of same day he was adjudicated a bankrupt. It appears that between the confirmation of the proposal for arrangement and the adjudication of bankruptcy, Mr. Wilson incurred new debts in the

course of his trade to the amount of 1,305l. 5s. 6d., and it is on the part of these creditors that the charge has been filed, by which two questions are substantially raised. First—They insist that they should be considered as creditors of the trustee, appointed under the arrangement proceedings, and as such should be paid their debts in full before any part of the assets vested in the trustees should be applied in discharge of the debts compounded for by that arrangement. Secondly—They say that even if this be not so, yet, that as between them and the arranging creditors, the latter were, under the circumstances of the case, only entitled to prove for the balance which remained due to them on foot of the composition, and could not now revert to the original amount of their demands. The latter proposition is one of general importance and interest in reference to the proceedings of this court, and particularly to the large class of cases which now come before the court under the arrangement clauses of the Act. I cannot find that this exact question has ever yet been decided; and as it has been raised in three cases now standing for judgment, I have selected this as the first to give my decision on this case, being the one in which the question is raised in the most simple form, and wherein the facts admit of no dispute. Now, as to the first point, affidavits have been filed by several of the new creditors, in which they allege that they were aware of the arrangement entered into with the bankrupt, and that his estate had been vested in trustees, and they allege that they would not have supplied the bankrupt with the goods for which the new debts have been contracted were it not on the faith of the arrangement, and their trust that it would have been carried out. Now, I cannot say that I think there is anything in the case as made by them to give them any right to a priority over the old or arranging creditors, or, indeed, that there is any peculiar hardship in their case. Of course, had their dealings been in reality with the trustees, or on their credit, they would have had a right to treat them as their debtors, and perhaps a case might have been made for the court to declare the stock in the hands of the trustees answerable, in the first instance, to discharge the debts incurred on the faith of this substantially new trading; but these creditors, being aware of the arrangement, and having continued to deal with Mr. Wilson himself without the intervention of the trustees, must be deemed to have taken their chance of his performing his part of the arrangement, and ought to have calculated on the consequences of the non-performance of its terms and to have guarded against it. The alleged hardships of which they complain formed the subject of argument in the case of *ex parte Vere* (1 Rose, 281), and was pressed on Lord Eldon, but he did not seem to think it deserving of weight. It must be borne in mind that the stock and effects of the bankrupt were merely vested in trustees, together with the official assignee, for the benefit of the then existing creditors, and for the purpose of securing it from any improper disposal by the trader contrary to the objects of the arrangement, and that the creditors for whose benefit it was intended do not complain of any breach of trust by the trustees; and, as a matter of fact, the business was, as was intended, carried on by the trader himself just as he had hereto-

fore done in the same establishment and under the same name, the goods supplied to him in his own name, and, except in one instance, on his own order, and the debts contracted (at least apparently) on his own credit; and all the dealings of the new creditors were conducted by the bankrupt himself without the intervention, interference, or even knowledge of the trustees. In my opinion, therefore, there is no ground to sustain the first point. To the second point insisted on in the charge, I have given the best consideration in my power, particularly as it has been pressed on me that if I decide against the new claim put forward by the charge, it may have the effect of diminishing the number of cases in which traders avail themselves of the benefit of the arrangement clauses, and being persuaded that the working of this system is attended with great benefit, not merely to traders, but to their creditors, I should be sorry to make any decision which would be attended with the suggested effect; but, on the best consideration I can give to the matter, I have arrived at the conclusion that the proposition contended for is not sustained by any principle of law, or by the enactments of the statute by which the system has been established. I have been referred to no case in which this exact question has been decided; and, therefore, I am obliged to consider it with reference alone to general principles, and the fair interpretation of the words of the statute. The question appears to resolve itself into this—does the confirmation by this court of the proposal of a trader to pay a composition to his creditors in discharge of their admitted debts so completely put an end to the original demand, that the creditor is for ever debarred of the power to set it up, or insist on it again, even where the trader has failed to perform his part of the arrangement, and is confined to his remedy for breach of the new, or substituted agreement? Now, the first thing to consider is, how the law stands in case of private arrangements of the same description between a debtor and his creditor, independently of the statute; and then to see what change the statute has made in relation thereto, and with what object it was framed. Since the case of *Cumber v. Wane* (1 Strange, 425), it is an undoubted and familiar principle at law, that an agreement by a creditor to accept a smaller sum in lieu of an ascertained debt of a larger amount, is *nudum pactum*, and cannot bind him. On this general principle there has been engrafted this exception, that if the creditors shall have obtained any further or other security or benefit by the new agreement, or if a third party, who has acted on the faith of this engagement, will be prejudiced thereby, then an agreement to pay a lesser sum in lieu of a larger ascertained debt will be valid and binding, provided the debtor perform that which was intended to operate in satisfaction, according to the terms of his engagement—in other words, there shall be no satisfaction without performance, where the performance is intended by the agreement to operate as the satisfaction. That such is the principle involved in cases of composition between a debtor and his creditors, where they agree to accept a lesser sum in lieu of their ascertained demands, whether the consideration be additional security or some other advantage, such as each creditor acting on the faith of the engagement

of the others, has been decided in many cases. *Hazard v. Mare* (6 Hur. & Nor., Exc. Repts. 440) seems an express authority, not merely as to the common law consequence in such a case, but as to its consequence where the agreement has been made through the instrumentality of the court in pursuance of the statutable authority. As to the construction put on such arrangements according to the common law rights of the parties, the cases of *ex parte Vere* (1 Rose, 283), decided by Lord Eldon; *ex parte Wood* (2 Dea. & Chit., 508); and *ex parte Bateson* (1 Mont. D. & De Gex, 299), seems to place the matter beyond dispute. On the best consideration I can give to the case, it appears to me that it was not intended to make any alteration in the legal consequence of failure in performance of such an arrangement by any of the enactments of the arrangement clauses of the statute. The principal object of these enactments appears to have been to bind dissentient creditors by the terms of an arrangement, acquiesced in and adopted by a certain majority of the creditors of an arranging trader, and thus hindering a few dissentients from defeating (as they might have done at common law) a beneficial arrangement. By the 35th section, the court cannot give to the arranging trader a certificate to operate as a certificate of conformity, “until the resolution or agreement shall have been carried into effect” (not merely carried), “and the creditors shall have been satisfied according to the terms thereof.” It might perhaps be suggested that the satisfaction here referred to may mean not the ultimate payment of the composition, but the completion of the new contract, whether that be by passing bills of exchange, obtaining new securities, or vesting the estate of the petitioner (as in the present case) in trustees for securing the performance of the contract, and that in such a view of the case the new contract itself, and not the performance of it, should be considered as that which was agreed to be taken in satisfaction and discharge of the breach; and if so, that the new contract would therefore operate according to the intention of the parties whether performed or not, so that the only remedy for its non-performance would be by an action for the breach, and not a right to revert to the original debt, according to the doctrine suggested in the cases of *Evans v. Powis* (1 Exch. Repts., 607); *Curlew v. Clerk* (3rd Exch. Rep., 375), and *Flecton v. Hill* (16 Q. B. 1039). But the terms and the policy of the clauses of the act of parliament under which these arrangements are conducted appear to me to suggest, and indeed require, a different construction. In the first place, I cannot but think that it was intended that the jurisdiction of the court over the trader and his property should continue till he had performed all the terms of his proposal, and made complete satisfaction of all the debts due by him. Now if I were to say that the new agreement was the satisfaction intended, I should be bound to give the trader his certificate of conformity the moment that agreement was completed, by the passing of the new security or the confirmation of the proposal, and the trader would be thus discharged from all his old engagements and freed from the control or interference of the court before, perhaps, one penny was paid to his creditors on foot of the new agreement. I cannot believe that such was the inten-

tion of the Legislature. Again, by the 353rd section of the act, which authorizes the court to adjourn the case of an arrangement into bankruptcy in certain contingencies therein mentioned, it is enacted that in such case "Any proposal which may have been made, or assented to, or confirmed, shall be wholly and altogether void." It appears to me that the present case is quite analogous to that referred to in this section of the act; in each case the bankruptcy takes place in consequence of some failure in the carrying out of the proposal; and how can I make a decision that would have the effect of binding one of the parties to an arrangement from which the other is wholly freed, and which is declared to be "wholly and altogether void?" If this case had been adjourned into bankruptcy, the agreement made with the arranging creditors would have been wholly void; and where, as in this case, the bankruptcy has supervened, in consequence of the act of the trader himself, whereby he has defeated the arrangement made with the creditors, I do not see how I could hold that the result, so far as his creditors are concerned, is different. I must therefore decide that, as the arrangement has not been performed, and the failure has been caused by the default of the arranging trader, his creditors are at liberty to revert to their original debt, and to prove for the full amount remaining due.

Attorney for the Assignees—Mr. Findlater.
Attorney for Mr. Charley—Mr. Oldham.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MONTGOMERY v. MIDDLETON AND POLLEKFEN.
April 26, 1862.

New Trial Motion—Special Case—Construction of written Contract.

A contract for the sale of a cargo of mixed maize then on its way from New York to Sligo contained a condition that should the vessel which carried it not arrive at Sligo on or before the 20th June, 1861, the contract should be void. Held—that this condition requiring parol evidence to explain it, and issue being taken upon its fulfilment, the construction of the contract was a question for the jury (Monahan, C. J., dissentiente).

THE first count of the summons and plaint complained that heretofore, to wit, on the 23rd day of May, the plaintiff by his agents, Messrs. James Pim & Co., agreed to sell to the defendants, and the defendants agreed to buy from the plaintiff, through his aforesaid agents, a cargo of mixed maize then on board a vessel called the *Surf*, on her passage from New York to Sligo, under the following agreement, that is to say, the cargo of mixed maize shipped per *Surf* from New York, consisting of 9,900 bushels in bags, as per bill of lading dated 23rd April, 1861, at the price of 35s. 6d. per quarter of 480 lbs., delivered cost, freight and insurance, condition guaranteed on discharge, slight heat not injuring the grain not to be objected to, any damaged to seller's account, buyers to pay duty and dues at Sligo, payment in exchange for

documents on arrival of the vessel at Sligo, meaning the port of Sligo, in cash, less two months interest at five per cent. per annum, or in buyer's option by their acceptance at two months' date any balance to be paid or received when quantity is ascertained. Sligo the vessel not arrive at Sligo aforesaid on or before the 20th June, 1861, the contract to be void. And the plaintiff says that he the said plaintiff duly performed all things on his part to be performed and fulfilled, and necessary to be done for the performance of the said contract on his part; and all conditions precedent were duly performed on the plaintiff's part to be performed; and all things happened to entitle the plaintiff to be duly paid the price aforesaid under said contracts. And he the said plaintiff did then and there tender to, and require, and request of the said defendants to accept and receive said cargo of maize as aforesaid, and pay for the same in the manner provided by the said contract; yet the defendants wholly refused to accept the said cargo or to pay for the same to the plaintiff's damage, &c. A second count defined Sligo to mean the harbour of Sligo; and a third stated the contract, with the condition simply that the vessel should arrive at Sligo on or before the 20th June, without offering any definition. The defendants pleaded to each of these counts, with other pleas, that it was agreed by the said contract in said counts respectively referred to as a condition precedent to the acceptance by the defendants of the said cargo of mixed maize in the said counts respectively mentioned, that the said ship in the said counts mentioned should arrive at Sligo, meaning thereby one of the quays used for the discharge of cargoes of corn at Sligo aforesaid, on or before the 20th day of June, 1861, and that in the event of the said ship not so arriving on or before the said 20th day of June, 1861, the said contract should be void. And the defendants aver that they were at all times ready and willing to perform and fulfil all things which under the said contract they were bound to perform on their parts, of which the plaintiff had due notice; yet that the plaintiff did not perform or fulfil the said condition precedent on his part to be performed and fulfilled as aforesaid; for that the said ship did not arrive at Sligo aforesaid within the meaning of said condition before the 20th day of June, 1861, but on the contrary did not arrive at Sligo aforesaid until the 21st day of June, 1861, whereby and by reason of the non-performance of the said condition precedent the said contract became void as aforesaid. Upon the trial of an issue whether this defence was true in substance and fact before Monahan, C. J., at the Michaelmas after-sittings, 1861, it was agreed between the parties that a number of facts should be found by the jury, and a special case stated for the opinion of the court. The plaintiff and defendants each conceiving themselves entitled to a direction; and the Chief Justice being of opinion with the latter, the plaintiff next required him to leave to the jury the question if there was an arrival within the intent and meaning of the contract, which he refused to do, and with the consent of the parties entered the verdict for the defendants, subject to be set aside or turned into a verdict for the plaintiff according as the court should apply the law to the following state

of facts:—That Sligo is a tidal port, and has three quays, respectively suited for vessels of different draught, the most important and the most seaward one being the Ballast quay; that vessels drawing twelve feet of water are unable to come up to it except upon a spring-tide; that Oyster Island is four miles from the quay within the port of Sligo, but without any quay of its own; that the *Surf* being a vessel of 270 tons burden, and drawing twelve feet of water, arrived at Oyster Island on the 12th June, 1861, upon which day she was reported and became liable to the port and harbour dues; that upon that day and the 13th there was sufficient water for her to come up to the quay, and that on the 12th the defendants offered a tug to her captain, which he refused; that from the 13th to the 20th June there was not sufficient water; and that upon the 21st she did arrive alongside the quay; that the *Surf* was bound to proceed direct to the quay if the state of the tide permitted, if not, as soon as it did permit; and that by the contract she was obliged to deliver her cargo at the quay, and the defendants were not obliged to take elsewhere. The plaintiff accordingly obtained a conditional order, against which

Macdonogh, Q.C. (with him *Purcell*), now showed cause.—1. This contract must be construed within its four corners. 2. It must be construed as a mercantile contract ought to be. 3. It must be construed by the light of authority. Ballyshannon, though twenty miles distant, is Parliamentarily within the port of Sligo, and this shows that place and custom-house jurisdiction are wholly different. Time is of the essence of the contract; and the arrival of the *Surf* at Sligo on the 20th June was a condition precedent—*Shadforth v. Higgin* (3 Camp. 385); *Glaholm v. Hays* (2 Man. & Grang. 267); *Croockewit v. Fletcher* (1 Hurl. & Nor. 893). [It was here conceded that this could not be disputed, and was not open on the record.] The corn trade is of such a fluctuating character that fortunes are made to-day and lost to-morrow. Arriving at Sligo therefore did not mean that this vessel should arrive in the roadstead, but that the defendants should have dominion over the cargo. It meant arriving at one of the quays of Sligo suitable for vessels of the *Surf's* burden. By Act of Parliament the harbour is made to range between the Sligo bridge and a place called the Wheaton Rock. The harbour is a tidal harbour, and any difficulties arising from this fall on the seller—*Parker v. Winlow* (7 Bl. & Bl. 942). Every analogous case of computation of time assumes the principle that the vessel must arrive at the usual place of discharge in the port—Abbott on Shipping, 222; MacLachlan on Shipping, 447; *Kell v. Anderson*, (10 M. & W. 498); *Brown v. Johnson* (10 M. & W. 331). One test of arrival is this, whether the lay-days have commenced to run—*Brereton v. Chapman* (7 Bing. 559). This case is explained in *Whitwell v. Harrison* (2 Excheq. R. 135). *Parker v. Winlow* is an authority on this point also. [*Monahan, C.J.*—Supposing the condition in this contract to have been that if this vessel did not arrive at Oyster Island the contract should be void; it would in no way concern the lay-days or the discharge of the cargo.] It would not, as it is conceivable such a condition might

be inserted in order to insure the arrival of the vessel in the harbour at all events. A second test of arrival is this,—at what time would the liability of insurers cease?—*Samuel v. Royal Exchange Insurance Company* (8 B. & C. 119); Arnold on Marine Insurance, 506. These authorities show that until a vessel arrives at the place of discharging her cargo the liability of insurers continues; and the cases before cited show that the lay-days commence to count from the same period. Proof of usage is not admissible to contradict the express terms of a contract—1 Park on Marine Insurances, 46. Would a Dublin merchant be satisfied with an arrival at Kingstown or the Pigeon-house? would a London merchant be satisfied with an arrival at Gravesend? would this give dominion over the property?—*Soames v. Lonergan* (2 B. & C. 564), turned upon the meaning of the term “non-arrival;” and at p. 570 Abbott, C. J., says,—“My opinion was, that it meant such an arrival of the ‘*Grant*’ as would answer the purposes of the parties to the charter-party.” The term “port” when unqualified means “place,” and not all the space included within custom-house jurisdiction. So MacLachlan on Shipping, 327, “When the condition is ‘to sail from’ or ‘depart,’ it is held that the ship must be out of port and on her voyage on or before the day specified; but although the limits of the ‘port’ in such a case may be determined by evidence of usage, yet in the absence of qualifying words that term is never received as comprehending in such a connexion all that is subject to one custom-house or one port jurisdiction, but rather as being synonymous with ‘place,’ and identical in meaning.” So *Lang v. Anderdon* (3 B. & C. 495). *Christian, J.*—Could this contract bear the following construction?—A vessel arriving at Oyster Island would have arrived at the general discharging ground and at a place where vessels of a certain tonnage must in any case discharge. If, as in the present instance, the vessel were able to go up to the quay would not the contract be performed, and the defendant’s remedy be in respect of any damage sustained by not coming up to the quay? The contract must be construed according to its subject matter, and the parties to this contract knew this vessel could come up to the quay when they made it. [*Monahan, C.J.*—Suppose the case of a cargo, part of which must be discharged at Oyster Island, and part of which might at the quay. would an arrival at Oyster Island be an arrival at Sligo, within the meaning of such a contract?] It would *pro tanto*. It would be an arrival *quoad* the part which needed to be discharged at Oyster Island. But such a case is not analogical. Such cases are provided for by mercantile usage. In the present the parties contracted according to the subject-matter. Upon such a supposition there was no more obligation on the plaintiff’s ship to be at the quay on the 20th than on the 30th of June. Could the contract mean that the captain of the *Surf* might send this message,—“Present my compliments to the Messrs. Middleton & Pollexfen, and say I am at Oyster Island, and shall go to Sligo whenever I please?”

Sergeant Armstrong, (with him, *Heron, Q.C.*, and *Corrigan*) in support of the order.—I concede the condition precedent. The fact that there is a class of ves-

vessels which cannot come up to the quay at all; the fact that there are three quays at Sligo respectively suited to different classes of vessels, and all the findings of this character go to support the plaintiff's case. Tonnage is no criterion of draught, as is shown by the case of pleasure-yachts and the vessels which bring tea from China, and the defendants (whatever the plaintiff knew) knew nothing of this vessel's draught. The parties could never have contracted for the performance of an impossibility, and for anything the defendants knew to the contrary the Surf was a vessel which could not come up to the quay. Whatever her draught or tonnage, all the expressions used in this contract might have been the same. It is found by the jury that she arrived on the 12th of June at Oyster Island, which is within the natural port of Sligo, and reported herself and became liable to the port and harbour dues. A fallacy which pervades the entire of the argument on the other side is the confounding the place of arrival with the place of discharge. Subsequently discovered facts ought not to be applied to the construction of this contract. If it be elliptical, then the ellipsis ought not to be filled up by what would defeat it. The defendants were acquainted with the tides, with the harbour, &c.; were they to say to themselves, "We know that the Surf is lying at Oyster Island, and cannot get up to the quay, but we will not stir but defeat the contract?" Could this have been contemplated? [Ball, J.—You argued a while ago that the defendants knew nothing of the draught of the Surf and cannot now assume they did.] I will now suppose the place of arrival to mean the place of discharge as is contended for; Oyster Island answers this description, it is a place of discharge,—the Wheaten Rock is not. [Ball, J.—Yes, but were the defendants bound to go to expense in procuring a discharge?] "At Sligo" does not mean at any known place of discharge within the port of Sligo. So in *Moir v. Royal Exchange Assurance Company* (4 Campbell, 84). Lord Ellenborough held Memel and the port of Memel to be synonymous, and this never was questioned except by an unsuccessful motion for a new trial; *Moir v. Royal Exchange Assurance Company* (3 Maule & Selwyn. 451). So *Lindsay v. Janson* (4 Hurl. & Nor. 699).

Heron, Q.C.—Earlier the Lord Chief Justice was wrong in his opinion at the time of the trial, or the question was a question for the jury alone. The condition is simple and independent. "Should the vessel not arrive at Sligo on or before the 20th June, 1861, the contract to be void." No question of this kind was ever before decided by the court. I admit the general rule that the construction of a document is for the court, but there are the well-known exceptions to it. In every instance where such document is to be construed by extrinsic circumstances of fact at the civil or criminal side of the court, then such document is left to the jury. [Monahan, C.J.—Do you say the jury are the proper tribunal to decide the meaning of this contract; to decide whether this ship should have gone to Oyster Island or to the quay?] Yes. The first exception to the general rule is the case of libel. [Ball, J.—By statute.] But the statute which made it so is only declaratory of the common law. The next familiar illustration is the case of a threatening letter,

Girdwood's case (1 Leach, 142) & East's Pleas of the Crown, 1120. A class of cases more conversant with mercantile matters are the following—*Jarman v. Coape* (13 East 394); *Dalgleish v. Brooke* (15 East, 295); *Smith v. Thompson* (8 Common Bench, 44); *Lindsay v. Janson* (4 Hurl. & Norman, 699); In 1 Starkie's Law of Evidence, 525, it is laid down that "the construction of a written document is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself, as in the instances of judicial records, deeds, &c.; but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury." In *Lindsay v. Janson* which is the case nearest to the present the words in the policy of insurance were "from Swan river to Mauritius, and for thirty days after arrival," and the meaning of these words was left to the jury. The vessel anchored at the Bell Buoy, which is a buoy with a bell on the top of it in the open ocean, and lying off the mouth of a narrow channel leading to the harbour of Port St. Louis. The judge left it to the jury to say whether the Bell Buoy was part of the Mauritius; he did not give them any geographical direction as to what was the Mauritius. In discharging the rule for a new trial, Pollock, C. B., says, "The present question is purely one of fact as every other question must be which involves an inquiry as to time or place. In a question of time, the judge may explain the meaning of terms, as mean time, or solar time, or central time (as in the case of railways which observe London time)." In *Jarman v. Coape*, which was also an action on a policy of insurance, the material words in the policy were "free of capture and seizure in her port or ports of discharge." British goods on board a neutral ship had been insured from London to any ports of discharge on the continent, and the ship arrived in the Jahde river, and proceeded fifteen miles up. An agent who was on board of her had landed when she was about 5 miles up, and proceeded to Varel, which is thirty miles up the river, in order to arrange how the goods might be most safely landed. Whilst lying on and off in the middle of the river, the vessel was captured by French Custom-house officers belonging to Varel. Lord Ellenborough advised the jury that there was sufficient evidence of a seizure in the ship's intended port of discharge, and they found for the defendant, and at page 398, Le Blanc, J., says, "This was a question of fact for the jury, and I do not think that they have decided it wrongly." Whenever a document cannot be construed without the aid of extrinsic circumstances, the construction is altogether for the jury. [Keogh, J.—What question do you say ought to have been put to the jury?] Was there an arrival within the meaning of the contract? The only case quoted on the other side which touches this case is *Soames v. Lonergan*. In *Dalgleish v. Brooke*, the vessel was captured by Prussian land soldiers, and the question left to the jury was, "Whether this was a seizure in the ship's port of discharge?" The goods were warranted free from capture or seizure in the ship's port or ports of discharge in the policy of insurance, and Lord Ellenborough, says, (15 East, 304),

"Now, here the parties meant a *port* in its natural and not merely in its technical or artificial sense. Nobody will contend that it was necessary for this ship to have arrived at the *caput portus* or ville before the warranty would attach. The evidence given that no captain would voluntarily have unloaded where this ship lay, has been relied on; but that was said merely with reference to the danger from the shore." And Le Blanc, J., says, at page 306, "Here it appears that the captain, intending to discharge his cargo at *Pillau*, had cast anchor without the bar, and had left his ship to land in the port and report her; that a ship of her burthen could not go over the bar without unloading a part of her cargo into a lighter; and that this was the common course with all vessels of a certain draught of water; and though this ship lay further out from the bar than ordinary, yet, whether she lay so far out as not to be within the *port*, in its large and general sense, was a question for the jury, which they have found for the defendant; thereby affirming that the seizure was made in the ship's port of discharge." If the words of the contract be incapable of a construction which the jury have put upon them, then and then only can the court set that construction aside. And is the present such a case? Are the words in this contract incapable of the construction we contend for? "Arrival" and "discharge" are essentially different, and the cases on demurrage have only to do with the latter. The case is sought to be embarrassed by Custom-house limits. When we talk of Dublin Bay, we do not think of the Custom-house; when we speak of Sligo Harbour, we mean the entire harbour. The captain's reporting himself as having arrived determines the arrival. [*Monahan, C.J.*—Do you say that the captain's reporting himself can alter the law of the case?] It is a duty done under an act of Parliament, and was considered material in *Dalglish v. Brooks*; there it was an element of the evidence that went to the jury. Where arrival or departure is mentioned the entire harbour is meant—*Williams v. Marshall* (6 Taunton, 390); 1 Phillips on Insurance, 442. In *Lindsay v. Janson*, Bramwell, B., says to the defendant's counsel, "Suppose a policy on a vessel bound for Deal, your argument would show that no vessel ever did arrive at Deal." If there is to be a construction put upon the word "arrival," varying with the place of arrival, then it is a question for the jury. Looking to the contract there are things in it which indicate time. The "buyers are to pay duty and dues at Sligo." When did these accrue? Upon the master's reporting himself. Payment is to be on arrival at Sligo, and this, it is said, must mean arrival at the quay, but the cases cited show that in such cases the port and not the town is meant. Again, this vessel could not have come up to the quay on some of these days without a tug. Suppose there were no tugs. Is this contract to depend upon the presence or otherwise of tugs? Where is the authority for saying that the port of arrival is the port of discharge? If the court is to construe this contract, then I submit that arrival means arrival within the first safe anchorage, but if there be doubt concerning it, and circumstances to be got at to explain it, then that the construction is for the jury altogether.

Purcell, in reply.—The settled and established rule deciding when the court and when the jury are to construe a document, will be found in *Neilson v. Harford* (8 M. & W., 823). Parke, B., in giving the judgment of the Court of Exchequer, says, "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed, as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them." It is also a leading rule upon the construction of written instruments, that the court shall take into account the meaning of the contracting parties, and to get at this meaning, they are to take the context. There is a clause in this contract which has not been sufficiently noticed, and, if I be right, it forms a key to the solution of the whole. I mean the words "then on board a vessel called the *Surf*, on her passage from New York to Sligo." Payment is to be before bulk broken, and where? Why, at the port of discharge. What does the condition "should the vessel not arrive" mean? The construction must be reasonable, and is it not absurd to be speculating upon the meaning of arrival, if not viewed in the light of the object the parties had before them? This was no betting speculative transaction. The plaintiff's liability continued up to the time when it became the consignees' duty to discharge. [*Monahan, C.J.*—Is there any case in which, there being an ambiguity upon the face of a document, the court, after getting the external facts, proceeded to direct the jury?] *Lindsay v. Janson* which is relied on upon the other side, goes very near supporting the proposition that there may be. But I do not consider this contract ambiguous at all, or one which contains any technical or mercantile terms. Sligo means the termination of the voyage, and that is the discharging port; and, therefore, the question for the jury was this—had the vessel arrived at her proper discharging place, the place she was bound to go to? It is quite intelligible that the defendants should have said to themselves, we will run the chance of the market rising and falling till the 20th June, and not one day longer: *Furness v. Meek* (27 L. J. Ex., 34); Taylor on Evidence, § 36.

Cur. adv. vult.

May 13.—The court desired to have re-argued the point, that the judge should have left the construction of the contract to the jury.

June 11.—*Macdonogh, Q.C.*—The plaintiff required the judge to leave to the jury the question, if there was an arrival within the intent and meaning of the contract; i. e., that the construction of the entire instrument, as well as all the facts, should be left to the jury. *Moir v. Royal Exchange Assurance Company* (4 Campbell, 84) has been cited on the other side, and is, really, an authority for us. That was an action on a policy of insurance on a ship "at and

from *Memel* to the ship's port of discharge in *England*—free of capture and seizure in the port and roads of loading—warranted to depart on or before the 15th of September." In fact, the vessel was cleared out at the Custom-house on the 9th of September, but remained within a bar which is at the mouth of the port of *Memel* till the 21st, and, being afterwards totally lost, it became a question if the warrantry had been complied with. The wind was adverse to her passing the bar all that time, and Lord Ellenborough says, "the authorities cited would have been conclusive, had the warrantry been to sail on or before the day mentioned in the policy. I think she had sailed when she broke ground on the homeward voyage. But a warrantry to *depart* appears to me to require a different construction. "Warranted to depart on or before the 15th of September," must mean that she should have departed from *Memel* on or before that day. But she remained in the port of *Memel*, and, therefore, she had not departed from it. The intention of the insurers must have been, that the ship should be out of the port of *Memel*, and at sea, by the given day; but she was still in the port, and, therefore, the warrantry was not complied with." The intention in the present case must have been that the *Surf* should arrive at the place of discharge. *Lindsay v. Janson* (4 Hurl. & Nor., 699) is also an authority in the defendants' favour. The barque "*Shanghai*" had been insured from *Swan river* to *Mauritius* and for thirty days after arrival. She anchored at the Bell Buoy, where it was proved that it was usual for vessels on their arrival at the *Mauritius* to anchor, and where they often discharged a portion of their cargo into lighters. The plea was that the ship was unnecessarily delayed, and abandoned, and deviated from her voyage; and the judge at the trial expressed his opinion that, taking the evidence to be true, the question whether this vessel had arrived was one of law; but he left it to the jury to say, first, whether the Bell Buoy was part of the *Mauritius*; secondly, supposing it was not, whether there was an unusual and unreasonable delay, looking at the object which the master had in going there. He intimated that, in his opinion, the vessel had arrived. In the present case, the facts are clearer. Mr. Heron's line of argument was more desperate than that adopted by Serjeant Armstrong, in contending that the question of arrival should have been left to the jury, and for these three reasons, first, because the question of libel is left to the jury since Fox's Act; secondly, because the meaning of a threatening letter is left to the jury; thirdly, because of an observation in *Lindsay v. Janson*. But into the two former the intent enters, being criminal. In *Jarman v. Coape* (13 East., 396), Lord Ellenborough says, "The policy contemplates that the ship might discharge at places which were not regular ports of discharge; the language of it is adapted to the present state of the commercial world, which never before exhibited such an extent of the French power from one end of the continent to the other." In *Dalglish v. Brooke* (15 East., 295), the insurance was to continue until the ship should arrive; upon the goods, until the same should be discharged and safely landed; and upon the ship herself, until she had moored at

anchor twenty-four hours in good safety. The goods were warranted free from capture or seizure in the ship's port or ports of discharge. The ship was captured in the outer road of *Pillau*, about two miles and a-quarter beyond the usual anchorage, and the question was, whether this was a seizure in her port of discharge, which went to the jury, with Lord Ellenborough's opinion against the plaintiff, and they found for the defendant. [*Christian, J.*—As I understand, if we are of opinion that the Chief Justice ought to have left this question to the jury, you take no benefit from the various facts found by them: is that so?] No. In *Williams v. Marshall* (6 Taunton, 390) the court construed the word "export." The word "arrival" must be construed according to the circumstances and the intentions of the parties. Such a question as this was never left to a jury, whose province it is to find usage, locality, the character of a place, &c.; *Neilson v. Harford* (8 M. & W., 806); *Parker v. Winlow* (7 E. & B., 942). In the present instance, the facts are all admitted.

Heron, Q.C., contra.—The very question reserved by this special case ought to have been left to the jury. It was not the province of the judge to decide it. The question of arrival has always been left to the jury. In *Neilson v. Harford*, which has been cited on the other side, the words of Parke, B., are these—"The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." The condition in this contract is, "Should the vessel not arrive on or before the 20th June, 1861, the contract to be void." [*Monahan, C.J.*—Can there be any doubt as to the meaning of "arrive?"] None; but the question concerns the place of arrival. In *1 Starkie on Evidence*, 525, it is laid down that "the construction of a written document is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself, as in the instances of judicial records, deeds, &c.; but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury." So *Lindsay v. Janson*, *Moir v. Royal Exchange Assurance Company*, decided that *Memel* includes the limits of the roadstead. [*Christian, J.*—*Moir v. Royal Exchange Company* is an authority for you on the former branch of your argument; but how do you account for Lord Ellenborough non-suited the plaintiff?] He changed his mind afterwards. [*Monahan, C.J.*—The question is this, what word will you supply after the word "arrive?" And next comes the secondary question, ought it to be left to the jury?] In *Mellish v. Stanforth* (3 Taunton, 500) we read, "The Chief Justice being at that time of opinion that it was a question of law whether the vessel were in port within the meaning of the warrantry; the jury found a verdict for the plaintiff, subject to this point reserved." This case would be an authority against me but for the case of *Rayner v. Pearson* (4 Taunton, 662); that was an action upon a policy of insurance upon goods by the ship "*Constantia*," warranted free of seizure

and capture in port. A portion of the goods were captured when she lay about six English miles from Swinnermund, and Mansfield, C.J., directed the jury, that if the ship was waiting on the outside of the port, very near it, with a determination of discharging her cargo there, that was substantially a being in port. The jury found a verdict for the plaintiff; and upon the argument of a new trial motion, Mansfield, C.J., said—"It was the province of the jury to consider the question, whether the ship was in port or not; the jury to whom it was left have decided it." It is argued that, in the present case, the facts are admitted; so in all the capture cases, the facts were admitted. *Jarman v. Coape*, as reported in 2 Campbell, 613, shows what was done at *nisi prius*. The report cited from 13 East., by the other side, gives the proceedings *in banc*. Lord Ellenborough said—"If, when she was seized, it was her intention to unload her cargo on the adjacent banks of the Jahde the first favourable opportunity, I think she may be considered as within the limits of her ports of discharge, although ships, when no danger is apprehended, do not usually unload there." [*Monahan, C.J.*—Suppose Sligo twice mentioned in this document, and mentioned in different senses, would the sense in which it was used in the expression "arrive at Sligo" be matter of instruction to the jury, or would that be for them?] *Smith v. Thompson* (8 Com. Bench, 44) decides that, in that case it would be the province of the jury to elect between the meanings; see *Keyser v. Scott* (4 Taunton, 660). The two leading cases are, *Jarman v. Coape* and *Dalgleish v. Brooke*, in 13 and 15 East., respectively. In the former, Lord Ellenborough says, "The ship had gotten within what, in a general sense, and for the purpose which the contracting parties had in view, was to be considered as her port of discharge, and there she was captured by a force coming immediately from the land. But, at any rate, this was a question for the consideration of the jury." In the latter, at page 304, the same judge says, "Nobody will contend that it was necessary for this ship to have arrived at the *caput portus* or *ville* before the warranty would attach." There the whole argument of this case is compressed into three lines. [*Christian, J.*—That was because the circumstances there showed that, manifestly, something larger was meant.] If so, then in the present case the plaintiff had a right to a direction. [*Keogh, J.*—What is the meaning of the finding that the vessel was bound to go up from Oyster Island by the next spring tide? If Oyster Island does not make an arrival, how differs it from the wide ocean? *Macdonogh, Q.C.*—That means if there be difficulties such as abound down the river; but if everything be fair, then the vessel is bound to go straight up. *Christian, J.*—Suppose an ordinary policy of insurance on this vessel, would the insurers be liable after the vessel had arrived at Oyster Island?] *Dalgleish v. Brooke* proves that they would not. The moment that the vessel anchored, she became liable to the custom duties; such is the finding. When did they attach? Upon arrival at Sligo. This, then, was a question for the jury; for where in the contract can this liability be discovered? Who pays these duties? The defendants. The ambiguity of the condition is

to be construed by extrinsic evidence. The cases on demurrage do not apply. 1st, the construction here should be a reasonable one. 2nd, it should be a liberal one. 3rd, it should be a favourable one. 4th, it should be the popular one. I mention these four principles as involving considerations which are plainly for the jury. By the rules of the common law, the entire case must go to the jury whenever the meaning of a document depends upon extrinsic circumstances. Mr. Fox's Libel Act was only declaratory of the common law.

Cus. adv. vult.

July 7. *CHRISTIAN, J.*—The facts of this case were not found by the jury; they were found by consent. The Chief Justice considered it a case for a direction, and for direction in favour of the defendants. The plaintiff contended that he was entitled to a direction, and afterwards made the new point, that it was a case for the jury to decide. Accordingly arise the two questions, first, ought this verdict to be changed into one for the plaintiff? secondly, ought it to be set aside, and a new trial had? That the verdict ought to be set aside is my opinion. The condition in this contract was, "should the vessel not arrive at Sligo on or before the 20th June, 1861, the contract to be void;" and the fact was, that before the 20th June the vessel did arrive at Oyster Island, which is four miles from the quay, and an ordinary place for anchoring at. The consignees were not bound to accept delivery at this place, nor did the lay-days commence to run. If this constituted an arrival, the plaintiff was entitled to succeed; if not, the defendants. *Prima facie*, arriving at Sligo meant arriving at the port of Sligo; and in a simple case, suppose of a wager, arrival at Oyster Island would be sufficient. This, however, is far from deciding the present question. In one class of cases it may be necessary to hold, that a vessel had arrived, and in another, that she had not. The cases in 3 & 4 Taunton may thus be distinguished from others which have been cited. In the present case, all the facts are material for the purposes of explanation. Parol evidence is necessary, and wherever parol evidence is necessary to explain a particular contract, I hold its construction to be a question for the jury. In the cases in Taunton, the vessels were warranted free of seizure and capture in their ports of discharge. They were hovering outside the natural harbour when they were captured by land soldiers, and the question arose, if this was a capture within the port of discharge, in which case the insurers would be free. There, as here, all the facts were beyond dispute. At first it was considered that this was a question of law, as in *Mellish v. Staniforth* (3 Taunton, 500), to which the reporter adds in a note, "See *Reyner v. Pearson*, contra." So that, it appears, the Chief Justice changed his opinion, and considered the case one of mixed law and fact. In *Reyner v. Pearson*, the court refused to set aside the verdict. In *Jarman v. Coape* the question was, if, at the time of capture, the vessel was within the port of discharge within the meaning of the warranty. The facts there were clearly stated, and, on a motion for a new trial, the verdict was upheld, and Lord Ellenborough says, "At any rate, this was a question for the considera-

tion of the jury, who were all persons of intelligence upon such subjects." *Dalgleish v. Brooke* is to the same effect. The case of the Bell Buoy bears out this view, that the present question was a question for the jury. The judge left it to the jury to say whether the Bell Buoy was part of the Mauritius. Bramwell, B., in giving his judgment, says, "if the plaintiff had demurred to a plea setting out the circumstances leading to the inference that the vessel had arrived, no judgment could have been given, whether there was an arrival at the Mauritius or not, because we could not know the fact." That means, because we could not know the ultimate fact, whether this vessel had arrived or not. How, then, can these cases be distinguished from the present? It is said that they involved pure questions of fact; but, though I have heard this case twice argued, I have heard nothing which shows it to be more or less a question of fact than were these. How arrival at Oyster Island is less a question of fact—a whit less a question of fact—I am unable to descry. This is not the case of a written document. It is said the facts are ascertained, and nothing remains but to apply the law to these facts. I reply, they are not ascertained, and to assert this assumes the whole question. There are no cases deciding that the judge may separate the law from the facts, and the result of such a doctrine would be that in the last stage the judge and not the jury would decide the issue. The analogy of the cases on libel has been instanced. I think I could form an opinion of what the jury would have found if this question had been left to them, and I am far from saying I should have been dissatisfied with their verdict. Oyster Island being within the natural port and harbour of Sligo, and the custom duties attaching upon arrival there, they might have held arrival there to be an arrival at Sligo. Upon the first question I need give no opinion, though what it is will probably be apparent from what I have said. It is important that the line which separates the functions of judge and jury should not be confused.

KEOGH, J., concurred in this judgment.

BALL, J., declined to offer any opinion as he had not heard the arguments.

MONAHAN, C.J.—As I have the misfortune to differ from my brothers Keogh and Christian, and as the question is an important one, I shall state the principles which lead me to hold that this was not a case to be left to the jury. This was a contract for the sale of a cargo of corn, then on its way from New-York to Sligo, and the condition, "Should the vessel not arrive at Sligo on or before the 20th June, 1861, the contract to be void." Now, I deny that any word is to be supplied. If there were no parol evidence, there would be no doubt. The parol evidence establishes that vessels drawing twelve feet of water are not able to get alongside the quay upon a neap tide; and that a vessel of the Surf's draught was bound to come up to the quay direct if the state of the tide permitted; if not, as soon as it did permit. Oyster Island is found to be four miles from the quay. I think that this is not a question of fact but a question of the construction of a document. There is no instance where such a question was ever submitted to a jury. In *Neilson v. Harford* (8 M.

& W., 806), it was contended that the words of art were for the jury, not for the court. The court held differently. "The construction of all written instruments," says, Parke, B., "belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." He goes on to show the mischief which would arise from a contrary method. "Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions of redress in a court of Error; but a misconstruction by the jury cannot be set right at all effectually." No judge could control what the jury would do. There would not be uniformity. There would not be appeal. This principle was acted on in *Hutchison v. Bouker* (5 M. & W., 535), which was an action of assumpsit for the non-delivery of barley. The defendants had offered good barley to the plaintiffs; the plaintiffs accepted the offer, adding, they expected fine barley. The jury found there was a distinction in the trade between good and fine barley, and it was held that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that, they having found what that meaning was, it was for the court to determine the meaning of the contract. In *Wells v. Hopwood* (3 B. & A., 20), the question was if a vessel had stranded, and it was treated as one of law, not of fact. In *Thompson v. Gillespy* (5 E. & B., 209), the court decided that the ship had not sailed. I cannot see what is the distinction between departure and arrival. *Parker v. Winlow* (7 E. & B., 942); *Brown v. Johnson* (10 M. & W., 331); *Kell v. Anderson* (10 M. & W., 498). Several cases have been quoted to establish that whether a vessel has arrived or not is a question of fact for the jury. In *Reyner v. Pearson* (4 Taunton, 662), the question left to the jury was whether the ship was waiting on the outside of the port, very near it, with a determination of discharging her cargo there. In *Levin v. Newnham* (4 Taunton, 722), the question left to the jury was whether upon the whole they thought the plaintiff had made Pillau his port of discharge or not. In *Whitwell v. Harrison* (2 Exchequer, 127), the court held there was nothing to be left to the jury. In *Lindsay v. Janson*, the question left was if the Bell Buoy was a part of Port Louis. The contract in the present instance is difficult of construction. I deny that "Port of Sligo" or any other words are to be supplied. I conceive that the Surf was bound to proceed direct to the quay, if the state of the tide permitted; if not, as soon as it did permit. I am of opinion that arrival means coming up to where the consignees were bound to accept. That was at Sligo. This is a question of law, not of fact.

Rule absolute.

CAHILL AND WIFE v. McDOWELL.—April 29.

Pleading—Misjoinder of Parties—Demurrer.

A summons and plaint to recover money had and received for the use of husband and wife which does not disclose the wife's interest, will be bad on general demurrer, anything in the Common Law Procedure Act, 1853 to the contrary notwithstanding.

THE action was brought to recover a sum of £22 alleged to be money had and received by the defendant for the use of the plaintiffs, Cahill and wife. There was an endorsement of particulars. The defendant demurred to the summons and plaint because it did not show why the wife was joined as a plaintiff or what interest she had in the subject-matter of the action.

Henry Fitzgibbon, (with him, *Serjeant Armstrong*) in support of the demurrer relied on *Abbott and Alice his wife v. Blofield* (Croke James, 644); *Serres v. Dodd* (2 Bosanquet & Puller's New Reports 405); *Johnson v. Lucas* (1 Ellis & Blackburn, 659); *Biggood v. Way* (2 W. Blackstone, 1236.)

Ryan, (with him, *Harris, Q.C.*), contra.—Some of these authorities have been over-ruled, and others have no application since the passing of the Common Law Procedure Act, 1853. The 84th section runs thus:—"No plea in abatement for the non-joinder of any person as a party, plaintiff or defendant, shall be filed without the leave of the court, but such defect, or the misjoinder or misnomer of any party, may be pointed out by either party by notice before the trial, and such notice may be followed by a summary application to the court or a judge in respect thereof, upon which application the said court or a judge may make such order therein, and touching the costs thereof, as shall seem to be just." The spirit of this section is no longer to construe the pleading most strongly against the pleader. [*Christian, J.*—This appears to be an application not so much for misjoinder of parties as for misdescription of cause of action.] The 81st section enacts that "no objection by way of general or special demurrer for formal matter only shall be allowed, and no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer; and wherever issue shall be joined on any demurrer, the court shall proceed to give judgment according to the very right of the cause, without regarding any imperfection, omission, defect in or lack of form; and every summons and plaint and defence or other pleading which shall, with reasonable clearness and distinctness, state all such matters of fact as are necessary to ground the action, defence, or reply as the case may be, shall be sufficient; and it shall not be necessary that such matters shall be stated in any technical or formal language or manner." This is in fact a general demurrer for formal matter. The proper application to the court should have been to strike out the wife or set her aside. It is going too far to say that a wife ought never to be joined when the cause of action accrues after marriage. *Hilliard and Uz. v. Hambridge* (Aley's Reports 36); *Bourne and Uz. v. Mattaire* (Buller's Nisi Prius 53); *Sloper v. Cottrell* (6 Ellis & Blackburn, 497); *Copinger v. Quirk*

(4 Ir. C. L. R. 444.) Take the case of a promissory note to the wife. [*Christian, J.*—Can you suggest any case in which money had after marriage might be treated as money had and received to the use of the husband and wife?] Yes; in the sense of pleading. [*Monahan, C. J.*—You have not answered my brother Christian's question, What state of evidence would support an issue upon your present plaint?] Money bequeathed to the wife separately and neglected to be paid over by the executor. I rely on the bill of particulars.

Harris, Q.C.—*Martin v. M'Hugh* (6 Ir. Jurist 279), shows that the bill of particulars is to be incorporated into the plaint. The 84th section of the Irish Common Law Procedure Act is not in the English Act. Section 34 of 15 & 16 Vic., c. 76 is the only one at all corresponding. In section 84 "may" is to be read "must." In *Ruckley v. Kiernan* (7 Ir. Common Law Reports, 79), Monahan, C.J., in giving judgment says, "We are of opinion, in order to give effect to the present system of pleading, in which special demurrers are abolished, and in lieu of them a party may apply to the court to set aside any pleading calculated to embarrass, that if a party, instead of so applying to the court, will demur, that the court ought to give to the pleading demurred to the meaning that will support the pleading if the words used will fairly bear such a meaning, rather than the meaning which will not support the pleading, though, perhaps under the old system, such pleading would be objectionable for uncertainty on special demurrer." I rely also on the 86th section. [*Christian, J.*, referred to *Bird v. Peagram* (13 Com. Bench 639).] [*Monahan, C. J.*—I do not consider that the Common Law Procedure Act embraces cases of this kind; and so this demurrer will come round to inquiring if there be any case conceivable where money could be recovered by husband and wife which accrued due after marriage.]

Serjeant Armstrong in reply.—It is perfectly settled that if the cause of action arise before marriage, there must be a joinder. *Abbott and Wife's case* is quoted in all the books, and has never been questioned. [*Monahan, C. J.*—There it appeared upon the face of the plaint that the wife could not be joined.] This case establishes that the court cannot assume that the wife was single when the cause of action arose. The endorsement of particulars cannot be referred to—*Roche v. Colclough* (5 Ir. Com. Law Reports 538); but if referred to does not assist the plaintiffs in the least. The plain inference from it is that the wife was Mrs. Cahill at the time of the money being retained. The statute applies only to where all the parties might have been joined, but where there has been a mistake of fact. The 84th section is inapplicable; so is the 85th. It could never be said that the wife who is not *sui juris*, might consent to be struck out.

Cur. adv. vult.

May 12.—The court allowed the summons and plaint to be amended by striking out the wife or showing that she had a cause of action; in case the plaintiffs did not amend, the demurrer to be allowed.

Rule accordingly.

HEARNS v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.—April 30.

Practice—Costs in Superior Court—Common Carriers—(Common Law Procedure Act, 1853, s. 243.

A plaintiff recovering less than £20 in an action against common carriers for the loss of goods delivered to them, is disentitled to full costs by the Common Law Procedure Act, 1853, s. 243.

Walter Boyd, for the defendants applied to the court for an order directing the taxing officer to review his taxation. The action had been brought by the plaintiff to recover the value of certain birds which he had entrusted to the defendants for safe carriage, and the damages recovered amounted to £12. The question was whether the action was one of tort or contract. The taxing master had allowed the plaintiff full costs.

Henry Fitzgibbon, for the plaintiff, made a preliminary objection that the point sought to be raised had not been made before the taxing officer, and the defendants were concluded from bringing it before the court.

Walter Boyd.—There is a distinction between matters of fact and questions of law. If the former are suppressed before the taxing officer the party is precluded from making any subsequent benefit by them. This is a question of law, which is not supposed to come within the comprehension of an attorney's clerk. The action was brought for the loss of birds which had been conveyed in the same cage with lizards; and it is difficult to imagine how the plaintiff ever expected them to arrive in safety. The lizards had probably eaten the birds. The 16 & 17 Vic. c. 113, s. 243, disentitles him to more than half costs. The court decided this already in a previous case in favour of the defendants.

Henry Fitzgibbon.—There is a later case of *Tattan v. The Great Western Railway Company* (29 Law Jour. N. S. 184), which decides the contrary. It is laid down there that the action is founded on the breach of the common law duty independently of contract. The 19 and 20 Vict. c. 108, s. 30, enacts "that where an action of contract is brought, in one of her Majesty's superior courts of record to recover a sum not exceeding £20, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs." And it was argued that this deprived the plaintiff of costs, but the Court of Queen's Bench held otherwise; and **Crompton, J.**, in giving judgment, says,—"By the statute 13 & 14 Vict. c. 61, costs are taken away from a plaintiff who shall recover a sum not exceeding £20 in an action of covenant, debt, detinue, and assumpsit; or not exceeding £5 in an action in trespass, trover, or case, except in cases of judgment by default. And the 19 & 20 Vic. c. 108, s. 30, extends the former provision to a judgment by default in actions of contract, and leaves untouched a judgment by default in actions of tort. This appears a somewhat curious mode of legislation; but it follows that costs are recoverable in a judgment by default in an action on the case. There is a case in the Common Pleas, *Marshall v. The York, Newcastle, and Berwick Railway Company*, which decides that the common law duty of safely carrying arises indepen-

dently of contract; and ever since the case of *Pozzi v. Shipton* it has been considered that these actions are to be treated as actions of tort on the case. [**Christian, J.**—The Irish act appears to provide for contracts and for wrongs disconnected with contract, but not for wrongs connected with contract. This may be a *casus omissus*, and open to the argument that the right to full costs applies. **Monahan, C.J.**—Are the words "disconnected with contract" to be found in the English section?] They are not. [**Christian, J.**—The Irish Common Law Procedure Act excuses us from considering the forms of actions; and if this was not a wrong independent of contract but a wrong connected with contract, it may come under the head of contract and be governed accordingly.]

MONAHAN, C. J.—We shall abide by our decision in the former case and do not choose to depart from it, because in a different case to which this Act does not apply a different decision was made.

Rule accordingly.

BRISTOW v. BROWN.—June 3.

New Trial Motion—Principal and Surety.

Evidence of forbearance by the plaintiff to sue the principal debtor upon a bill of exchange is no evidence to go to a jury of such an agreement to forbear as will discharge the surety.

Joy, Q.C. (with him **May**), showed cause against a conditional order for a new trial which had been obtained on the grounds of misdirection, that the verdict was against evidence, and against the weight of evidence.* The defendant had filed an equitable plea, which was demurred to, and the demurrer overruled; and the issues for the jury accordingly were—

1. Whether had the bank (represented by the plaintiff) notice the bill was an accommodation acceptance?
2. Did the bank give time or agree to give time to the principal in manner and form alleged in the plea?
3. Was time given with the knowledge and assent of the plaintiff?
4. Were there accounts stated between the parties?

The jury were discharged at the trial from finding on the 3rd issue, and to sustain the affirmative of the 2nd the defendant proved that the bank had allowed a considerable period of time to elapse after the bill of exchange had become due without suing the principal or giving notice to him, the defendant, who was an accommodation acceptor. The judge directed the jury to find for the plaintiff.

Kolleston, Q.C. (with him **Pigot**), in support of the order.—For eighteen months after the bill became due no application was made for payment nor any notice of dishonor given. [**Monahan, C.J.**—Is this forbearance to sue evidence of forbearance under a binding agreement?] It is some evidence. [**Christian, J.**—There was no contract to abstain from suing. I read the 2nd issue thus:—Did the bank agree to give, and did they in pursuance of that agreement give time?] The forbearance to sue and the want of notice were evidence from which the jury might infer that the defendant was an accommodation acceptor. [**Christian, J.**—Undoubtedly; but where was the evidence of a binding contract not to sue?]

* The particulars of this case will be found in 7 Ir. Jur. N. S. 153.

May was not called on to reply.

MONAHAN, C. J.—We all think there was evidence that the bank had knowledge that the bill was an accommodation bill, but no evidence of a binding contract entered into by the bank with the principal.

Rule discharged, with costs.

HOGAN v. CAREY—June 3.

Practice—Setting aside Sheriff's Return.

Ryan, for the plaintiff, an execution creditor, applied to have the sheriff's return to a writ of *fi. fa.* set aside as evasive, ambiguous, and unsatisfactory. The writ had been delivered to him on the 18th April, and was marked for the sum of £40 1s. 3d.; and the sheriff returned that he had goods in his hands to the value of £30, but had good grounds for believing they belonged to a different party.

Serjeant Armstrong, who appeared for the sheriff, stated that the defendant's son claimed the property in question under a deed, and suggested the possibility of the court granting an interpleader order.

The court directed the return to be set aside, and the time for making a fresh one to be extended.

NELSON v. SMALL.—June 5, 1862.

Ejectment—Contingent Rights of Entry—Construction of 8 & 9 Vic. c. 106, s. 6.

The 8 & 9 Vic. c. 106, s. 6, which rendered contingent rights of entry assignable, does not apply to Ireland; and, semble, even if it did apply to Ireland, it was not meant to include the assignment of pretended titles.

THE facts of this case were as follows:—It appeared that prior to the year 1827, the premises in question were in the possession of one Cators and his wife, who made a lease for a term of years, and for a life, which life is still in being. Cators died in 1830, and his wife followed him in 1832. The lease was surrendered to their son, Reilly Cators, who shortly afterwards demised the premises to a club, which paid him rent up to the year 1838, and that was the last receipt of rent, the lands being waste from that time. Reilly Cators died in 1847, having duly made his last will and testament, by which, *inter alia*, he devised the property to a private soldier named Boyle, his own nephew, who was then on foreign duty. But Reilly also left a brother surviving, his heir-at-law, James Cators, who went into possession, and subsequently sold the land to the defendant, Small, who built houses upon it. The devisee, Boyle, returned from India in 1854, and never got into possession. M'Quillan became the purchaser of his interest for £5, and also procured an assignment to himself of the lease made by Cators, and brought his ejectment in 1855, when there was a great deal of litigation between him and Small. Subsequently to this M'Quillan assigned his interest by deed to the plaintiff, Nelson, for £5, who upon cross-examination admitted that he had got back the £5 immediately afterwards. The judge non-suited the plaintiff. The plaintiff obtained

a conditional order to set aside the non-suit, against which

Ferguson, Q. C. (with him *Dix*), showed cause. The transaction between M'Quillan and Nelson is void by the 10 Chas. I., sess. 3, c. 15, which is entitled "An Act against Maintenance, Embracery, &c., and against Unlawful Buying of Titles;" and which enacts that all statutes made in England concerning maintenance, &c., shall be put in execution in Ireland. The second section prohibits the buying or selling or getting any pretended right or title to lands unless the seller or grantor or his ancestors be in possession for one year immediately preceding, upon pain of forfeiture of the lands. The conveyance is itself void. That was decided in *Doe dem. Williams and Protheroe v. Evans* (1 Com. Bench, 717). Evan Richards died possessed of a term, upon which his brother, who had previously resided on a part of the premises, went into possession and held them till his death, when he devised them to the defendant. The defendant went into possession and remained so until the next of kin to Evan Richards took out administration to Evan Richards, and then assigned his supposed interest in the premises to one of the plaintiffs for £10, who brought his ejectment. It was held that the conveyance was void both by common law and by the analogous English statute, the 32 Hen. VIII., c. 9—Bacon's Abridgment, title, Maintenance, E.; 3 Ridgeway's Parliamentary Cases, 499.

Kernan, Q. C., contra.—There is no evidence of maintenance. *Doe dem. Williams and Protheroe v. Evans* is an authority in point unless the statute of Chas. I. is repealed by the 6th section of the 8 & 9 Vic. c. 106, which runs thus:—"That a contingent, an executory, and a future interest, and a possibility, coupled with an interest in any tenements, hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed"—*Hunt v. Remnant* (9 Ex. 640). The doubt is whether this section includes Ireland. The end of the section suggests that England cannot mean England proper. It enacts that every such disposition by a married woman shall be made conformably to the provisions of the English Fines and Recoveries Act; or in Ireland, conformably to the provisions of the Irish Fines and Recoveries Act, [*Christian, J.*—Was there a section in the Irish Fines and Recoveries Act which was not in the English Act; and did it include rights of entry?] There is the 22nd section which is not in the English Act; but it does not include rights of entry amongst the contingent interests which it makes assignable. Ireland is not expressly excluded from this 6th section of the 8 & 9 Vic. c. 106, and it is affected by the other sections. [*Monahan, C. J.*—I do not know that a contingent right of entry could be assigned even in England under this statute, suppose in the case of a disputed will or disputed heirship.]

Dix in reply.—It is not M'Quillan who sues here; and if it were the case in 1 Common Bench shuts him out. But Nelson is only a bailiff. It is not a right of entry in him but a law-suit which he has

bought. [*Christian, J.*—You mean to say that this act, even if it included Ireland, did not mean to legalize maintenance.] Yes.

MONAHAN, C. J.—We cannot insert the word Ireland in the 6th section of 8 & 9 Vic. c. 106, nor can we substitute it. I give no opinion, nor does any other member of the court, to the effect that, even if Ireland were included, this statute meant to legalize the assignment of pretended titles.

Rule discharged.

CHALLONER v. O'KEANE.—June 17.

Substitution of Security.

Falkiner moved that a sum of £36, standing in court, might be paid to a Mr. Stott, an attorney and solicitor, under the following circumstances. The plaintiff had, in 1857, obtained a judgment against the defendant in this court, which he held in trust for the various creditors of the latter. His attorney in the matter had been one Mitchell, and, on the 26th of January, 1858, he made a motion to the court upon an affidavit, stating that Mitchell had obtained £36 upon foot of the judgment which he neglected to pay over. Mitchell made an affidavit alleging the existence of other judgments, and notice given him not to pay the money, upon which the court required him to lodge the amount to abide further order. The defendant subsequently became an insolvent. In the meantime Mitchell died, and owing to his death the applications of the creditors of the defendant to the Insolvent Court for the £36 were unsuccessful. A number of them had entered into a consent by which Stott was put in motion, and his application was, that the money might be paid to him on their account. The names of these creditors were all upon the schedule in the insolvent matter, but all the names upon the schedule were not to the consent. Those who were unrepresented were, however, very few, and their debts very small. Every extortion had been made to find Challoner, but in vain. [*Monahan, C.J.*—You want us to substitute Stott for Challoner.]

The court ultimately made an order that the money should be paid to Mr. Stott, upon his personal undertaking to refund it, if required.

LYONS v. M'DONNELL.—June 17.

Trespass—Costs.

The plaintiff recovered £5 in an action in the superior courts, for trespass upon premises previously recovered in an action of ejectment between the same parties. The judgment in ejectment failing to describe the premises more minutely than as being "part of a house, part of a shop," &c., Held, that the action of trespass was one which could not have been tried in the Civil Bill Court, and that the plaintiff was entitled to costs.

Michael Morris, for the plaintiff, applied to the court to certify that the case was one which could not have been tried in the Civil Bill Court, or was a fit case to

be tried in one of the superior courts, and to direct the taxing officer accordingly. The plaintiff is the Protestant incumbent of the parish, and last year brought an ejectment against the defendant; he afterwards brought an action of trespass against the same party for not removing a building from a portion of the premises recovered in the ejectment, when £10 was lodged in court. He next brought this action, and the defendant lodged £5, which we have drawn out. We are satisfied with it. The 97th section of the Common Law Procedure Act, 1856, enacts that "if in any action for any wrong or injury disconnected with contract the plaintiff shall recover a sum not exceeding £5, he shall not be entitled to any costs, unless at the trial of such cause the judge shall certify, on the back of the record, either that the case was one which could not be tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it, nevertheless, was a fit case to be tried in one of such superior courts, or (in case there shall be no trial) unless the court or a judge shall, on motion, make an order to the like effect." The plaintiff has made an affidavit, stating that the defendant's attorney attended at the taxation, and objected to the plaintiff's getting costs. It is not necessary to cite any authority for the present application. This case was not fit to be tried before the county court judge. It involved a question of title.

Bourke, Q.C., contra.—The defendant had held the premises recovered in the ejectment as lessee from the plaintiff's predecessor, and, in raising a story upon other premises, which he did not hold from the plaintiff or his predecessor, but by a different title, he trespassed a very little on these premises. The question of title was raised in the ejectment, and, being decided against the defendant, was an estoppel in any subsequent trial. The plaintiff then proposed this alternative to the defendant, "Take down your story, or I will bring an action of trespass against you." The defendant refused, and the action was brought, being confined exclusively to the part and parcel question. The terms in that summons and plaint are identical with those used in the present. There is, therefore, no question of title here. [*Keogh, J.*—Why do not you give up the possession?] The plaintiff is afraid to execute the *habere* lest he might trespass one inch on the property of the defendant; in which case he would become the defendant, and my client the plaintiff. He is unable to point out exactly how much ground is his.

Michael Morris, in reply.—It is now admitted that the quantity of land recovered in the ejectment is uncertain. I have a letter from the defendant to that effect, and the draft of an agreement which begins:—"Whereas differences have arisen with respect to the meanings of the glebe," &c.

MONAHAN, C.J.—This action could certainly have been tried in the Civil Bill Court if the exact limits were known, or not disputed; but, otherwise, the barrister would be unable to assess the damages without determining the exact limits. The premises recovered in the ejectment are described as "part of a house, part of a shop," &c., but there is nothing upon the face of the proceedings to show what was precisely the amount of land originally trespassed on. We must make the order.

Rule accordingly.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

THE QUEEN AT THE PROSECUTION OF JAMES GORDON AND MARTIN NAUGHTEN v. WILLIAM RITSON, COLLECTOR OF EXCISE—Nov. 4, 6.

Civil Bill Process Servers in Recorder's Court—Appointment by Recorder—Payment of salary to those officers. St. 14 and 15 Vict. c. 57.

The Recorders of boroughs as well as the Chairmen of counties, have authority to appoint officers for the service of civil bill process in their courts, and the officers so appointed are entitled to be paid by the collectors of Inland Revenue, the salary of £10, given by s. 17 of the Civil Bill Acts, to the process officers appointed by the Chairmen of counties.

THIS was a motion to show cause against a conditional order, made on the 7th of June last, that a writ of mandamus should issue, directed to William Ritson, Collector of Excise for Galway district, commanding him as such collector of excise, to pay to each of the prosecutors the sum of £2 10s. as, and for, a quarter's salary, as officers for the service of civil bill processes in the Court of Quarter Sessions, holden before the Recorder of the county of the town of Galway, duly appointed in that behalf, and pursuant to the certificate of the said recorder. From the affidavit of the prosecutors, it appeared that they had been duly appointed officers for the service of civil bill processes in the Court of Quarter Sessions, holden before the Recorder of the county of the town of Galway; that they had discharged, and still continued to discharge, the duties of their office; that each of them had obtained a certificate signed by the recorder on the 20th March, 1861, declaring that each of them had discharged the duties of the office of process server to the satisfaction of the said recorder, during the previous quarter of a year, and that each of them was entitled to be paid the sum of £2 10s., being for one quarter's salary; that they had presented their certificates to the collector who had refused to pay them the sums mentioned in them, and that upon an application by the prosecutor, Martin Naughten, to the Board of Inland Revenue, that board had refused to direct the collector to pay them. Mr. Ritson, the collector, made an affidavit, admitting the truth of the facts stated by the prosecutors, but saying, that his refusal to pay was grounded upon a belief that he was not authorised by law to make the payments, having reference to the several Acts of Parliament relating to the appointment and salaries of process servers in the courts of Chairmen of Counties and recorders of boroughs in Ireland, and particularly the act of 14 and 15 Vict. c. 57, ss. 17, and 159, and that in so refusing he acted under the directions of the Board of Inland Revenue.

Mr. Donogh, Q.C., (with him Jebb), for the Crown.—The question is, whether £10 a year are to be paid to the officers for the service of process in the courts of recorders of boroughs as in the case of officers in the assistant barristers' courts. St. 7 G. IV. c. 56, s. 3, first gave this salary, but only in the case of officers appointed by assistant barristers; section 4

also gave certain fees to those officers. The case of officers of boroughs is provided for by ss. 131 and 194 of the Municipal Corporations Regulation Act, 3 and 4 Vict. c. 108, the former of which enacts that all salaries of borough officers are to be paid out of the borough fund, while the latter provides for a table of fees being prepared for the officers of the borough courts of record. Sections 15, 17, 158, 159, of the Civil Bill Act, 14 and 15 Vict. c. 57, will be relied upon on the other side, but they are intended only to assimilate the procedure in the various civil bill courts, and do not touch this question. At best those sections create an implication of the right to the salary, and such a mere implication is not sufficient to cast a burden upon the subject.

Blake, Q.C., in support of the conditional order. The St. 7 G. 4 is repealed by the Civil Bill Act, on which statute the case altogether turns. Process officers are not contemplated by the sections which have been cited from the Municipal Corporations Act. Section 162, the interpretation section of the Civil Bill Act, enacts that the words "assistant barrister," all through that Act, shall include recorders. Reading then, the 15th, 17th, and 159th sections of the Act, by the light of the glossary, we must arrive at the conclusion that the recorders are to appoint officers for the service of the civil bill process, and that those officers, as well as the process officers of the assistant barristers' courts are to be paid their salaries by the collectors of Inland Revenue.

Nov. 6.—LEFROY, C.J.—This case comes before the court upon a motion to show cause against a conditional order for a mandamus. A rule was obtained calling on the defendant to pay £10 a year to the process servers of the Court of Quarter Sessions held before the Recorder of Galway, and the case turns upon the right of the recorder to make the appointment of those officers. If he has that right, the parties are entitled to maintain their conditional order, but if not, the rule must be discharged. We have all come to the conclusion—though, perhaps, through the medium of different premises—that the recorder has the right to make the appointments in question. The question turns mainly upon the construction of the Civil Bill Act, 14th and 15th Vict. cap. 57 which, after repealing a variety of other Acts upon the same subject matter, enacts what was to be in future the Civil Bill Code upon every subject, and, amongst others, upon the subject of the process servers. One of the previous Acts gave authority to the chairman or assistant barrister to make the appointment, and gave the process servers so appointed a salary of £10 a year, to be paid them by the collector of the excise upon the production of a certificate by the chairman, of the satisfactory discharge of their duties. The present Civil Bill Act consists of a re-enactment of a great many portions of former acts, and is, in fact, an aggregate of those acts. There are several clauses which would seem to indicate, and from which it might be inferred, that it was intended to give, by this Act, to recorders a similar jurisdiction and authority to that which had been given to assistant barristers. Well, I confess, so long as the argument was rested upon inference and implication, it appeared to me, and I said so at the time, that it was only, at best, weak, for the principle of

law, a principle not only a constitutional, but also a legal one, was well settled, that nothing but expressions, clear and unambiguous, could charge the public revenue, and I had not made up my mind that there were adequate words to deserve that description to be found in this Act, sanctioning the appointment of process servers by the recorders. And although I think that a very wide range was taken in respect to other sections, upon which it was argued that a necessary implication arose of an intention to give this authority to the recorders, it struck me as a conclusive answer to every argument of implication, that this very Act itself shews that it required an original Act, which was repealed by this one—an Act couched in clear and unambiguous language,—to give this authority to the assistant-barristers; and though that very Act was repealed by the general repealing clause of the present statute, yet it was re-enacted, *ipsisimis terminis*, by it, and, therefore, if the Legislature made an express enactment in order to give this authority to the assistant-barrister, why should I, where I have such an express enactment in that case, suppose that the Legislature intended to give the same authority by implication to the recorders, or leave anything to an implication which was rebutted by the fact that they give the authority in express terms to the assistant-barrister? And, therefore, I own I left the court very much under the impression that there was an end to every argument which rested on implication; but when I came to look minutely into the case, I confess it appeared to me that almost in the very last lines of the Act, and in the explanatory clause, there are words which of necessity must be held to include the recorders, for they can include nothing else if they do not include the appointment to this office, for there are words expressly providing that the words “assistant-barrister” where they occur shall be taken to mean recorder, saving and excepting when relating to his own appointment and his continuance in office, with his salary, leaving, of course, every other possible provision, every other case in which the word is used, to include, of necessity, the word “recorder.” The rule of construction, therefore, *expressio unius est exclusio alterius*, does apply to make it a matter of necessity to give this force to the words which are as plain, unambiguous, and precise as words can be, that in every case, save those excluded, where the words “assistant-barrister” are used, they shall include the “word recorder.” This is not an excluded case, and, therefore, I have here words which, of necessity, can mean nothing else unless this; and, therefore, on this ground I am of opinion that the recorder is entitled to make the appointment. The 159th section has in my opinion nothing to do with this question, for it relates when you come to consider it, to the course and form of proceedings, but does not apply to the salary in precise terms, but, on the contrary, to other things. I have come to this opinion on the grounds which I have mentioned, but I dare say that further reasons will be stated by the other judges.

O'BRIEN, J.—I am of the same opinion, and I agree with my Lord Chief Justice in the opinion that if this was a case of implication merely, we should not be warranted in imposing a tax on the subject,

which would be the effect of our decision in favour of the prosecutors. It appears to me to be a case of express enactment. The 15th section of the Act gives power to the assistant-barrister to appoint persons for the service of process, and expressly provides that no one but the persons so appointed shall be at liberty to serve process. The 17th section entitles the persons appointed to a salary of £10 a year, to be paid quarterly by the collector of excise upon a certificate of the assistant-barrister, that the officer appointed has duly performed the duty of his office to the assistant-barrister's satisfaction during the preceding quarter. Well, I pass over the 159th section, and then comes the 162nd section, which expressly provides that in every part of the Act the expression “assistant-barrister” or “assistant-barristers” shall extend to the recorder of the city of Dublin and the borough of Cork, and the several recorders mentioned in the Act, in civil bill proceedings, save and except so far as relates to the appointment, salary, retiring pension, and continuance in office of the said recorders, or so far as it is by the Act in other respects specially provided. Now the general rule where a matter is expressly excepted from a clause, is against any other exception, so that the argument from implication does not arise in support of the application, but the parties who oppose the application would be driven to contend against the express words of the Act, that we were to except something else. Is there anything in the Act to warrant our doing so? I concur with my Lord Chief Justice in considering that the 159th section would not of itself be sufficient to entitle the parties to carry this application, and we merely say that a provision that civil bill proceedings before recorders shall be in the forms provided by the Act, would not warrant us in going on further to say that the same salary is payable in one case as in the other; but the importance of the section is this, that it negatives and affords a complete answer to the argument, that the interpretation clause should be narrowed, and that another exception besides that contained in it should be engrafted on it. That arises in this way. The 15th section positively provides that no other persons except the process-servers appointed by the assistant-barristers shall serve process. Is not that one of the forms of proceeding?—is not the power to appoint an officer who alone shall serve any process—is not that a form of proceeding within the 159th section? Well, if it stopped there, is it not a complete answer to the argument of the Commissioners of Inland Revenue that the interpretation clause does not give a power to the recorder to appoint officers for the service of process? Well, then, what becomes of the 15th and 17th sections? That we are to read them as if the word “recorder” was actually in them. Upon these grounds I think it clear, that under the Civil Bill Act the process server is appointed by the recorder, and is entitled to his salary. We were referred to several sections of the Municipal Corporations Act, which, I think, have nothing to do with the Act. The 109th section of that statute provides a table of fees for officers; but those are officers appointed by the council; and it is to them that the provisions of the 139th section of the same Act apply. They have

nothing to do with the process-servers appointed by the recorders under a different Act.

HAYES, J.—I am glad that, by the decision we have arrived at, we are enabled to relieve the fiscal scruples of the Excise. Our judgment rests on express grounds. The 15th section of the statute authorises a person, who in that section is called the assistant-barrister, to appoint certain officers for the service of process. The 17th section directs that the officer so appointed by the person called the assistant-barrister shall be paid a certain salary. Well, then, who is the person who is called the assistant-barrister? What is the thing signified, of which the letters which compose the words "assistant-barrister" are the sign? We go to another section of the Act, which tells us that, in the construction of this Civil Bill Act, that phrase shall be understood to mean, not merely the Chairman of the County Dublin, but also the recorders of boroughs, except in the instances specified, unless in any of these cases there be something in the context or provision repugnant to or inconsistent with such construction. Well, now, putting aside the last clause of this section, I must say that, in my opinion, there is nothing of implication here. The section merely gives a construction to the words "assistant-barrister," when used in the Act. And though sometimes a good deal is said about the inconvenience of the modern system of introducing these interpretation clauses into Acts of Parliament, I must say that, of two evils, this modern system is less than the old one, of having half-a-dozen different words used to express the one thing, and repeated over and over again in the different parts of an Act of Parliament. Here we have the meaning assigned to the words "assistant-barrister," and if that is so, there is an end of the case. In my opinion, it would, besides, be very repugnant to common sense if it were otherwise. Before the passing of this Act, the recorder was invested with certain powers. He was authorised to appoint process-servers, and certain fees were allowed to them. Then comes this Civil Bill Act, which says that, instead of that fee, no fee shall be given or taken, no matter what the work to be done is, save the fee of six-pence, or one shilling for the service of process, and just let us see what the process server has to do. He must serve the process in each case, perhaps on forty different people; he is to keep, besides, a book with such accuracy, that it may be used as evidence in case of his death; and he must attend the court when it sits. All this is underpaid with a fee of sixpence, and he is made subject to these enactments, while the judge is also armed with a larger jurisdiction than he formerly had. It is only carrying out the system of the statute, providing adequate remuneration for their work, and making them not altogether dependent on fees, but making them officers of the court. Therefore, I think we have not only express enactment, but reason and sense to warrant us in holding that this rule should be allowed.

FITZGERALD, J.—As I understand this case the commissioners do not resist this claim in the ordinary sense, but they come here, I think properly, to seek for the interpretation of an Act which is by no means free from doubt. The question before us is one of no

small difficulty, but at the same time I am able to concur in the result which has been arrived at by the court, namely, that the Recorder, exercising civil bill jurisdiction, has authority to appoint civil bill process-servers, and that they are entitled to be paid the salary which the Act provides. It is unnecessary for me to state in detail my reasons for coming to that conclusion upon what I think a difficult Act, but I may say that I am very much influenced by the concluding provision of the 159th section. That section provides for the civil bill proceedings in the Recorders' Courts being the same as in the courts held before the assistant-barristers; and in the concluding part of it it provides that if any doubt shall arise in the application of the Act as to what officers of the Recorders' courts shall correspond to those named in the Act for the service or execution of process, it shall be lawful for such courts to determine the same. That appears to me to be a legislative declaration that there shall be in the Recorder's court an officer standing directly in the same position as the officer of the Chairman's Court, the only one entrusted with the exclusive right and duty of serving process, obliged to attend at the sittings of the court and to keep a book which is open to the public, in which he is bound to enter the time and manner of service of process in each case, and which, in case of his death, becomes a record of the court, and is evidence. Taking into account the language of this provision and the mandatory terms of the 162nd section, and applying these to the 15th and 17th, my conclusions are the same as those of the rest of the court. Little light is thrown upon the question by the other Acts which have been referred to. The general scope of the Civil Bill Act was to give increased power and efficiency to the Civil Bill Courts; and amongst other means for that end to provide that in all of them there shall be a person who shall be solely entrusted with service of process, and shall be an officer of the court in which he is appointed.

Rule absolute, with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MERCER v. O'REILLY.

April 29, May 7, 8, 12, 1862.

Pleading—Demurrer—Construction of Landlord and Tenant Law Amendment Act, 1860, s. 44.

The 44th section of the Irish Landlord and Tenant Law Amendment Act, 1860, is retrospective to the extent of affecting gales of rent accruing due after its enactment under leases made prior to its enactment, but not to the extent of including gales which accrued due before it was passed.

THE action was brought against the assignee of a lessee to recover £80 10s., arrears of rent due out of lands and premises in Dublin. The sum in question consisted of seven quarters of rent, four of which accrued due before the passing of the Landlord and Tenant Law Amendment Act, Ireland, 1860, and the

remaining three subsequently. The defendant pleaded that during the time mentioned in the summons and plaint the plaintiff had been in possession of a great part of the lands and premises, and received the rents, and wrongfully withheld possession from the defendant. The plaintiff replied that the several gales of rent claimed became and were due on the several quarter-days mentioned. To this replication the defendant demurred.

Ralph, in support of the demurrer, relied on *Neale v. Mackenzie* (1 M. & W. 747), and cited Darris on Statutes, p. 540, to show that the Landlord and Tenant Law Amendment Act could not take away rights existing before it was passed. [*Christian, J.*—You have a right to push your argument to the extent, that if the suspension of the rent took place before the act was passed, the act must be shown to be retrospective in order to revive the right to it.]

Hemphill, Q.C., and *Kelly, contra*.—This defence is meant to amount to eviction by the landlord; and the replication goes upon the 44th section of the Landlord and Tenant Law Amendment Act, 1860, which runs thus:—"The surrender to or the resumption by a landlord, or eviction of any portion of the premises demised by a lease, shall not in any manner prejudice or affect the rights of the landlord, whether by action, or entry, or ejectment, as to the residue of said premises." The object of this act was to put the law regarding eviction of a part on the same footing with that which governed eviction of the whole of the premises demised. The statute is remedial, because it enables a lessor to recover from a lessee or assignee the rent of the portion of the premises of which he retains possession. The courts have gone a considerable length in giving a retrospective operation to remedial statutes, as in *Hilliard v. Lenard* (Moo. & Mal. 297), confirmed in *Towler v. Chatterton* (6 Bing. 265); *Freeman v. Moyes* (1 A. & E. 338); *Charrington v. Meatheringham* (2 M. & W. 228); *Edmonds v. Lawley* (6 M. & W. 285); *Cornill v. Hudson* (8 El. & Bl. 437); which lays down that from an act itself is to be collected whether and how far it is retrospective; *Doe dem. Corbyn v. Bramston* (3 A. & E. 63); *Doe d. Bennett v. Turner* (7 M. & W. 226); *Turner v. Doe d. Bennett* (9 M. & W. 643); *Wright v. Hale* (6 Hurl. & Nor. 227). As far as the three gales are concerned the plea is no answer. [*Christian, J.*—The defendant's argument is, that at the time of this act being passed the *corpus* of the rent was gone by reason of the part eviction.] "Lease" in the 44th section cannot mean lease made after the 1st January, 1861. The 46th section has no words expressing antecedence, yet it must be retrospective. Could it be said that a tenant holding under a lease for 99 or 999 years made before this act was passed was to get no benefit from its 48th section? A number of the preceding sections in this act are made in terms to refer to leases executed after its passing, because they might otherwise be supposed to have a retrospective operation. Can the 30th section be construed otherwise than as being retrospective? [*Monahan, C.J.*—That is borne out by the 31st.] The policy of the act was to shake off the old feudal principles of rent; and this 44th section was made as comprehensive as possible in order to include every

case. So it includes surrender and resumption. There are no decisions upon it yet. [*Monahan, C.J.*—Supposing past leases to be meant, what would you say of subsequent evictions?] The moment the first of January, 1861, came, the landlord who had evicted was guilty of a trespass, and a fresh eviction commenced every day. Eviction includes a trespass. There was no vested right which could be injured by giving this section a retrospective operation; and in all the cases where the retrospective operation of a statute has been controverted there existed some vested right; but so far as the three gales are concerned it is not a retrospective operation that we ask for. Each of these gales is a distinct cause of action—*Hudson v. Nicholson* (5 M. & W. 437); *Holmes v. Wilson* (10 A. & E. 503); Addison on Wrongs, p. 422; all lay down that continuing acts of a tortious character are new acts. An eviction of the whole of the premises, if pleaded, would not excuse the tenant from paying any rent at all; nor would eviction by title paramount formerly have been an answer to an action for the whole rent—*Stevenson v. Lambard* (2 East, 575). The marginal note of this case runs thus:—"An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or replevin. Aliter in covenant against the lessee himself, who is liable on his personal contract." Again, the plea is bad; it must be intended to be a plea of eviction; and on all the authorities it is bad—*Salmon v. Smith* (1 Saund. Rep. 204); *Dunn v. Di Nuovo* (3 Scott's New Rep. 487); *Ecclesiastical Commissioners v. O'Connor* (9 Ir. Com. Law Rep. 242). The form of plea of eviction given in Bullen & Leake, p. 373, is the following:—"That during the said term, and before the said rent became due, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the said messuage and premises and evicted the defendant from the possession, use, and occupation thereof, and kept him so evicted thenceforth hitherto"—*Morrison v. Chadwick* (7 Common Bench, 266); *Newton v. Allin* (1 Q. B. 518). [*Christian, J.*—Would you say if the landlord behind the back of the tenant quietly went into possession of part of the premises, that would not be an eviction of part?] No. But it is not necessary to go that length—*Hunt v. Cope* (Cowper's Reps. 242); *Wheeler v. Stevenson* (6 Hurl. & Norm. 155); *The Grand Canal Company v. Fitzsimons* (1 Hud. & Br. 449); *Smith v. Raleigh* (3 Camp. 513); *Stokes v. Cooper* (3 Camp. 514, note). The three last are authorities to show that this plea would be no defence to an action for use and occupation.

Heron, Q.C., in reply.—As regards the argument that this act is retrospective the general rule is, that the most express words must be found in a statute to make it so. I have tried in vain to discover a section which would make this 44th section retrospective. See Broom's Legal Maxims, p. 29. The Statute of Frauds was held not to be retrospective in *Gilmore v. Shuter* (2 Lev. 227); that was an action of assumpsit upon a promise for payment of a marriage portion.

The promise was not in writing. The action was brought after the statute had been passed; but it was held that the promise having been made before was binding. Take again the Statutes of Mortmain—*Ashburnham v. Bradshaw* (2 Atkyn, 36) was a devise to charitable uses under a will made in 1734, before the new Statute of Mortmain was passed: the testator lived a month after the statute and the devise was held good. See also *Attorney-General v. Lloyd* (3 Atk. 551)—on the Bankruptcy Acts, *Moore v. Phillips* (7 M. & W. 536); on the Copyright Statutes, *Chappell v. Purday* (12 M. & W. 303); *Perry v. Skinner* (2 M. & W. 471); on the Gaming Laws, *Moon v. Durden* (2 Exch. Rep. 22). The general rule is this:—*Nova constitutio futuris formam imponere debet, non præteritis*. [*Christian, J.*—The application of these principles, it seems to me, depends very much on what was the right vested in you at the time the act was passed.] It is almost admitted that the act cannot be retrospective so far as the four gales are concerned, but the plaintiff insists it is as to the three which accrued since it was passed, and claims to have the demurrer overruled, whereas I am entitled to judgment on this demurrer, because the replication is not an answer to the entire of the plea. The plaintiff goes for seven quarters of rent, I answer that at common law; and a replication becomes necessary, and judgment is given in my favor as regards four of the quarters. [*Monahan, C. J.*—Where is the rule that the replication must answer the whole of the plea? No doubt, the plea must answer the whole of the plaintiff.] [*Christian, J.*—In truth, the replication is an answer to the whole of the plea, because it shows the plea is not an answer to the whole of the plaintiff.]

Cur. adv. vult.

May 12.—The Court overruled the demurrer without prejudice to the defendant's applying next Term to amend his pleadings.

ETRE v. M'DOWELL—June 3, 1862.

Pleading—Demurrer—Disclaimer—Want of Consideration.

It is no defence to an action upon a bill of exchange by the indorsee against the acceptor, that an agreement for the conveyance of an estate by the plaintiff having been entered into between the plaintiff and the drawer of a bill of exchange accepted by the defendant, such bill was drawn and accepted to secure the purchase-money of such estate; that when due, and the drawer unable to pay the amount, the bill of exchange now being sued upon was drawn and accepted as a renewal of it; and that the plaintiff had not, in pursuance of his agreement, conveyed the estate in question.

Neither, under the above circumstances, will a defence that the plaintiff in a bill by him filed in an equity suit had disclaimed the agreement, be held a good defence as amounting to what might constitute a rescission of the contract.

THE action in this case was brought by the plaintiff,

T. J. Eyre, the indorsee of a bill of exchange for £17,000, against the defendant as official manager of the Tipperary Joint Stock Bank, the acceptors of said bill. The defendant pleaded that an agreement for the conveyance of an estate called the Wall Estate having been entered into between the plaintiff and John Sadleir, a bill to secure a portion of the purchase-money was drawn by John Sadleir, and accepted by the bank; that when at maturity John Sadleir was unable to pay the amount of it, and that the bill now being sued upon was drawn and accepted as a renewal, including an additional sum of £2,000, and that the plaintiff had not, in pursuance of his agreement, conveyed the Wall Estate. The defendant also pleaded a disclaimer of the agreement by the plaintiff in a bill by him filed in a Chancery suit in England. The plaintiff demurred to the first of these defences, on the ground that it was consistent with it that the agreement was still in full force, and because the bank were not parties to the agreement. The second plea was demurred to on the ground that the alleged disclaimer was confined in its operation to the suit in which it was made.

John B. Murphy, in support of the demurrer.—It is not alleged that John Sadleir or his representatives ever repudiated this agreement—*Spiller v. Westlake* (2 B. and Ad., 155); *Moggridge v. Jones* (14 East., 486). Part failure of a consideration will not avoid a contract—*Mann v. Lent* (10 B. & C., 877); *Grant v. Welchman* (16 East., 207); but here there was no failure of consideration at all. The plaintiff is liable to an action upon the agreement. Upon the point of the disclaimer the following cases were cited:—*Howard v. Hudson* (2 El. & Bl., 1); *Freeman v. Cooke* (2 Ex., 654); *Clarke v. Hart* (6 House of Lords, 633).

M'Kenna, contra, relied upon *Asley v. Johnson* (5 Hurl. & Nor., 137), and *Wells v. Hopkins* (5 M. and W., 7).

June 16.—MONAHAN, C.J.—It is argued that the breach of the agreement to convey the Wall Estate is a defence to this action, and we think it is not. An authority for this is *Spiller v. Westlake* (2 B. & Ad., 155). The plea was the general issue: the plaintiff was not in a condition to keep his engagement; and the circumstance of a negotiable security having been given by the defendant was held to show an intention to pay the money in all events. *Moggridge v. Jones* (14 East., 486), and other cases, establish that where there is an agreement to perform and a negotiable security taken, which is not payable on the same day with the performance, the consideration is not the payment, but the undertaking to pay. In the present case, the first bill was due long before the time fixed for the execution of the conveyance; and the renewed bill was given because John Sadleir was not in a condition to pay it, clearly showing that upon that first bill there was a direct liability. The next question is, whether the allegation of repudiation makes a good defence. We think it does not, because one party has no right to repudiate an agreement; it can only be rescinded by both. John Sadleir is not a party. There is nothing here to show that John Sadleir is not able to sue upon this agreement at the present moment. *Pickard v. Sears* (6

A. & E., 469) is good law as explained by the two cases of *Howard v. Hudson* (2 Kl. & Bl., 1) and *Freeman v. Cooke* (2 Ex., 654). The representation must be made to the other party himself; it must be made with the intention of inducing him to alter his condition; and the other party must act upon it in that way. It would be difficult to make a representation in a bill filed in a Chancery suit answer this description; but it would be more difficult to hold that it was made to every defendant in the suit in order to alter his condition. The demurrers to both these defences must be allowed. Nothing that we now say is meant to express that the parties may not have ample relief in the Court of Chancery.

Judgment for the plaintiff.

JOHNSTON v. BLOOMFIELD.—June 17.

Pleading—Leave to file additional Replications.

Hamilton moved for liberty to file additional replications, and stated the particulars of the case, which will be found in 7 Ir. Jur., N. S., 61. He sought to reply that the plaintiff being the owner of adjoining land had a right by prescription, as annexed to the said messuage, to bury in the said churchyard his lineal and collateral relatives; also a lost grant. [*Christian, J.*—This is such an amendment as the judge at Nisi Prius might make, and the act is imperative. The judge is to make all such amendments as shall be necessary to raise the proper question.]

Serjeant Armstrong (with him *Dowse*) contra.—The first of the suggested replications amounts to a right to bury all the plaintiff's relatives wherever they die. It would be intelligible if confined to those dying in a particular house. Such a prescription might be. The second replication does not state from whom to whom the "lost grant" was made. Though a fiction of law it must appear from whom to whom it was made. [*Monahan, C.J.*—What occurred at the trial was sufficient to show that a question might exist respecting the plaintiff's private right to bury in this churchyard.] The defendant never denied the plaintiff's right to be buried in his own vault in the churchyard. What the plaintiff sought was to establish a public right. His original replication ran thus,—that the place in which the trespasses were committed was an ancient burial-ground; and to the truth of this replication he swore before he got leave to file it. I require that he give up this replication. If this were an application to plead an additional plea instead of to reply it would not be granted without an affidavit. [It appeared that there was an affidavit.] If these replications are allowed, it must be upon the terms of the plaintiff's paying all the costs incurred by them.

MONAHAN, C. J.—We shall allow these replications to be filed, the plaintiff paying the costs of this motion and all the costs incurred by this step, and agreeing to withdraw notice of trial.

Rule accordingly.

Dowse applied for leave to rejoin and demur to save the expense of another motion, which the court refused to grant on the ground that the Common Law Procedure Act did not include such a procedure.

Court of Exchequer.

[Reported by H. J. Wrixon, Esq., Barrister-at-Law.]

[BEFORE THE FULL COURT.]

SEYMOUR v. CLARKE.—Nov. 4, 1862.

Discharge of Debtor—Fraud.

Discharge of debtor by creditor after arrest on a Ca. Sa. is a satisfaction of the debt, and he cannot be re-arrested for the same debt, even though it was so stipulated in a Master's order to which he was a party.

W. C. Smith applied to set aside the writ of *ca. sa.* under which the defendant, *Clarke*, was detained in custody, and to have him discharged. In March, 1861, defendant was indebted to the plaintiff in the sum of £1841 7s. 1d. On 6th July, 1861, *Clarke* was arrested under a *ca. sa.*, and, three days later, Master *Murphy* made an order directing his discharge on the payment of £659 11s. 9d., being part of the debt; and plaintiff's attorney, on receiving that sum, gave, with plaintiff's consent, a written order to the sheriff, directing defendant's discharge. On the 22nd October, 1862, the defendant was again arrested at plaintiff's suit, under a *ca. sa.* issued on foot of the same judgment, for £1,199 18s. 5d. An order of 30th April, 1861, directed that defendant should invest £700 in the three per cents., and that all proceedings against him be stayed on this being done, and it continued—"It is further ordered that the said defendant shall pay the balance thereof, being £1,151 7s. 1d., by five separate instalments, unless the full sum be paid off; and it is ordered that, in case default be made by the said defendant in payment of any of the said instalments, that then the plaintiff shall be at liberty to continue proceedings at law, and mark judgment and issue execution thereon, against the said defendant for the entire sum then due, but not otherwise." The order of 9th July, 1861, also directed that the judgment obtained against the defendant should stand as security for the balance. The answering affidavit set out these conditions as distinct agreements, that, in case of the instalments not being paid, defendant would be arrested again, and the execution renewed.

Smith argued that there was not, on the face of the orders, any express provision that defendant should be re-taken in case of default, which distinguished this case from *Denton v. Godfrey* (11 Jur., 600). If the construction of the orders contended for, on behalf of the plaintiff, was correct, there was nothing to have prevented the arrest of the defendant the day after the order was made. [*Fitzgerald, B.*—The question is, whether, where the court is made a party to such an arrangement as this, it is not taken out of the category of mere party arrangements.] There is neither force nor fraud here, and the defendant having

been once fairly discharged, by the plaintiff's authority, cannot be re-arrested. The usual rule of law applies. He cited *Blackburn v. Stupart* (2 East., 242), where Grose, J., lays down the rule "that a person cannot be taken in execution twice on the same judgment, whether he had agreed or not;" *Jaques v. Whitby* (1 Term., 557); *Tanner v. Hague* (7 Term., 420); *Clarke v. Clement* (6 Term., 525); Archbold's Practice, 1, 650. He contended that *Denton v. Godfrey and others* (8 Jur., 800), was not adverse to him, as there, an express condition that the debtor should be retaken in case of default was one of the provisions of the order of the court.

J. E. Walsh, Q.C., contra.—There is no doubt as to the general rule of law; but where the assent of the creditor is procured by compulsion or a trick, it will not avail to defeat the *ca. sa.* Here there was the compulsion of a competent tribunal to force the terms on plaintiff. The tribunal was influenced by a fraud of the defendant, to wit, the representation that he consented to be arrested if he did not pay his debts. [*Hughes, B.*—What compulsion was there on the Master?] If the Master is induced by the debtor's promise to make the order, then the court, on the authority of *Baker v. Ridgway* (9 Moore, 114), will not allow him now to come forward and repudiate it. It is clearly expressed on the order, that if the instalments are not paid then the execution should be renewed. [*Pigot, C.B.*—Was it fraud in the bankrupt to take the discharge on certain conditions which he knew were not binding on him? If he had said that such was his intention, would it have been fraud?] The facts of this case show that the defendant used a legal process to intimidate the creditor. The creditor was coerced by this order. Further, where the debt is not one payable in a bulk sum, there the discharge from execution for one instalment is no satisfaction for the other instalments. The second arrest was here made for the nonpayment of the second instalment. He cited *Baker v. Ridgway* (9 Moore, 114), where, in a parallel case, Best, C.J., says: "If there has been no fraud in the transaction, I am of opinion that the defendant is entitled to his discharge; but if there has been fraud, I am clearly of opinion, in which my two learned brothers concur, that he is not." He also cited *Atkinson v. Baynton* (1 Scott, 404), and *Denton v. Godfrey* (11 Jur., 800).

Cur. adv. vult.

Nov. 7.—*Pigot, C.B.*—The rule of law is clear, that the discharge of a debtor from custody, after his arrest under a *capias ad satisfaciendum*, is a satisfaction of the debt, when made by the authority of the creditor. In this case the discharge was so made. No doubt the defendant acted in contempt of what is the substantial equity of the Master's orders, but this confers no right on the plaintiff to take him again under a fresh execution for a debt already discharged. The sheriff here acted on the plaintiff's authority, not on that of the Master. If plaintiff has been prejudiced by the orders, he must go to Chancery for relief. It has been strongly argued for the plaintiff that the defendant here was guilty of fraud. I can find no fraud in his conduct, nor any imputation of it. I certainly think that the defendant is now acting in

violation of the Master's orders. I think it was intended that the judgment should stand as a security for the unpaid balance. But there is nothing more than a violation of the defendant's undertaking. It does not follow that there was any deception. Whether defendant be or be not acting rightly is not the question. It is enough for us that there is no fraud. *Denton v. Godfrey* (11 Jur.) does not bear on the present case. My view of this matter here is, that there has been a miscarriage in Chancery. What the Master intended has not been done. As the matter stands, we are bound to order defendant's discharge, but the order will be made without costs.

Fitzgerald, B.—There is no evidence of fraud here. I wish to have it understood that I express no opinion as to what the decision would have been if there had been fraud.

Discharge ordered.

BRETT v. SHERIDAN.—November 8, 1862.

Pleading—Embarrassing Defence.

A defence, "That defendant did not promise to retire a certain bill, nor did he receive from plaintiff said bill for the purpose alleged," set aside as double and embarrassing.

THE summons and plaint in this case declared that, in consideration that the plaintiff would accept and deliver to defendant a bill of exchange, drawn by defendant on plaintiff for the purpose of retiring another bill of exchange, defendant promised plaintiff to retire the latter; that hereupon plaintiff accepted the first-mentioned bill on the above condition: breach alleged that defendant did not retire the second bill, as was agreed, whereby plaintiff was damaged, &c. Defence—"That defendant did not promise the plaintiff to retire said bill, nor did he receive from the plaintiff said first-mentioned bill for the purpose and on the terms in the said paragraph alleged."

J. M'Mahon, for the plaintiff, applied to have the defence set aside, on the ground that it was double. It denied that defendant promised the plaintiff to retire the second-mentioned bill of exchange, and it also denied that the defendant received the first-mentioned bill for the purpose and on the terms alleged. It also denied the defendant's promise, and it controverted as well, the plaintiff's performance of the contract, which was to be a condition precedent to defendant's performance of his part of the contract. Moreover, the denial that defendant promised to retire the second-mentioned bill amounted to the general issue, and was an inference of law. The allegation of the plea, that defendant did not receive the first-mentioned bill from plaintiff, "for the purpose and on the terms" stated, was a negative pregnant, and was ambiguous. He cited *Fitzgibbon v. Nagle* (10 Ir. C. L., Appen. xxxv.), *Dowling v. Wallace* (3 Ir. C. L., 83).

Brereton, Q.C., appeared to support the plea.

Fitzgerald, B.—It is alphabet law, that you cannot make two traverses in one defence. Here you plainly deny more than one material fact in one plea.

PER CURIAM.—The defence must be amended.

Attorney for plaintiff—Bernard and Daly.

Attorney for defendant—Read and Goodman.

[BEFORE THE FULL COURT.]

YOUNG v. POWER—11th November, 1862.

Liability of Attorney for the undertaking of his Clerk.

Attorney held bound by the undertaking of his clerk, though he, on the same day, in another place, refused to give the same undertaking to the agent of the person to whom his clerk gave the promise.

Armstrong, Serjt. (with him P. White) moved that a judgment which had been obtained, and on which a writ of *fi. fa.* had issued, should be set aside on the ground that it had been obtained in violation of an agreement between the attorneys in the cause. It appeared that Mr. Strange, the attorney for the defendant, being desirous to effect a compromise, called at the office of Mr. Whitestone, the plaintiff's attorney, in Waterford, on the 12th July, where he saw a Mr. Thornton, who was acting as chief clerk of Mr. Whitestone. Mr. Thornton gave him, on behalf of his principal, a written consent to extend the time for pleading from the 12th, which was the last day, till Tuesday, the 15th, defendant agreeing to take short notice of trial. On the same day, Mr. Whitestone had seen Mr. Strange's Dublin agent, and had refused to extend the time of pleading. On Monday, 14th July, Mr. Strange sent a notice to Mr. Whitestone, reciting the consent of the 12th, and cautioning him against marking judgment. Mr. Whitestone replied that he would mark judgment forthwith, unless defendant agreed to plead *issuably*, in addition to the terms stipulated by Mr. Thornton. This not being done, judgment was marked on Tuesday, and execution issued for £9 1s. 8d. and £4 7s. 6d. costs. Strange had given notice of an application for obtaining the plaintiff's security for costs on Tuesday, 15th, serving notice after four o'clock on Tuesday, and it was suggested that such notice was only served for a colourable purpose.

J. E. Walsh, Q.C. (with him T. Harris) appeared in support of the judgment, and contended that, as Mr. Strange had withheld from Mr. Thornton the fact that he had issued a preliminary notice for security for costs, the extension of time was obtained under misrepresentation of facts, and was not binding.

PIGOT, C.B.—This is an important case in reference to the dealings between professional men. There can be no doubt that Mr. Thornton was acting *bona fide* as a conducting clerk of Mr. Whitestone's, and that he was held out by Whitestone as invested with full authority to act in his absence; independently of the fact that his acting in his master's absence furnishes grounds for imputing to him authority. Moreover, Whitestone seems to have recognised his authority, by ratifying his conditions as far as they went, and then going on to impose a new condition. Should we then bind the attorney by the acts of his clerk, who was the only person who could act for him? I am clearly of opinion that Whitestone was bound by the act of his clerk, and that by the terms proposed by that clerk we must now act. This quite removes the question of whether there is any defence on the merits or not. In some cases where a judgment is

set aside for irregularity, there is an affidavit of merits required. But where the judgment is marked in violation of a contract, the party who violates the contract cannot prevent the defence being met on the file by requiring an affidavit of merits. How, then, has this contract been violated? On the 12th the undertaking was given. After this, and before judgment was marked, Whitestone demanded of the defendant that he should plead *issuably*. He had no right to impose such a condition. Nothing could have been more reasonable than the arrangement of the 12th. That arrangement was simply, that the defendant's time for pleading should be extended, and that he should take short notice of trial, which was the only condition imposed. The plaintiff's attorney relies on another fact. The defendant appears to have contemplated applying for security for costs, and he did serve a notice for motion on the 14th, and if I thought that he had endeavoured, by the undertaking of the 12th, to throw his adversary off his guard, then the plaintiff could certainly complain of a breach of faith. But here there was no dissemblance. The statement that the defendant had not prepared any pleas is not supported by the affidavits. It is sworn on the defendant's part that the pleas were prepared and transmitted to Dublin for the purpose of being filed. In this case, the undertaking to give time has been violated, judgment marked, and an execution founded on it. It cannot stand. Defendant must get the costs of this motion, and the costs incident to setting aside this judgment. Who is to pay those costs? Is a seafaring man like the plaintiff, who is now out of Ireland, and who was so at the time of this unjust proceeding? Certainly not. I clearly think that they must be paid by the person who is the cause of this litigation—the plaintiff's attorney. The execution, of course, falls, and all the costs are to be paid personally, by the plaintiff's attorney.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., and H. Fawcett, Esq.
Barristers-at-Law.]

[BEFORE JUDGE HARGREAVE.]

THE ESTATE OF JOHN CORNWALL, JUN., AND L. CLUTTERBUCK, TRUSTEES OF THE WILL OF RICHARD NEVILL AND FRANCIS GEARY, OR SOME OR ONE OF THEM, OWNERS AND PETITIONERS.

Contract for sale by the owner, the incumbrances on the lands exceeding the amount of the purchase-money —Petition to carry the contract into effect under the 47th section of the Landed Estates Act (a).

The court will not carry out a contract for sale entered into by the owner where the charges on the lands

(a) The 47th section of the act provides, that "Whenever a contract for sale of any estate in Ireland shall be made, it shall and may be lawful for the vendor and vendee jointly, or if the contract shall so provide, for the vendor or vendee individually, as the case may be, to present a petition to the court for the purpose of procuring for the vendee an indefeasible title to the land so previously sold, and a statutable conveyance thereof under the said court to him, and if necessary, the court, as incidental to such proceeding, may make an

exceed the amount of the purchase money unless the incumbrancers consent—45th General Rule (b).

FRANCIS GEARY, one of the petitioners in this matter, being the beneficial owner in fee in possession of one moiety of the lands forming the subject of the petition, and also beneficial owner of the reversion in fee in the other moiety expectant upon the decease of the tenant for life, entered into a contract with George Orr Wilson for the sale of his interest in said lands for the sum of £22,000. It was provided by the contract that the same should be carried into execution by the Landed Estates Court. Accordingly a petition was presented under the 47th section of the Act to carry the contract into effect. The petition was presented by Francis Geary, the beneficial owner, and by John Cornwall and L. Clutterbuck, in whom the lands were legally vested for payment of incumbrances under the will of Richard Nevill, from whom the property was derived. The incumbrances, as appeared by the petition, amounted to £55,000. On this petition the court refused to make an order to carry the contract into effect, as the incumbrances exceeded the amount of the purchase-money, the purchase-money being £22,000, and the charges £55,000 (c). The petition was subsequently amended by making Mr. Wilson, the vendee, a petitioner, and by praying for a sale of the lands for the purpose of discharging the incumbrances thereon, and the court made a conditional order for sale, which was in due time made absolute.

order for specific performance of such contract at the instance of either party; and thereupon all investigations of title and other proceedings in relation to such petition shall be similar to those which are and shall be prescribed for owners applying for the sale of incumbered or unincumbered property by the court as aforesaid, save that no sale thereof shall be made by the said court unless the petitioner, being the vendor, shall so desire, with the consent of the purchaser. But the sale or contract so theretofore made by the vendor shall be ratified by the said court if it shall so think fit, and a conveyance of such property so sold shall be executed to the purchaser by the judge, and such conveyance shall have the same validity and effect as conveyances of incumbered estates by the judges under this Act. And it shall and may be lawful for such court, if necessary, to pay and discharge out of the purchase-money such incumbrances as shall appear upon investigation of the title to be charged upon the property so sold or contracted to be sold, and for that purpose to order the purchase-money into court: provided always that it shall be lawful for the court, at the joint instance of the vendor and vendee, to substitute any other person as purchaser in the room and stead of the original vendee, or to set up the land for sale under the court, and in such case the conveyance shall be made by the judge to such substituted or other purchaser as if the original application had been for a sale of the lands so contracted for.

(b) The 45th General rule is as follows: "If an estate ordered to be conveyed to a vendee be found to be incumbered, the judge shall not execute any conveyance to the vendee until all the incumbrances thereon be paid, or a sufficient sum be retained in court to pay the same, unless the incumbrancers, being competent thereto, consent to such conveyance. And if an estate alleged to be unincumbered be found to be incumbered, the judge may order a sale for payment of the incumbrances, or may discharge the order and dismiss the petition."

(c) But where the vendor in the contract sought to be carried into execution is a mortgagee with power of sale, the question is not whether the lands are incumbered to an amount greater than the purchase-money, but whether the charges prior to the mortgage exceed the purchase-money. [*In re Robert Dyke and others, before Judge Hargreave.*]

[BEFORE JUDGE HARGREAVE.]

THE ESTATE OF JANE ELIZA FINLAY AND OTHERS, OWNERS; EX PARTE, WM. THOS. DANIEL, PETITIONER.

Cause against the conditional order for sale—Side-bar order allowing the cause—Motion to rescind the side bar order, and to make the conditional order for sale absolute notwithstanding the cause shewn to the contrary.

The court refused a motion to rescind a side-bar order obtained under the 18th General Rule (a), allowing the cause shewn against a conditional order for sale where the side-bar order was obtained on the 29th Nov., 1861, and the notice to set aside the order was not served until the 20th January, 1862. The court will not rescind the side-bar order unless the notice of motion for that purpose is served immediately on the petitioner's solicitor being made aware of the order.

IN this case a petition having been presented to the court for the sale of certain premises for the payment of the incumbrances thereon, a conditional order for sale was duly made and directed to be served on Maria Finlay Soden. Within the time limited by the order an affidavit was filed on behalf of Miss Soden, shewing cause why the order should not be made absolute. The petitioner's solicitor should, at the expiration of the time limited by the order for parties to shew cause, or within four days afterwards, have served his notice of motion to make the order for sale absolute notwithstanding the cause shewn by Miss Soden, as provided by the 18th General Rule. He, however, neglected to serve this notice, and the solicitor for the party shewing cause pursuing the practice prescribed by the 18th General Rule, obtained a side-bar order in the registrar's office allowing the cause and dismissing the petition. This order was dated the 29th November, 1861. The petitioner's solicitor, although aware of the order, took no step in the matter until the 20th of January following, when he served his notice of motion, seeking to set aside the side-bar order and to make the conditional order for sale absolute notwithstanding the cause shewn to the contrary. In the meantime another petition had been filed for sale of the same premises. An affidavit was filed to support the motion, but the chief fact alleged and relied upon to account for the delay in bringing forward the motion was, that the solicitor had been absent on business in London.

JUDGE HARGREAVE, in refusing the motion, said,—There is quite a settled practice in these cases. The court will not set aside the side-bar order unless the solicitor having the carriage of the proceedings move

(a) The 18th General rule provides that "any person desiring to show cause against a conditional order made on a petition must enter an appearance and serve on the petitioner a notice of cause referring to any affidavit or other document on which he relies: and unless the petitioner shall within the time specified in the conditional order, or four days thereafter, serve notice of motion to make the same absolute, the person showing the cause may cause a rule to be entered in the office allowing his cause; and on such rule being entered the cause shall be deemed to be allowed, and the party showing cause may proceed to tax his costs of resisting such conditional order."

immediately he is aware of the order. When the court was first established, and the practice new, the court was in the habit of setting aside these orders if the solicitor was taken by surprise, and moved immediately on hearing of the order; but now that the practice is well known, I doubt whether the court ought to let in the solicitor at all to move to rescind the order. In this case, however, it is quite clear no case has been made to set aside the order, for the solicitor admits in his affidavit that he heard of the order on the 18th Dec., yet this notice of motion was not served until the 20th Jan. An excuse is attempted that the offices of the court were closed during the Christmas vacation, and so the notice could not be served. But this excuse fails, as the offices were not closed until the 23rd of December, and were opened again on the 8th of January. Besides, a petition has been presented by the owner for sale of the premises comprised in the petition filed by the petitioner, relying upon the side-bar order dismissing that petition. And as to the suggestion that the owner may not proceed with her petition, and that the petition may yet be dismissed on cause, if the owner delays the proceedings, any creditor may apply that the carriage of the proceedings be given to him; and if the owner's petition should be dismissed, the petitioner may then file a new petition of his own. The motion must be refused with costs.

Counsel for the petitioner—Mr. Hemphill.

Counsel for the party showing cause—Mr. Malley.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

HENNESSY v. HENNESSY.—Nov. 5.

Jurisdiction of Quarter Sessions—Costs.

If solicitors file pleadings in the Probate Court in cases within the jurisdiction of the Sessions, without having informed their clients of the jurisdiction, and without their express directions, notwithstanding, to proceed here, no costs will be allowed to them, either out of the estate or against their own clients.

Dr. Miller moved that this case should be transferred to the Quarter Sessions for the East Riding of the County of Cork, the personal assets being under £200, and the real estate under £300; he moved on an affidavit to that effect; and that the deceased at his death had his fixed place of abode there. The plaintiff had propounded in his declaration a will, and the defendant had, in his plea, alleged a later one, with a clause of revocation. A motion was pending on the part of the plaintiff for leave to file a replication to that plea, alleging undue execution—incapacity and undue influence as to the latter will. A consent had been tendered by the defendant's proctor to dismiss the suit, so that, on the usual affidavit, the registrar might give jurisdiction to the Chairman of Quarter Sessions; but the plaintiff's solicitor would not sign it, unless the pleadings and intended replication, with the several issues proposed to be raised by the plaintiff thereby, were embodied. However, the

defendant's proctor did sign a consent to that effect, under protest, that it was unnecessary, and would not be acted on. Counsel submitted that it was entirely useless filing a replication, as the case would go to the quarter sessions entirely free from all pleadings, and there a testamentary process would be served by each party, in support of the several wills they relied on. As to the costs of the proceedings, they should be allowed, as the sixty-third section of the Probate Act of 1857, left it open to the parties to adopt the Probate Court if they preferred it. The words of the section are—"It shall not be obligatory on any party to apply to the district registry or the assistant-barrister," &c.; and if the court held that, in every case within the jurisdiction, parties must, at the peril of losing all costs, go to the sessions, it would defeat the intention of the Legislature, which plainly was, that in cases where points of law would occur of a difficult nature, parties should have the election of having their cases tried and decided before the more experienced Court of Probate, and have the further right to appeal to the Court of Chancery Appeal, or of going to the sessions, where, on account of the numbers of entries, the case must of necessity be hurried over. If that were not held, a like rule should be applied to the district registries, as the same words referred to them also.

W. O'Brien, for the plaintiff, thought that the Chairman would try the issues as settled by this court, and also submitted that the parties should get their costs in this court.

KEATINGE, J.—In this case, it occurs to me that I cannot allow the costs out of the assets, nor as against the clients. The solicitors or proctors, before filing any pleadings, should have ascertained, if the assets were within the inferior jurisdiction, and have informed their clients of that fact. If their clients persisted in forcing them to go on here, or if there were difficult points of law to be decided, then, perhaps, a case would be made for allowing costs; but neither of those cases has been made here by affidavit, and I think that the sixty-third section of the Act referred to is almost obligatory; at least, it is the duty of the judge to protect, as far as he can, as well the estate, as the absent clients; and, on those grounds, I shall send the case to the sessions, and order that each party do abide his own costs, and that the proctor and solicitor for each party do not charge their respective clients with any part of same.

TODD v. THOMPSON.—13 & 17 Nov.

Acknowledgment by testator—Express or virtual.

A will was signed by the testator in the absence of the two attesting witnesses, and the survivor of them in his evidence negatived an express acknowledgment then, but admitted that the will was on the table, signed, before the testator, and that it was handed over to them to sign. The drawer and the defendant, who were present, swore to an express acknowledgment. Held, on the evidence, that there was an express acknowledgment; but, besides, that there was enough to constitute a virtual one in law.

This was a cause heard before the judge without a

jury to try the validity of the will of the deceased John Todd, bearing date the 29th day of June, 1858, propounded by the defendant. The plea was undue execution. The evidence had been on a former day given before the judge, and the points raised now came on for discussion.

Dr. Ball, Q. C., and *M. Gusty*, for the defendant, contended that the will was sufficiently proved. The question was merely whether on the evidence the acknowledgment by the testator of his signature was proved. There are three witnesses who were present; of these two agree in their account of what occurred, and one disagrees; the difference being that he says, O'Hare, the drawer, did not ask (as the other two say he did) the deceased if the paper on the table was his will, and that the deceased did not say it was; but this is not even necessary to be done if the acknowledgment can be inferred from the conduct of the deceased. He was sitting at the table with the will, signed, before him, as all the witnesses admit, and the will was handed over to them to sign—*1 Jarm. on Wills*, 90 (2nd ed.); *Gwillim v. Gwillim* (29 L. Jour. 31, and *Lloyd v. Roberts*, cited in that case); *Goods of Holdgate* (1 S. & T. 261); *Falls v. Jackson* (6 No. Ca. App. 1); *Leach v. Bates* (ib. 699); *Goods of Bosanquet* (2 Rob. 577); *Bayliss v. Sayers* (3 No. Ca. 22).

Dr. Chatterton and *F. M'Blain*, for the plaintiff, contended that there was no evidence sufficiently satisfactory as to acknowledgment. There must be some act on the part of the deceased to show an adoption of the signature; here he was only passive. Counsel relied on the discrepancies in several affidavits made by the witnesses from the *vivâ voce* evidence to discredit them, which is fully detailed in the judgment. *Goods of Summers* (2 Rob. 295); *Moore v. King* (3 Curt. 243); *Goods of Davis* (2 Rob. 337); *Burgoyne v. Showler* (1 Rob. 19).

Cur. adv. vult.

Nov. 17.—*KEATINGE, J.*—The question in this case is, whether a sufficient acknowledgment by the deceased of his name at the foot of the will has been made by him. It is conceded on all sides that this will was not signed in the presence of the two attesting witnesses; but of a man named O'Hare, who drew it and read it to the deceased, who signed it in his presence. O'Hare then went for the two witnesses, who were down stairs, and brought them up to the room in which the deceased was sitting at the table, and they then attested the will. The will was lying on the table where the deceased was sitting; and the question raised on the evidence which has been given is, whether there was *then* a sufficient acknowledgment by the deceased of his signature to the will. There is a controversy among the witnesses as to what then occurred. O'Hare, the drawer of the will, swears that when he brought up the two witnesses he asked the deceased in their presence if it was his will? and that he replied that it was; and that then the witnesses attested it. If that is believed there was clearly a sufficient acknowledgment; but it is argued for the plaintiff that O'Hare is not to be believed as he made an affidavit when an application was made for probate in common form, in which there was a statement inconsistent with his evidence on this

trial; and that one of the attesting witnesses also then represented what occurred in a different way; and also that he made a somewhat inconsistent statement in an affidavit in Chancery in certain proceedings had under a decree there to take an account of the assets of the deceased. But on looking at those affidavits I don't see that the affidavits were so prepared as to render it necessary for the parties to state that the deceased acknowledged the will in the way they have deposed to here. It appears that a matter occurred, which is in evidence here, which may have misled the professional gentlemen who prepared the affidavits. It now appears that after the deceased had signed, and after the witnesses had attested, he and all the witnesses went down stairs, and then one of them said, "I doubt the will is not right as we did not see the deceased sign his name;" and that the deceased refused to sign his name again, but afterwards opened the envelope in which the will was and acknowledged his signature again to the witnesses. This is mentioned in the two affidavits, but that in Chancery says, "and *then* the witnesses attested." But affidavits, I regret to say, are often loosely drawn; and the witnesses probably told the solicitor that the deceased had only acknowledged and not signed the will in their presence, without mentioning the fact of there being two acknowledgments; one before and the other after the attestation; and he drafted it in that way. The defendant, Thompson, was present, and he confirms O'Hare in his account; but then Scott, the surviving attesting witness, says positively that no question was asked at all about the will being the deceased's will, but he admits that it was on a table where the deceased was sitting, and that the will was *drawn over* to the witnesses who attested. The general rule is, that where one or two persons swear positively to a matter of fact, and another swears that it did not occur, giving credit to all the witnesses to intend to tell the truth, the persons swearing to the affirmative are to be credited, as the most that can be said as to the other is that he has no recollection of the matter. And in the evidence of Scott there is a matter which suggests that this is what really did occur. He says that when they came down he said to Crawford, his co-witness, that he doubted that the will was not good, as they did not see the testator write his name. But according to his evidence what he ought to have said was, that the deceased never said a word about it being his will. I therefore am clearly of opinion that on the evidence there was an *express* acknowledgment by the testator of his signature, and that the party propounding this will has made out his case. But supposing I am wrong in that view of the evidence, and that I ought to hold that the deceased was not asked about it being his will at all, and that he did not in terms acknowledge it as such, nevertheless I should still hold that there was here a sufficient acknowledgment in law to sustain this will. It is not necessary that the acknowledgment should be in any particular form nor in any particular words, nor in words at all; it is enough if the *conduct* of the person on the occasion amounts to an acknowledgment. Now the fact of the will having been signed before the two witnesses came up—the will being on the table—the witnesses being those

whom the testator sent for, and the will having been handed over to them to attest, all amount to sufficient *conduct* to create in law an acknowledgment. The case of *In the goods of Summers* (2 Rob. 295), would appear to be an authority against the latter view; but it is material in the decisions in the Prerogative and Probate Courts to consider whether such decisions were made *ex parte* or in a cause, as a judge may without objection or without argument, in the former case make an order, which on argument in a cause when the will is propounded, he would not adhere to. Besides, I do not see that that case, though decided in 1850, has ever been quoted or acted on in any other case; and the case of *In the Goods of Bosanquet* (2 Rob. 577), is exactly in point with this case. I therefore would, if necessary, hold this a good *virtual* acknowledgment, but I am equally clear it was an express one. I therefore decree in favour of the will, and give the defendant his costs; but as the estate is not considerable, as between party and party and not solicitor and client.

WHITNEY v. WHITNEY.—14th Nov.

Costs of heir-at-law propounding a will, and failing—Practice as to decree of a will propounded, but not impeached, save by a later and revoking will, and not proved.

An heir-at-law who fails in establishing the contents of an alleged lost will will not be exempt from costs though he swears that he propounded it, from representations which were made to him, and which he believed, as to its validity—A will propounded and not impeached, save by a plea alleging a later one, cannot be decreed for unless some evidence of execution be given; an affidavit will suffice.

Dr. Ball, Q.C., on behalf of the heir-at-law, Thomas Whitney, moved that he should be allowed his costs of the suit out of the estate. The plaintiff, a brother of the deceased, had relied on a will of the 17th December, 1857, with two codicils, under which the father of the heir-at-law would have derived considerable benefit. He died, however, in the lifetime of the deceased. The heir intervened when cited, and propounded a later will, which was not forthcoming, setting out the alleged contents of it. His brother, William, who was a remainderman in the will of Dec. 1857, also alleged the later will. The defendants relied on an attempted interlineation in that will of the word *children* after the bequest to their father, in support of their case, alleging that it was made by the deceased. Several witnesses were examined at the trial, from whom the defendants had got the information as to

the later will and its contents, but the jury did not credit their evidence, and they found a verdict against it. There was no issue sent to them as to the first will, and it was not in the pleadings impeached further than by the pleas propounding the later one as a revocation, but no evidence was given of its execution. The cause was now set down for final hearing. Affidavits were now relied on by the defendants that they believed the statements made to them of the genuineness of the alleged later will, and denying any collusion with the persons who so informed them about it; and it was contended that under such circumstances it was the duty of the defendants to bring the matter before the court, and that though they failed they were entitled to costs. In fact William Whitney derived more under the earlier will than he would under the later—*Fairtlough v. Fairtlough* (Mil. 36); *Robins v. Paxton* (29 L. Jour. N. S. Prob. 138); *Onslow v. Cannon* (30 Ib. 165).

Dr. Walsh, Q.C. (with him E. Johnston) asked for costs against the defendants. The witnesses for the defendants were of a very low class, and they completely broke down; and the rule was settled that parties relying in their pleading on a defence which failed should pay the costs—*Fyson v. Westropp* (1 S. & T. 279); *Nichols v. Binas* (Ib. 239); *Onslow v. Cannon* (30 L. Jour. Pr. 165).

J. A. Byrne in reply.

KEATINGE, J.—The question now is, whether a party setting up an imaginary will and failing to establish it is to be excused from costs, because he was misled by other parties who made certain representations to him which he says he believed. I am much surprised that credence was given to such statements; but if I were to give costs in this case they should, according to *Newton v. Newton* (7 Ir. Jur. N. S. 134), come out of the personal estate, and I should in all other similar cases have to give costs. I regret extremely that the judges of appeal did not in that case define out of what fund the costs were to come; they did not alter the general decree giving costs out of the estate, but intimated that it meant out of the personal estate; but no decree to that effect was made. In this case I shall order that the defendants do pay the costs of the suit from the date of their pleas down to this hearing. There is, however, a difficulty in giving a decree in favour of the earlier will and codicils as no issue was sent to the jury on them, and no witness was examined as to their execution. I am of opinion that although they were not in pleading impeached, yet I cannot give a decree in favour of them without some evidence of due execution; therefore I will allow this hearing to stand over to enable the plaintiff to get from one of the attesting witnesses an affidavit of due execution.

Court of Queen's Bench.

CROWN SIDE.

[Reported by William Woodlock, Esq., Barrister-at-law.]

IN THE MATTER OF KIRBY AND OTHERS.—

November 4, 8, 10, 11.

Malicious burning—Compensation—Dublin Improvement Act, st. 12 & 13 Vict., c. 97—Jurisdiction of Town Council—Right to Traverse.

The Town Council of Dublin has no jurisdiction to investigate cases of malicious injury, except in presence of a judge of this court.

In case of the rejection, by the Town Council, acting with the assistance of a judge, of an application for compensation, the applicant cannot have the decision reviewed; but, in case the application is allowed, any of the rate-payers may traverse the presentment which shall be made.

THIS was an application, on behalf of Thomas Kirby, to have a jury summoned to investigate this case, and also to have a day fixed for the hearing of the case, or to take the directions of the court upon the matter, or for such other order as the court might be pleased to make. Mr. Kirby was the proprietor of a theatre at the Portobello Gardens in this city. Sometime in the course of the summer of this year, the theatre was burned; and Mr. Kirby, conceiving the burning to have been malicious, presented a petition to the Court of Queen's Bench, in last Trinity Term, praying for compensation, as in the case of malicious burning. The Town Council of Dublin, in the month of October, sitting, under the Dublin Improvement Act, st. 12 & 13 Vic., c. 97, in place of the Grand Jury of the city, investigated the matter by themselves, and finally disallowed Mr. Kirby's application. Mr. Kirby now sought to have that decision reviewed before a jury and this court, or a judge of it. The case ultimately became a discussion upon the proper method of proceeding to obtain compensation for malicious injuries in the city of Dublin, and of investigating cases of that description.

Armstrong Serjt. (with him *Sidney and Hancock*) in support of the application, referred to the statutes, 7 Wm. III., cap. 21; 9 Wm. III., cap. 9; 19 & 20 Geo. III., cap. 37; 4 & 5 Vic., cap. 10; 12 & 13 Vic., c. 97; and contended that the Town Council of Dublin had jurisdiction to investigate these matters by themselves, without the assistance of a judge, and that the proper course was that which had been taken, namely, first to have such an investigation before the town council, and then a re-investigation before this court, or a judge of it, and a jury, in case the decision of the council was unsatisfactory either to the applicant or to any of the rate-payers.

Barry, Q.C., appeared for the town council, submitting to act as the court should direct, and stating that the council had acted in good faith in entertaining these applications as they had done. The following cases were cited—*In Re Millar* (2 Jebb & Symes, 271); *In Re Donohue* (3 Cr. & Dix., 220); *In Re Elliott* (9 Ir. L. Rep., 100).

Nov. 11.—LEFROY, C.J.—In this case, which has been argued before the court, and which we are called upon to decide, it appears to me that it will be more for the convenience of the administration of justice to decide upon the abstract point, as to what, in every similar case, ought to be the course pursued, and not to confine ourselves to what might be the decision in this particular case. Upon the question, what should be done in this particular case, I never entertained the least doubt, and, in the way the Act presented itself to me, I could not agree to the course which had actually been taken. It affords, however, an occasion, of which for the convenience of the administration of justice in like cases we avail ourselves, to state what we consider to be the law with respect to every case of this sort. Upon again looking into the Acts and the language of them, although there are repugnancies upon the face of the Acts, yet I confess that, altogether, it appears to me, that their language affords a clear and explicit direction that cases of this sort should be decided, from the first to the last, with the assistance of the court, or a judge representing the court, and that there is no jurisdiction given to the council to decide these cases by themselves. In the first place, the proceeding originates in a petition to the court, and there is not a word giving to the council a right to decide alone. It is a most remarkable thing, that the right to decide is given to the court, or a judge, and although, by implication, it might be supposed that a right to decide was given to the council by the Act saying that the decision of the council might be traversed by a rate-payer, that would be but an implication, and the Act is capable of another construction. But not to rest too much on that, but to follow up the origin of the proceeding, which is by a petition to the court, the words are then express, that the matter shall be decided not by the council, but by the court or a judge, and upon the examination and hearing of the matter; and how agreeably to any notion of justice, should it be devolved upon the council to decide, when they have not the power to administer an oath, and when no oath is administered to them in reference to the exercise of their jurisdiction, if they have it, upon this matter? Everything, therefore, from the first to the last, satisfies me that an application of this sort can only be disposed of, *ab initio*, by the court, with the council in place of the grand jury, both together forming that compound jurisdiction which is best calculated for deciding a case which, almost of necessity, involves, not merely matter of fact, but also matter of law, as in this case, the question, what constitutes an offence of this sort, namely, a malicious burning or injury. With respect, also, to the amount of compensation, that is a matter which, though the council might be more competent judges of it than the court, affords a strong argument in favour of the decision, that both bodies, the court and the council, must be concurrent in the decision of the case; that is, that they must act together; that the council are to have the assistance of the judge upon any matter of law that may arise, and, in matters of fact, are to assert the jurisdiction which our constitution and law usually ascribe to the jury, which formerly belonged to the grand jury, and is now given to the committee of the council. It appears, therefore, to me, that not merely

this case, but every case, should be, in the first instance, examinable before the court, with the assistance of a body of the council, consisting of at least twenty members. I have stated shortly what occurs to me on the case. I dare say we shall have other views expressed upon the subject by the other judges.

O'BRIEN, J.—The Lord Chief Justice has stated his opinion, and I may add some observations to those which have been made by him. There certainly, at first, appeared to be a great deal of difficulty as to the course of proceeding, from the manner in which the Act of Parliament is framed with regard to this subject; and it seemed to me that its framers either were incapable of understanding the matter for which they were legislating, or else that they took for granted that no case of malicious burning would ever arise in the city of Dublin. I think, however, that the words of the statute, when carefully considered, are sufficiently clear. Until the year 1840, the practice prevailed of dealing with presentments for malicious injuries in the city of Dublin in the same manner as in the other counties in Ireland previous to the passing of the Grand Jury Act. In 1840, however, the question was raised before this court in the case of *In re Millar* (2 Jebb and Symes, 271), and the court there came to the conclusion that the Statute, 19 and 20 G. III., cap. 37, did not apply to the city of Dublin, and disallowed a presentment for compensation for a malicious burning in the city accordingly. In consequence of that the Act 4 Vict., cap. 10, was passed. I need not call attention to the circumstance that the Grand Jury Act of 6 and 7 Wm. IV., cap. 116, introduced a totally new set of provisions for the counties at large, but the Act of 4 Vict. dealt with what had been the law in Ireland previous to the Act of Wm. IV. It recited the former Acts of Wm. III. and Geo. III., and said that from the passing of the Act, the provisions of those statutes should be extended to the city of Dublin, "so far as relates to the malicious burning of houses, barns, haggards, corn, or other articles or effects." Now what was the form of proceeding laid down by those former Acts? The 9 Wm. III. which was altered, but only in some immaterial respects by the 19 & 20 G. III., established the form of procedure to be as follows. "That in all cases where any person is . . . entitled to recover amends or satisfaction for any loss or damage incurred or suffered, . . . such person shall or may pursue his remedy for recovery of such satisfaction or amends at the next assizes to be held in the said county where such offence was committed, before the judge or judges of assize, and grand jury of the said county, to be impanelled and sworn at the said assizes in the method following (that is to say), the person or persons so robbed shall, at the said assizes, exhibit and deliver to the said judge or judges of assizes his, or their, petition, therein praying such satisfaction, and shall set forth in such petition the time and place, when and where such robbery was committed, or other injury done to him or them . . . and the said matter shall thereupon be examined by such judge or judges of assizes in open court, in the presence of such grand jury, on the oath of the party robbed or injured, and such other evidence as can be

produced touching the said facts according to the nature thereof; and the said grand jury shall thereupon and are hereby required, in consideration of the said matter amongst themselves, to make such presentment touching the same, and of such sum or sums of money as the person or persons so robbed or injured by such offender ought to have or receive for such loss, injury, or damage . . . Provided always, that if any person or persons shall find him or themselves aggrieved by any presentment to be made in pursuance of this or the former Act, such person or persons, in case the sum presented to be raised do exceed the sum of five pounds, shall or may at the said assizes traverse the same; which traverse shall be tried at the same or the next ensuing assizes, as the judge or judges, who shall allow the same, shall think fit; and if on such traverse the issue shall be found for the traverser such presentment shall be discharged, and if the issue be found against the traverser, he or they so traversing, shall pay to the person or persons on whose behalf the presentment was made the sum of twenty shillings for the costs of such traverse, and the said presentment shall thereupon be final and conclusive to all parties." Now nothing can be clearer than the course of procedure under that enactment. The petition was presented to the judge, and the matter was considered by the judge and grand jury in open court. The grand jury were to consider what compensation, if any, the party was to receive, and to make their presentment accordingly, and they would do that with the benefit of the presence of the judge, and giving the attention due to such observations as he should make for their guidance. If the grand jury disallowed the presentment, there was clearly no remedy for the party. If they granted it, the rate-payers, who had not been represented at that application were entitled to traverse the presentment. No power was given to traverse the finding if it was against the applicant. I presume the intention was that if he failed to make out a *prima facie* case before the judge and grand jury, he was to be completely barred. Now, I may observe, the Grand Jury Act of Wm. IV. remedied that apparent anomaly, by establishing that whereas before that the applicant had no remedy in the case of the disallowance of his application, a power was now given to him as well as to the rate-payers to traverse the finding of the grand jury. If the application was granted the rate-payers might traverse as before; if it was disallowed, the applicant had the power of having the matter re-investigated. Now the statute 4 Vict., cap. 10, deals with the state of the law as it was before the passing of that Act; and having said that the provisions of the Acts recited shall extend to the county of the city of Dublin, it goes on to provide for the form of the procedure, and the manner in which the burning Acts might be carried out in the city. It says, "that the notices directed by the recited Acts to be given by every person so damaged, or shall have been in the county of the said city, given to the churchwardens of the parish in which such damage shall have been done, or any of them, and to the lord mayor of the said city, or to the secretary of the grand jury." But then it goes on: "Provided always, and be it enacted that all persons who may have suffered, or shall suffer,

any loss or damage from such malicious burning as in the said Acts, or any of them, and hereinafter mentioned, at any time since the first day of January, 1841, or after the passing of this Act, shall be entitled to receive satisfaction and amends for such injuries within the county of the city of Dublin, by exhibiting at the next presenting term, in the Court of Queen's Bench, after the offence committed, or, after the passing of this Act, exhibit such petition for satisfaction as is under the said Act, and the Acts therein mentioned required to be exhibited to the judge or judges of assizes; and in examining, directing, and acting on such petition, the Court of Queen's Bench shall have and exercise the same authority as under the said Acts is given to the judge or judges of assize; and upon any such petition, such examination shall be made, and such presentment shall also be made, by the grand jury of the said county of the city of Dublin, and in such manner as by the said Acts, or any of them, was required to be made upon any petition to be thereunder presented at any assizes; and a traverse of any such presentment may be made, and such traverse may be tried at the same, or the next ensuing presenting term, in like manner as any traverse might be made under the said Acts, or any of them, at the assizes at which any such presentment might be had thereunder, or as such traverse might be tried at the same, or the next ensuing assizes, provided always, that any sum of money so presented for damages (in case the presentment be not discharged upon such traverse as aforesaid) shall be levied and raised off the said county of the city of Dublin, as the amount of any other presentment for the said county of the city of Dublin is or may be now levied." Well, now, it is perfectly clear what the course of proceeding was. The court was substituted for the judge at the assizes, but with that exception, and the exception of the Act pointing out that the petition was to be exhibited at the next presenting term after the offence, the form of procedure is similar to that at the assizes, and I should say that in cases under this Act, as in cases under the former ones recited in it, if the applicant's claim was rejected, he was without remedy; on the contrary, if the jury granted the application, the ratepayers had the power of traversing. Now, that being the state of the law when the Dublin Improvement Act passed, let us see what is the law as it exists under that Act. Mr. Serjeant Armstrong as I understand his argument, says, that if the applications for compensation are not within the provisions of the 43rd and 44th sections of the Improvement Act, neither are they within the 40th and 41st sections; and inasmuch as by section 40 the functions of the grand jury were determined, the result would be that there are no means at all of getting compensation. I think there is no foundation for that argument. The 40th section, it is true, abolishes all the functions of the grand jury with respect to fiscal matters, but the 41st section says, "And be it enacted that from the time aforesaid, all the powers theretofore exercised by or vested in relation to the presenting and levying of rates or cesses for local purposes within the borough of Dublin, in the said grand jury and the said sessions grand jury, shall be transferred to, and solely exercised by,

the council of the said borough, and all things by any Act theretofore in force, authorized or required to be done by the said grand jury of the county of the city aforesaid, and by the said sessions grand jury, in relation to the said fiscal matters, rates, or cesses, shall, save where altered by this Act, be done by the said council." Now, it is impossible to conceive words more general than those. Every power which the grand jury had in relation to presentments and fiscal matters was transferred to the town council; every act and thing required by any Act in force to be done by the grand jury, was required to be done by the town council. It is, therefore, impossible to contend that the powers exercised in burning petitions were not, by the 41st section, transferred to the council. Now, what were those powers? Was it that the grand jury should investigate these matters alone, and without the assistance of a judge? No; the grand jury had no power of dealing with the petitions except as pointed out by the old statutes, namely, of having them investigated before them with the judge in court, and then considering them by themselves. That power, and that alone, was transferred to the council. Now, let us see whether the 42nd, 43rd, and 44th sections, contain anything else—whether those sections contain any expressions which might be construed to give to the town council the power for which Sergeant Armstrong contends. The 42nd section enacts that the town council shall appoint a time once every year, to receive applications for all things authorized to be done by the grand jury in relation to fiscal matters, and that such applications shall be made in form as "the same are now authorized to be made in cases of applications for presentments; and immediately after the day so fixed for receiving such applications, the council shall proceed to investigate such applications, and decide upon them, at an open meeting of the said council, or of a committee thereof, authorized in that behalf;" and then the 43rd and 44th sections contain provisions for scheduling the applications, and fixing and traversing the presentments made. But was the authority given by the 42nd section to receive applications, an authority to receive applications for a matter that, by the former law, could only be applied for by petition to the Court of Queen's Bench? The 41st section substitutes the town council for the grand jury, but it would be straining the Act to hold that the 42nd section gave the council a power which the grand jury had not, of entertaining an application, which should be made by petition to the Court of Queen's Bench. That, in my opinion, leaves the matter precisely as it was before, except as to the tribunal, the town council being substituted for the grand jury, and I do not see any hardship that will arise from holding that such is the state of the law. It is true that, according to this decision, the applicant could not, in my opinion, sustain an application in the nature of a traverse in case the town council before a judge should refuse his original application, but it must be recollected that that was a state of things which, for reasons best known to themselves, the Legislature allowed to exist all over Ireland until the statute 6 & 7 Wm. 4, c. 116. That statute amended the law with respect to counties at large. It may be considered that the law as to

the city of Dublin is in an anomalous position, and that it also ought to be amended, and I would suggest that it may be well that the council should consider whether a communication ought not to be made with the law officers of the Crown, with the view of having a short enactment passed to put an end to the anomaly which exists between the city of Dublin and the other counties in Ireland. The law is anomalous, but we cannot help that, and I, therefore, am of opinion that the council has no authority to entertain these applications without the assistance of the court or of a judge.

HAYES, J.—It would appear from the notice of motion which was served in this case, and which I hold, that the court was moved in this case to direct, that a jury should be summoned for the investigation of the matters in question. Now that motion was made by Serjeant Armstrong on behalf of the petitioners, but it was very early met by a question from the court whether Serjeant Armstrong could produce any precedent of this court directing a jury to be summoned, the statute from which alone the court has any jurisdiction in the matter being silent upon the subject. Serjeant Armstrong candidly replied that he could not produce any such precedent; and I think he also candidly admitted that in the absence of such a case it would be impossible for the court to transfer the authority in the matter from one tribunal to another, which would be the case if a jury were summoned. Passing by that matter as clearly settled we come to the important subject which was broached under the general words of the notice, "or for such other order as the court should be pleased to make." And as the court has been appealed to as to the proper course of practice to be pursued in these petitions we come to consider that subject. We have given the matter our best consideration in order to arrive at the true construction of the two statutes,—I mean that of the 9 Wm. III., and the 12 & 13 Vict. My brother O'Brien has gone fully into the statute of the 9 Wm. III., and I think that from the perusal of that statute we may gather two or three things. First, that the Legislature has always intended that the consideration of burning petitions was to be treated differently from other matters, such as the repairs of roads and such like subjects; and accordingly that a special tribunal should be constituted, partly for matters of law and partly for matters of fact. The judge and the grand jury are to meet for the consideration of the question,—I may say now town council instead of grand jury. The judge was to deal with matters of law, for the Legislature seems to have thought that important and difficult questions might arise dangerous to entrust to the grand jury unassisted. Questions might arise, for instance, as to malice, as to the competency of witnesses, as to what was legal evidence and what not, and therefore the Legislature established this mixed tribunal. Things are in that condition when the statute 12 & 13 Vict. is passed. See now the course of legislation adopted in that Act. The authority of the grand jury is nullified in fiscal matters by the 40th section. The 41st section then proceeds to confer upon the town council of the city of Dublin all the authorities that had been previously wielded by the grand jury. If I stop here what

authority has the council to entertain these burning petitions by itself? The authority which they assume, or have assumed, namely, that they were to proceed as in the case of road petitions? or is it that they are to attend before the Court of Queen's Bench to hear these matters investigated in the presence of a judge and of themselves, and afterwards, upon consideration of the matters, to deal with the presentment as they should think right? That, and that alone, is the authority given to them by the Act; and therefore it appears to me that it was an over hasty reading on the part of the council when they thought they had authority to deal alone with this case. Another consideration has fortified me in this conclusion. When the 9 Wm. III. was passed it speaks of a petition to the judge of assize; and in the case of the city of Dublin the petition under the statute 4 Vict. is to be presented to this court. What machinery is provided by the statute 12 & 13 Vict. for bringing the petition which is still presented in the court over to the City Hall? None whatsoever. It is lodged here with the clerk of the crown, and there is no legislative authority for our transferring it to the town council. It would appear that in some cases there were applications to that effect, and that the court may have made an order directing the clerk of the crown to attend the council with these petitions. If we are right in our conclusions to-day, probably that is the last order which ought ever to have been made. The court will itself keep the petition, and will entertain and decide the matter of it. Between the two views therefore, which I will not say have been pressed—for there was a strange unanimity between the counsel on both sides in the view that the town council have authority to deal with these petitions by themselves in the first instance,—between these views it appears to us that sound law calls on us to decide that the town council have no original authority to entertain by themselves these petitions, but are in the first instance to appear before the judge and entertain or reject them as they think proper. If the application should be rejected, there, it would appear, would be an end of the matter. If it is entertained, as it is a one-sided application before them, there is a remedy provided by the 43rd section, which in general terms declares that it shall be lawful for any ratepayer to traverse any presentment made by the council. Thus it appears to me that the party is not left without remedy, and that he may now have a full discussion of the subject before the town council under the guidance of a judge.

FITZGERALD, J.—My opinion may be expressed in a single sentence,—that the Dublin Improvement Act has no further effect upon the procedure in burning petitions than to substitute the town council for the grand jury. In all other respects the procedure remains the same; that is, the matter of the petition is to be investigated before the judge and, not the grand jury, but the town council. It is necessary to come to that conclusion, for otherwise on looking to the 12 & 13 Vict. we shall find that a number of cases would be outside the law; that is, if the law was that there was to be a preliminary investigation before the council sitting by itself, as has been done in this case. Under the 4th Vict. c. 10, the petition must be pre-

sented and disposed of by the Court of Queen's Bench at the next presentment term, and if not then the jurisdiction of the court is barred. If what Serjeant Armstrong contends for is right, that there should be a preliminary investigation by the council, there would be a class of cases unprovided for. The council sits but once a year, some time in October. If any case arose after the council sat, the preliminary investigation could not take place; and yet, as Michaelmas is the presenting term in this court, the petition should be presented and disposed of in that term; so there is a class of cases which, if a preliminary investigation was necessary, could not be disposed of. I merely wish by this to illustrate the case. I concur in the judgment of the court, and I agree with the observations which have fallen from my brother O'Brien that this is a case in which an alteration of the law is necessary. I think the council ought to have the power to have a preliminary investigation, and also, as road sessions have, to administer an oath to witnesses, and that they should perform their own duties under the sanction of an oath.

In accordance with this decision the matter was on a subsequent day investigated before the town council and Fitzgerald, J., when the application for compensation was rejected.

FAYLE V. THE KINGSTOWN WATERWORKS COMPANY. Nov. 5—6.

Substitution of service—Dissolved Company—The Kingstown Waterworks Act, 1861—The Dublin Corporation Waterworks Act, 1861.

The Court will not direct a substitution of service of a writ of summons and plaint issued against a dissolved company, upon the secretary of that dissolved company.

THIS was a motion to make absolute a conditional order obtained by the plaintiff on the 11th June last. The action was one brought by the plaintiff against the Kingstown Waterworks Company. The first paragraph of the summons and plaint averred, that before the application to Parliament for the purpose of obtaining the Act under which the defendants were established and incorporated as a company, the plaintiff executed a certain indenture, dated the 5th December, 1858, being the subscribers' agreement or subscription contract, executed in respect of the said undertaking, whereby the plaintiff, amongst others, covenanted and agreed with William Bell and Robert Raymond, their executors and administrators, that he did thereby subscribe the sum set opposite to his name in the schedule thereto, for the purpose of establishing and incorporating a company to be called the Kingstown Waterworks Company, and for the purpose of enabling such company to make and maintain waterworks with all proper works and conveniences connected therewith, for the purpose of supplying with water the towns of Kingstown, Monkstown, Dalkey, Bullock, and Glashule, and also for the purpose of applying to Parliament for, and endeavour-

ing to obtain an Act for establishing and incorporating such company; and the plaintiff amongst others, did thereby covenant with the said William Bell and Robert Raymond, their executors and administrators, that he, his executors and administrators should, and would, pay, or cause to be paid, the full amount subscribed by him, or such part thereof as should not have been paid at the time of his execution of the said indenture, in such sums, and at such place or places, and at such time or times, as should be required or appointed by the provisional committee until the passing of the said Act; and after the passing thereof, as should be required or directed by the said Act, or as the directors or others authorised by the said Act, should lawfully direct or appoint, and the plaintiff said that it was by the said indenture declared and agreed upon, that the said William Bell and Robert Raymond, their executors or administrators, should be trustees of the covenants before stated, for the purposes and in furtherance of the said undertaking, and the plaintiff said he did sign his name and affix his seal to the said indenture on the 22nd of December, 1858; and the amount of subscription so set opposite his name, and which he so became liable to pay as aforesaid, was £150; and that an application was made to Parliament for the purpose of establishing and incorporating the said company, in support of which said application the said indenture or subscription contract so signed by the plaintiff, as aforesaid, was deposited in the private Bill Office, and the plaintiff said that afterwards, in pursuance of such application, in the 22nd Vict., an Act was passed having the short title of "The Kingstown Waterworks Act, 1859," by the 5th section whereof it was enacted, that the persons therein named, and all other persons and corporations who had already subscribed, or should thereafter subscribe to the said undertaking thereby authorised, their executors, administrators, successors, and assigns respectively, should be, and they were thereby, united and incorporated into a company by, and under the name of The Kingstown Waterworks Company for the purpose of supplying with water the inhabitants of the towns of Kingstown, Monkstown, Dalkey, Bullock, Glashule, and the neighbourhood thereof, in the county of Dublin; and it was thereby further enacted, that the capital of company should be £32,000, divided into 6,400 shares of £5 each, and the plaintiff said that the provisions of the Companies' Clauses' Consolidation Act, 1845, the Lands Clauses' Consolidation Act, 1845, and the Waterworks Clauses' Act, were incorporated with the before mentioned Kingstown Waterworks Act, 1859, under which said last mentioned act, the defendants were incorporated, and that said undertaking was proceeded with, but no expenditure of moneys was made in the laying down of pipes or purchase of lands; and the plaintiff said that he, previous to the passing of the said last mentioned Act, had subscribed, in manner aforesaid, to the extent of thirty shares to the undertaking by the said last mentioned Act authorised, and all things having happened or been done, and all times having elapsed which were necessary to entitle him to call upon the defendants to enter the name and addition of him the plaintiff in the register of shareholders, as

a shareholder, in respect of the said thirty shares, he, the said plaintiff, after the passing of the said Kingstown Waterworks Act, 1859, and before the commencement of this action, to wit, on the 31st of January, 1860, did request of the defendants to cause the name and addition of him the plaintiff to be so entered on the register of shareholders as the person entitled to the said shares, together with the said number of shares to which he was so entitled; yet the said defendants, well knowing the premises, and intending to injure the plaintiff in that behalf, in utter disregard of the statutes, and of their duty in that behalf, had hitherto wholly neglected and refused, and still did so neglect and refuse to cause to be entered in the said register of shareholders, the name and addition of the plaintiff, as the person entitled to said shares, or any of them, pursuant to the said section of said last mentioned statute, whereby the plaintiff had been prevented from realizing, and converting into money, and obtaining the proceeds thereof, to and for his own benefit; and the plaintiff was personally interested in the fulfilment by the defendants of the duty aforesaid, and in having his name and addition so entered as aforesaid, and sustained, and might sustain, damage by the non-fulfilment by the defendants of their said duty to so enter his name and addition as aforesaid, and fulfilment of the said duty by the defendants had been demanded by the plaintiff, and all conditions had been fulfilled, and all things had happened, and times elapsed necessary to entitle the plaintiff to the performance of said duty and to claim a writ of mandamus in that behalf. The second and third paragraphs varied the same facts; the third paragraph claimed £200 damages, and the summons and plaint ended by praying judgment for the £200, and as a separate prayer in respect of each of the paragraphs the plaintiff claimed a writ of mandamus commanding the defendants to enter the name and addition of the plaintiff in the register of the shareholders of said company as a shareholder, in respect of the said shares respectively. On the 11th June last, the plaintiff obtained a conditional order to substitute service of the writ upon "R. D. Kane, who was the attorney, and also a director of the said company," and on "Thomas H. Kane, who was appointed secretary to the said company." He now applied to have that order made absolute. From the affidavits made, as well for the purposes of the first as for those of the present motion, it appeared that the plaintiff had signed the subscription contract as stated in the summons and plaint, but that when doing so he had obtained from Mr. R. D. Kane a written indemnity to protect him from liability, and that in fact he had not paid any money towards the undertaking; that the Kingstown Waterworks Company had obtained their Act in April, 1859; that in the session of 1861 it became necessary to make another application to Parliament for an increase of the company's powers, and that during the progress of said bill through Parliament, an agreement was entered into between the corporation for supplying the city of Dublin with water, and the Kingstown Waterworks Company for the purchase of the undertaking of the latter company, and that a clause was introduced into the Kingstown Waterworks Company's Act, 1861, as well as into that of

the Corporation of Dublin, enabling them to carry out that agreement, if it should be approved of by the proprietors of the company; that a meeting was duly called and the agreement approved of; that on the 20th January, 1862, a conveyance of the undertaking of the Kingstown Waterworks Company was duly executed under their common seal to the corporation of the city of Dublin, pursuant to the provisions of section 20 of the Kingstown Waterworks Act, 1861, and the 74th section of the Dublin Corporation Waterworks Act, 1861, whereupon the Kingstown Waterworks Company became dissolved and ceased to exist, pursuant to the 21st section of the Kingstown Waterworks Act, 1861. That deed was duly registered. The purchase money for this sale of the undertaking of the Kingstown Waterworks Company amounted to £5,850.*

* The following are the sections of the Kingstown Waterworks Act, 1861 (St. 24 and 25 Vict. cap. cv.), which were referred to in the course of the argument. The Act received the royal assent on the 28th June, 1861.

Section 20.—The company may, if they think fit, with the consent of three-fifths of the votes of the proprietors thereof present, in person or by proxy, at any general meeting specially convened for the purpose, sell to the Corporation of the city of Dublin, and the said corporation may purchase and acquire at such price and on such terms and conditions as shall be mutually agreed upon between the company and the said corporation, all the undertaking, rights, powers, easements, lands, hereditaments, pipes, mains, reservoirs, and all the property, of whatever kind, and all the powers and authorities vested in the company under, and by virtue of, the recited act and this act; and such sale or transfer shall be upon a deed or instrument duly stamped, and be under the respective common seals of the company and of the said corporation.

Section 21.—Upon the due execution and delivery of such deed or instrument as aforesaid, all the powers, rights, privileges, property, and liabilities of whatever kind, held, enjoyed, or possessed by the company, or to which the company may be subject, shall thereupon be vested in, and transferred to the said corporation, as fully and effectually, to all intents and purposes, as if the said corporation had been named in the recited act and this act instead of the company, and thereupon the company shall be dissolved and cease to exist.

Section 22.—The receipt, in writing, of three of the directors, for the time being, of the company, for the purchase money agreed to be paid for the company's property, effects, rights, and authorities shall be an effectual discharge to the said corporation for the sum in any such receipt expressed or acknowledged to be received; and the said corporation shall not be obliged or concerned to see to the distribution of such purchase money, or of any money which may be paid by them to the said directors of the company among the proprietors or shareholders of the company or be otherwise answerable or accountable for any loss or misapplication, or non-application thereof, or any part thereof.

Section 23.—The directors of the company for the time being shall stand possessed of the moneys to arise from the sale of their undertaking upon trust, after paying and discharging all debts, engagements, and pecuniary and other liabilities for which the company shall be liable, to divide the residue of such moneys between or among the several persons who at the time of the payment thereof shall be proprietors of shares in the capital of the company, their executors, administrators, or assigns.

The following sections of the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii) were referred to. The act received the royal assent on the 22nd of July, 1861.

Section 74.—It shall be lawful for the corporation, if

Heron, Q.C. (with him *P. Martin*), for the plaintiff.—The service which we seek to have deemed good would be sufficient in the case of a company carrying on business. In *Gashell v. Chambers*, (26 Beav. 252), service of the bill upon the late chairman and the secretary of a company which had practically ceased to exist, was deemed good service on the company. He also cited *Nixon v. Brownlow* (2 Hurl. and Norm. 455); *The Thames Tunnel Company v. Sheldon* (6 B. and Cr. 841); *The Gds. of Woodbridge Union v. The Gds. of Colneis* (13 Q. B. 269). [*Fitzgerald, J.*—If this is an existing company you require no order to substitute service, for you can serve the secretary under the Common Law Procedure Act. If it is a non-existing company you require some authority to show that we can make an order in such a case.]

Whiteside, Q.C. (with him *Ferguson, Q.C.* and *Shekleton*), for the Messrs. Kane, against making the conditional order absolute.—The Kingstown Com-

pany, by the terms of the statute, stands dissolved by the execution of the conveyance to the Dublin Corporation. The case cited from Beavan does not apply, for there the company was not dissolved. Grant on Corporations, p. 1303 states the mode of dissolution of corporations and the effect of that dissolution.

they think fit, to acquire and purchase the undertaking of the Kingstown Waterworks Company, incorporated under the provisions of "The Kingstown Waterworks Act, 1859," and for that company, if it think fit, to sell and convey to the corporation, at such price and on such terms and conditions as shall be mutually agreed upon by the said company and the corporation, all the undertaking, rights, powers, easements, lands, hereditaments, pipes, mains, reservoirs, and all the property of whatsoever kind, and all the powers and authorities vested in, or which may be vested by any act of the present session of parliament in the Kingstown Waterworks Company; and such sale or transfer shall be upon a deed or instrument duly stamped, and be under the respective common seals of the said company and of the corporation; provided always that the corporation shall not, without the previous consent of the said company, supply water within the limits of the said "Kingstown Waterworks Act, 1859."

Section 75.—Upon the due execution of such deed or instrument as aforesaid, subject to the provisions of this act, all the powers, rights, privileges, and property of whatever kind, held, enjoyed, or possessed by the Kingstown Waterworks Company shall be vested in the said corporation as fully and effectually to all intents and purposes as if the said corporation had been named in the Kingstown Waterworks Company's Act, and Acts, instead of the said Kingstown Waterworks Company.

Section 76.—The receipt, in writing, of three of the directors, for the time being, of the Kingstown Waterworks Company for the purchase money agreed to be paid for the purchase of the Kingstown Waterworks Company's property, effects, rights, and authorities, shall be an effectual discharge to the corporation for the sum which in any such receipt shall be expressed or acknowledged to be received; and subject, as aforesaid, the corporation shall not be obliged, or concerned, to see to the distribution of such purchase money, or of any money which may be paid by them to the directors of the said Kingstown Waterworks Company, or among the proprietors or shareholders of the said company, or be otherwise answerable or accountable for any loss or misapplication, or non-application thereof, or any part thereof.

Section 77.—The directors of the said Kingstown Waterworks Company, for the time being, shall stand possessed of the moneys to arise from the sale of their undertaking upon trust, after paying and discharging all debts, engagements, and pecuniary, and other liabilities for which the company shall be liable, to divide the residue of such moneys between or among the several persons who, at the time of the payment thereof shall be proprietors of shares in the capital of the company, their executors, administrators, or assigns.

P. Martin in reply.—The purchase of the undertaking by the Dublin Corporation was made under the Dublin Corporation Waterworks Act which says nothing about any transfer of the liabilities of the company to the corporation. Accordingly, the liabilities of the company did not pass, and it must be held to be in existence for the purpose of meeting the liabilities of creditors, and the plaintiff is a creditor in respect of the damages which he claims. The legislature had it not in its contemplation that the rights of creditors should be interfered with. To refuse this motion will virtually be to declare that the liabilities of the company are cast upon the corporation.

LEPROY, C. J.—We are all of opinion against making this order absolute. We may, perhaps, have arrived at that opinion for different reasons; but I should say for myself that the application appears to me to be the most anomalous one that I could imagine. In the learned and able argument of the counsel whom we have last heard, it was attempted to prove that this company is still a subsisting one. Well, if it be so, there is a legislative provision to enable the plaintiff to proceed against it as a subsisting company. It is not pretended that the motion in that case can be sustained on the ground that there is not a secretary; on the contrary, the plaintiff has discovered who the secretary is, and he desires to substitute service upon him as for a dissolved company, arguing further, that he can set the company up as an existing one for the purposes of the suit, after the substitution of service has been had as if the company was dissolved. It appears, therefore, to me a most anomalous proceeding to make an order on the ground of the company being a dissolved one, in order to set it up as a subsisting company, so as to enable the plaintiff to sue it as subsisting. I, therefore, cannot think that the order ought to be made. There are other grounds against making an experimental order of this kind. Here is a person coming before us, who merely went through the form of having his name inserted as a shareholder, getting an indemnity at the same time to secure him against ever being called upon to advance any money, or to contribute in any way to the company, and this person, if he is a *bonâ fide* member, is bound by the act of the company; if he is not, are we to make this experimental order in his favour? I cannot understand the case at all in any view that we may take of it.

O'BRIEN, J.—In my opinion also, the application ought to be refused. We are told that we need not now decide the point whether this company is still a subsisting one, but that if we grant the application, the point may be raised and decided afterwards. I confess I think there would be considerable difficulty in that. If we made the order now, on the supposition that the company was an existing one, it would be very difficult for us to treat the same company hereafter as not existing. With respect to the other question, it appears to me to be difficult for Mr.

Martin's client to contend that he is not affected by the provisions of the Act of 1861, which declares, that upon certain conditions being performed, the company shall stand dissolved. Everything required to be done by the statute has been done, and it is declared that on the execution of those acts, the company shall be dissolved. Without going into the general principle, that strangers are not bound by an act to which they are not parties, I would ask, can it be said that Mr. Martin's client stands here in the position of a stranger to the transaction? Why, the mandamus which he asks for, and the damages which he seeks, are asked for, and sought by him in the character of a shareholder in this company. I refer to this, but it is sufficient to say that everything required by the Act has been done. The deed not only recites the Act, but purports to be made in pursuance of that Act and of the other Act, and to those who are bound by the Act it is not open to say that the company is not dissolved. I have the less regret in coming to the conclusion at which I have arrived, because if the plaintiff has the right which he claims, he has a clear remedy against the individual directors in the Court of Chancery.

HAYES, J.—This is a motion to make absolute a conditional order, obtained on the 11th June last. (His lordship read the conditional order.) Now this is an application which rests a good deal upon the construction of the Common Law Procedure Act rather than upon the considerations which have been chiefly presented to us on the two Acts of 1861. The 33rd section of the Common Law Procedure Act of 1853 says, that service of any writ of summons and plaint, issued against a corporation aggregate, may be effected by delivery of a copy of the writ to the secretary of the corporation. That, of course, presumes that there is a living secretary, and a living and existing corporation. Then the 34th section provides for a substitution of the service under particular circumstances. It would appear that it was under this latter section that the plaintiff in the present case came here. In considering this question, the plaintiff ought to be able to tell the court distinctly, whether he says that for his purposes, this corporation is to be treated as an existing or as a defunct corporation. I have yet to learn which he says it is. But, to save him the trouble of answering the question, let us take it in both ways. Assuming it to be an existing corporation for his purposes, then the short answer to his application is the 33rd section of the Common Law Procedure Act. Serve the gentleman who, it is represented here, "was appointed secretary," and then you will have served the company. It will be a good service if the company is existing; but if the company is not existing, it would appear to me to be out of the scope of the statute altogether, for I think the statute speaks only of existing corporations. A good deal was said about the unreasonableness of the thing. It does not, I confess, when I look at these Acts, appear to me to be such a frightful thing. The Kingstown Waterworks Company's Act enables the company to sell everything to the Dublin Corporation, and to transfer to it all its liabilities, and on that being done, it provides that the company shall be dissolved. Then the corporation gets an Act passed, under which it is not to take the liabilities, but is to buy

up the concerns of the company and have the money invested to answer the liabilities, and then, also, when the deed is executed the company is to be dissolved. If the company is dissolved to all intents, let the parties who may have claims go against the fund which is invested; if it is existing, let the plaintiff treat it as an existing company, and serve it in the manner pointed out by the 33rd section of the Common Law Procedure Act. If it is not existing, I say the case is beyond the scope of the Act.

FITZGERALD, J.—I concur in the judgment of the court. The plaintiff in this case is suing for a mandamus—for I look upon it that the damages are of little consequence, and the suit is mainly for a mandamus—to compel this company, as an existing company, to register him as a shareholder. The difficulty which I have felt, arises upon the 21st section of the Kingstown Waterworks Act. It appears to me that the point which has been so much argued, namely, whether the liabilities of the company were not transferred to the corporation, is entirely beside the case. I should, indeed, be very slow to hold that, whether by a statutable contract, the corporation became subject to the liabilities of the company, as between themselves and the company or not, this statutable contract would affect the rights of third parties. I should be slow to hold that, if the effect of the contract was to make the corporation liable, that could affect the rights of a third party, for his right is to go against the property of the company, and if that is not sufficient, then against the shareholders themselves; he has a right to have calls made, if necessary, to have his demand satisfied; but it becomes a different question if the party is one who now says he is himself a member of the company. I find that the present plaintiff, being one of those who had signed the subscription contract, became a member of the company, and if his rights are affected by his not having his name upon the register, he, and he alone, is to blame; but for the purposes of contract, of being bound by the contracts of this company, he was in April 1859, a member of the company, and we must take him to have been also one when the Act of 1861 was passed, providing that the company should cease to exist; that is, as between the members of the company whose rights are transferred to a fund. Whether for the purpose of obtaining a distribution of the fund this gentleman was a shareholder, I offer no opinion. The ground on which I concur with the other members of the court is, that by a parliamentary contract, to which he was a party, the company ceased to exist, and he comes now to compel the same company to do a corporate act, to place him on the register, and authenticate that by their seal, when, by an act to which he was a party, the company had ceased to exist. I think we ought not to interfere in the exercise of a judicial discretion, to compel the company to appear in its corporate capacity. I concur with my brother O'Brien, that if we made this order now on the company to appear, it would be impossible afterwards in raising the question of law, whether it had ceased to exist, to avoid being influenced by our present decision. One observation made by me during the argument I wish to correct. I called attention to the 33rd section of the Common Law Procedure Act,

and it might have been inferred from what I said that I considered that there could be no case for a substitution of service wherever there was an existing company. However, cases might arise of a corporation existing in this country, contracting here, having officers here, but not having any secretary here. In such cases I think the court might make an order substituting service and compelling the company to appear.

Motion refused with costs.

Court of Exchequer.

[Reported by H. J. Wrixon, Esq., Barrister-at-Law.]

REG. AT THE SUIT OF ALEXANDER MARTIN SULLIVAN, v. WILLIAM WATSON AND DANIEL ROGAN BRANNIGAN.—Nov. 3.

Newspaper recognizances—Notice to the Crown.

Before newspaper recognizances are put in suit, under 1 Wm. 4, c. 73, the court requires notice to be served on the Attorney-General, as the Crown would be liable for costs if the proceedings failed.

Waters for the plaintiff, in the case of *Sullivan v. Holland*, applied for an order to put in suit the recognizances entered into by Mr. Holland, as publisher of the *Irishman* newspaper, and Messrs. Watson and Brannigan as his securities, under 1 Wm. 4, cap. 73. In *Sullivan v. Holland* a verdict had been returned against the defendant for 6d. damages, and the taxed costs had been certified to amount to £137 13s. 8d. A writ of *fi. fa.* had been issued against Mr. Holland in August last, to which the sheriff had returned *nulla bona*—it was, therefore, necessary to resort to the recognizances.

PER CURIAM.—The Crown would be liable for costs if these proceedings failed. We will give you a conditional order, which must be served on the Attorney-General and the defendants.

MILLS v. IRISH NORTH WESTERN RAILWAY COMPANY.
November 19.

Liability of railway company for accident—Contributory negligence—Tuff v. Warman.

In an action against a railway company for injuries resulting to a passenger from alleged negligence, with a defence of contributory negligence, the proper issue to be sent to the jury is, "Whether the defendants, by the exercise of ordinary care, might have avoided the consequence of the plaintiff's neglect."

ACTION for so carelessly carrying plaintiff, that "he fell, and was thrown from defendants' conveyance," and suffered damage, &c. Defence—"That the defendants did use all due care and diligence, and that they did not provide for plaintiff's carriage an ill-constructed or improper conveyance, as alleged;" and for a second defence, "that the plaintiff himself so far con-

tributed to the misfortune complained of in the plaint by his own negligence, and want of ordinary and common care and caution, and that but for such negligence, and want of ordinary and common care and caution on his part, the said misfortune complained of would not have happened." The issues, as tendered by the plaintiff, were—first, whether the defendants did use all due care and diligence to carry the plaintiff, as in the first defence alleged, and whether they provided for his carriage an ill-constructed or improper conveyance; second, whether the plaintiff so contributed to the misfortune complained of, by his, the plaintiff's, own negligence, and want of ordinary and common care and caution, that but for such negligence, and want of ordinary and common care and caution on his part, the said misfortune complained of would not have happened, and whether the defendants, by the exercise of ordinary care, might have avoided the consequence of the plaintiff's said neglect. The issues returned by the defendants were—first, whether the defendants did use all due care and diligence to carry the plaintiff, whether they negligently or carelessly carried the plaintiff, and whether they provided for his carriage an ill-constructed or improper conveyance, as in the first defence alleged; second, whether the plaintiff so far contributed to the misfortune complained of, by his, the plaintiff's own negligence, and want of ordinary and common care and caution, that but for such negligence, and want of ordinary and common care and caution on his part, the said misfortune complained of would not have happened.

F. Falkiner for the plaintiff, on the summons to settle the issues, contended on the authority of *Scott v. The Dublin and Wicklow Railway Company* (11 Ir. C. L.), that the issue, as settled by the plaintiff, "whether the defendants, by the exercise of ordinary care, might have avoided the consequence of the plaintiff's said neglect" was necessary. In *Scott v. The Dublin and Wicklow Railway Company*, it was ruled, following *Tuff v. Warman* (5 C. B., N.S., 573), and *Waite v. North Eastern Railway Company* (1 Ell. & Bl. & Ell., 719), that though the plaintiff has contributed to the accident by want of ordinary care, he is not disentitled to recover if the defendant might, by ordinary care, have avoided the consequence of the plaintiff's neglect. If this were not so, a person on the wrong side of the road, if negligently driven into by a person on the right side, would have no remedy. So with a steamer, which omits to exhibit proper lights, and is run into negligently by another vessel. If the simple issue, whether the plaintiff so far contributed to the misfortune complained of by his own negligence, that but for such negligence the misfortune would not have happened, were sufficient, it would be impossible to meet any case of misconduct in a person causing an accident where the injured party had been guilty of negligence.

Walter Boyd appeared for the defendants.

PER CURIAM.—We must follow the rule settled in *Tuff v. Warman* and *Scott v. Dublin and Wicklow Railway Company*, and by that rule the issue tendered by the plaintiff should be sent to the jury.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

IN THE GOODS OF JOHN ARMSTRONG, DECEASED. —
November 8.

Administration—Advertisements—Presumption of Death.

The court will not dispense with the usual advertisements required in cases of applications for administration in cases of death on presumption, though more than seven years have elapsed since the deceased was last heard of.

W. Smith, on behalf of Mrs. Armstrong, the mother and next of kin of the alleged deceased, applied for letters of administration of the goods of the deceased, as of a person dying intestate, to be granted to her. He had an affidavit from her, stating that her son, in May, 1852, went to Australia, and that she received some letters from him there, the last being in November, 1853, since which time he had not been heard of. A sum of £283 stock was now in the bank, residue of a larger sum which she had transferred to him, and he must have drawn the rest before his departure; but no dividends had since been drawn, and the bank had given notice that, if not applied for before October next, it would be transferred to the Commissioners for the Reduction of the National Debt. No advertisements have been inserted in any papers. The next of kin were, besides the mother, brothers and sisters; one brother is in Australia. Counsel submitted that advertisements were not necessary, as if there was an ejectment, and proof that the deceased was not heard of for more than seven years, it would be sufficient to prove his death by presumption.

KEATINGE, J.—That would be so in an ejectment, as the opposite party would have the opportunity of giving evidence affirmatively that he was heard of within seven years; but that cannot be done here, and I do not think that I should dispense with the usual advertisements—more especially as the money is quite safe.

No rule.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., and H. Fawcett, Esq.,
Barrister-at-Law.]

[BEFORE JUDGE LONGFIELD.]

THE ESTATE OF NELSON TRAFALGAR FOLEY AND
OTHERS, OWNERS AND PETITIONERS.

Practice—Partitions.

Where the lands forming the subject of the proposed partition are held by different tenures, or under several leases, each estate must be partitioned separately. The court will not sanction a partition which gives the freehold lands to one owner, and the leasehold lands to another. Each owner must receive a portion of each estate. And in the partition of leaseholds, the court will not allow one lease to be given to one owner, and another lease to the

other owner, but each lease must be partitioned separately. Nor will the court allow the entire rent reserved by a lease to be thrown on one owner. Those rules apply equally to a partition by consent of the parties, under the 81st section of the act, where there is no sale by the court, and to a partition under the 80th section, where the petition prays for a partition and sale.

In this case a petition was presented for a partition, under the provisions of the 81st section of the act, of certain premises, of which one part was held in fee, another part under a freehold lease, and the remainder under a lease for a term of years. This being a petition under the 81st section, the parties had agreed upon the partition and allotted the several shares amongst them, and the petition simply prayed that a partition might be made upon the terms proposed by the petition. To the first owner were allotted a portion of the fee-simple property, producing the annual rent of £92 6s. 2d., a portion of the leasehold, rental £184 16s. 0d., and the entire of the freehold lease, rental £17 18s. 2d.—total, £295 0s. 4d. To the second owner were allotted a portion of the fee-simple lands, rental £211 7s. 8d., and a portion of the leasehold, rental £79—total, £290 7s. 8d. And to the third party were allotted the remainder of the fee-simple property, rental £184 19s. 4d., and the residue of the leasehold lands, rental £111—total, £295 19s. 4d. And this third share was made to bear the entire of the head rent payable in respect of the leasehold premises.

On this petition Judge Longfield refused to make an order for partition, as the freehold property was given all to one party, and the rent of the leasehold premises was thrown entirely on another party.

In a more recent case, of Anne L. Ormsby and others, also a petition for partition under the 81st section of the Act, an arrangement had been made by the parties involving the same difficulty as in Foley's case, and Judge Hargreave refused to sanction the partition, making this order: "The proposed partition gives the whole of the chattel-lease to one owner, Mrs. Charretie. As it is necessary that this lease should be partitioned, a portion of it must be given to each owner. The arrangement must be altered in this respect before a partition can be made by the court."

It should be observed that the same practice prevails in compulsory partitions by the court, where the petition prays for a partition and sale, and the court makes a compulsory order for partition under the 80th section of the act. It has occasionally happened that a partition made by a surveyor, under order of the court, has proved quite useless, and the court has required a new partition, in consequence of the surveyor not knowing the practice of the court as to partitions and not receiving proper instructions from the solicitor. In one case the surveyor made his valuation and partition of certain leasehold lands, allotting one entire lease to one owner and another lease to another owner, instead of partitioning each lease separately, as required by the practice of the court: and the surveyor was required to make a new partition accordingly.

[BEFORE JUDGE HARGREAVE.]

THE ESTATE OF HUGH MORROW, OWNER AND PETITIONER.

Judgment—Mortgage.

The affidavit of judgment stated the lands sought to be charged by this description, "the lands of Carraboola, Cartronfin and Killendowd, situate in the Baronies of Abbeyshrule and Moydow, and county of Longford"—Held that the affidavit did not comply with the Act 13 and 14 Vic., c. 29, which requires that where the lands are situate in two or more baronies, parishes, or counties, the same shall be distinctly stated.

The affidavit stated the amount of the judgment to be £71 15s. 9d. besides £6 4s. 8d. costs; when the affidavit was filed the costs, though ascertained, had not been inserted in the judgment roll, a blank having been originally left for the amount of the costs; but subsequently to the filing of the affidavit, the blank for the costs was filled up, so that on the hearing of the motion the roll was perfect, and the affidavit of judgment was in accordance with it. Held that this court would not enquire into the intermediate state of the roll, as it had been perfected properly and in conformity with the practice of the court.

THESE questions on the judgment act of 1850, arose on a motion by Mr. M'Dermott for liberty to file an objection to the final Schedule of Incumbrances seeking to establish a judgment vested in Mr. M'Dermott in priority to another judgment vested in John H. Jessop. This motion was resisted by Mr. Jessop, on the ground that M'Dermott's judgment was not validly registered as a mortgage, and accordingly that he had no charge upon the lands.

The points in dispute, and the arguments for and against the registration, sufficiently appear in the judgment of the court. Cases cited—*Fitzgerald's Estate* (11 Ir. Ch. R. 278); *Edgeworth's Estate* (11 Ir. Ch. R. 288); *Power's Estate* (11 Ir. Ch. R. 288).

Ince appeared for M'Dermott.

Fetherston for J. H. Jessop.

HARGREAVE J.—There are two questions in this case arising on the construction of the Judgment Act of 1850. It appears that at the time when the affidavit was filed the roll of judgment was imperfect, as the amount of the costs, although ascertained, had not been inserted in it; but the affidavit stating the judgment specified the amount of the costs. The roll is now perfect, and the affidavit corresponds with it; and as it is admitted that the roll has been perfected properly, and in conformity with the practice of the court, I think I cannot enter upon any enquiry as to the intermediate state of the roll.

The next point is that the lands are described in the affidavit as "the lands of Carraboola, Cartronfin, and Killendowd, situate in the baronies of Abbeyshrule and Moydow, and county of Longford;" and it is objected that this promiscuous statement is not a compliance with the requirement of the Act, that where the lands are situate in two or more baronies,

parishes, or counties, the same shall be *distinctly* stated. I was at first inclined to think that "distinctly," merely meant plainly and intelligibly, but on consideration, I think it means "by way of distinction," or "*distinguendo*." That, no doubt, is the primary meaning of the word "distinctly;" and although it has in common speech acquired a secondary meaning of a looser character, yet I think it will generally be found that there is a kind of reference to the primary meaning. When a man sees distinctly, it is that he sees so as to distinguish objects from one another; and when he speaks distinctly, it is because he distinguishes his words one from another; and I think that the word here was used in this its primary meaning. If it were not so, there would be no object in the act in providing separately for the case of one barony or county and the case of several; it would have been enough to have said, that in all cases the lands should be described by baronies and counties. It is obvious, moreover, that the affidavit would be practically unintelligible unless the statement was a distinct one; for if there were a large number of townlands in several baronies and three or four counties, and the names were all thrown in promiscuously, it would be difficult to say that there was a distinct statement of the townlands, and the baronies, and counties in which they were situate. The argument derived from the construction of a deed is of no weight, for the simple reason that the deed would be just as valid to pass the lands if there were neither barony nor county mentioned, or even if there was no name of a townland, "all the lands of the said Hugh Morrow" would suffice; but the object of this Act was to have a definite specification of the lands intended to be charged.

ORDER—That the motion be refused, the court being of opinion that Mr. M'Dermott has no charge on the lands sold in the matter.

NOTE—This decision has been recently affirmed by the Court of Appeal in Chancery.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

IN RE LUNHAMS.

Partnership—Statutable allowance to Partner—Joint and separate estate.

R. L., of the firm of L. and Co., trading in England, and also in Ireland, was made bankrupt in Ireland. The other member of the firm was made bankrupt in England. R. L. having obtained his certificate in Ireland, applied for the statutable allowance under the 302nd and 303rd sections. Held, that the allowance should be calculated on his separate estate and on his share of the joint estate, but not on the whole joint estate.

THE 302nd section of the Bankruptcy and Insolvency Act provides, that the court may make to every bankrupt who shall have obtained his certificate, and

every insolvent who shall have obtained his final discharge, such allowance out of the estate as to the court shall seem fit, not exceeding the rates and amount following; that is to say, if the net produce of the estate shall pay the creditors five shillings in the pound, an allowance at the rate of three pounds per *centum*, provided such allowance shall not exceed three hundred pounds; and if such produce shall pay such creditors ten shillings in the pound, an allowance of five pounds per *centum*, provided such allowance shall not exceed four hundred pounds; and if such produce shall pay such creditors twelve and sixpence in the pound, an allowance at the rate of seven pounds ten per *centum*, provided such allowance shall not exceed five hundred pounds; if such produce shall pay such creditors fifteen shillings in the pound or upwards, an allowance of ten pounds per *centum*, provided such allowance shall not exceed six hundred pounds. Then the 303rd section provides that the court may make such allowance to any one partner, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, although the other partner may not be entitled to any allowance. Upon this case coming before the court for audit, Judge Lynch ruled that the statutable allowance to Robert Lunham should be calculated on his separate estate, and also on the entire of the joint estate of T. and R. Lunham. The case now came before the court upon motion on the part of the petitioning creditor, with a view to have this ruling reviewed.

Purcell was for the petitioning creditor, and Kernan, Q.C., for the bankrupts. *Ex parte Morris* (1 Dea. & C. 526), *Ex parte Gibbs* (Mont. Repts., 105), and *Ex parte Lomas* (4 Dea. and C.) were cited.

LYNCH, J., in giving judgment, said—In this case some questions are brought before me by way of review of opinions stated by me at the audit meeting. I then invited this discussion; and now, for the first time the question in this case has been discussed before me. I made a rule at the audit meeting to allow Robert Lunham, who was made a bankrupt in Ireland, and who got his certificate here, the statutable sum authorised by the 302nd section of the Act; and it was asked on behalf of the bankrupt that this allowance should be made by a per-centage on the whole joint estate. At present that stands as the ruling of the day; and this motion is properly made to review it. It is first insisted that no allowance should be made in this case, it being a separate bankruptcy of one member only of the firm; but, in my opinion, the case stands on different grounds; and here I am not administering the separate estate of Robert Lunham on any dissolution of partnership or otherwise; but both partners being bankrupt, one by the adjudication of this court, the other by the adjudication of the court in England, I am here, now, by consent distributing the funds of the bankrupt partnership; and this motion is made in the matter of the two partners. Therefore, without canvassing the cases brought forward, or deciding what would now be the rule if the partnership was solvent by reason of the solvency of one of the partners, I treat this case, as now before me, as the matter of the joint estate, both parties being bankrupt. This being so, I treat Robert Lun-

ham as entitled by virtue of the 303rd section, to have the allowance made to him. But then arises the question, out of what estate is this to be made? Is it out of the entire joint estate and his separate estate? or is it out of his separate estate and his share of the joint estate? A similar question, I believe, was brought before Judge Berwick, and it was insisted on before him that each partner was entitled to the statutable allowance upon the entire joint estate, and *Ex parte Morris* and *Ex parte Gibbs* were relied on, as sustaining such a claim. Now, I have been referred to these cases, and I find them reviewed and explained in *Ex parte Lomas*, and a sensible, reasonable, and just rule arrived at in this last case, namely, that the allowance authorised to be made to one partner is an allowance on his separate estate, and on his share of the joint estate, provided there is also paid a sufficient dividend on his separate estate. This case of *Ex parte Lomas*, is received into all the text-books as establishing the principle of allowance in such cases. It appears to me to establish a reasonable and just course. I accordingly direct in this case, that the allowance should only be calculated on the moiety of the joint estate. The petitioning creditor has, therefore, succeeded in his motion, and has properly brought this matter before the court, and I, therefore, must give him the costs of this motion, to be allowed, with the assignee's costs of this motion, out of the estate.

[BEFORE JUDGE LYNCH.]

IN RE F. & R. REID.

Forged or fictitious bills put in circulation—Payment made before those bills are due to prevent exposure or prosecution—Fraudulent preference.

Where traders get fictitious bills discounted in a bank as ordinary trade bills, and before those bills become due, the traders find themselves embarrassed, and in order to prevent a prosecution or exposure, the traders go to the bank and take up those bills, and bankruptcy ensues when those facts are disclosed—Such payment will be deemed a fraudulent preference, and the bank will be compelled to bring in the amount for the benefit of the general creditors.

FRANCIS and Richard Reid, the bankrupts in this matter, were brewers in the city of Dublin, and dealt with the Hibernian Banking Company as their bankers, where from time to time they got several bills, to a considerable amount, discounted. It appeared that some of these bills were fictitious, in point of fact, forgeries; and the Messrs. Reid, finding that they were much embarrassed, knew that bankruptcy or insolvency should follow, and that it was still more certain, that in case their affairs should be brought into the bankruptcy court, the true character of these bills would be discovered, and, probably, a criminal prosecution follow. To prevent such consequences one of the partners went to the bank and took up these bills before they became due. Bankruptcy having taken place, those facts were disclosed in the progress of it, and the assignees claimed from the

bank the amount thus paid, on the ground that such payment was a fraudulent preference made in contemplation of bankruptcy, and the entire question in the case was, whether payment made under the circumstances was a fraudulent preference.

Heron, Q.C., appeared for the assignees; and *Kernan, Q.C.*, for the bank.

They cited *Ex parte De Tassett* (Mon. 148); *Thompson v. Freeman* (1 T. R. 155); *Thornton v. Hargraves* (7 East. 549.)

All the facts fully appear in the able judgment of JUDGE LYNCH. His Lordship said—This case is now before me on the charge of the assignees claiming the sum of £441 5s. 7d. from the Hibernian Bank, as being paid to them by way of fraudulent preference by the bankrupts at a time when they were insolvent. To this charge the Hibernian Bank has put in a discharge, putting the chargeants on proof of the insolvency of the bankrupts at the time of the payment, and further submitting that, under the circumstances disclosed in this case, the payment was not voluntarily made by the bankrupts so as to make the payment a fraudulent preference, within the rule of law applicable to this subject. The facts of this case are peculiar, and no decided case exists which can be said to be an express authority on the point; and I, therefore, in the first instance, state the facts which I find, arrived at by me from the evidence before me. The bankrupts, in the course of their trade, dealt largely in the way of discount with the Hibernian Bank, and in November, 1860, the bank had bills discounted for them to a considerable amount, still current. In November the affairs of the bankrupts became hopeless, and bankruptcy was then inevitable. A meeting of their creditors was called by them; their insolvent condition was announced, and the bankruptcy necessarily followed. Matters being so, it appears that Thomas Francis Read, who was the active partner of the firm, managing its discount, had before that time passed to the Hibernian Bank certain bills to the amount of £441 5s. 7d., which were fraudulent and fictitious bills, the apparent acceptances being really fictitious, no such persons existing as purported to be the acceptors. The bank acted in entire ignorance of this fraud or felony committed by T. F. Read, and held all these bills, believing them to be genuine trade instruments. Thomas Francis Read, being cognisant of his crime in uttering these fictitious bills, became then aware that if these bills remained in the hands of the bank, and that he was adjudicated a bankrupt, his fraud should inevitably be discovered; and therefore he, while manifestly in insolvent circumstances, and in fact because he was in such circumstances, while the bills were still current, and their time of payment yet distant, went to the bank and took up for cash the fictitious paper then in the bank. This transaction was certainly irregular, and not in the course of trade, and as far as the bank is concerned there exists, I am told, no record of the transaction to show how the money was paid for the particular bills given up, or when such payment was made; but then it is not controverted by the bank that the bills were paid before they arrived at maturity, and the bank itself relies now upon the fraudulent nature of the securities in their defense. Bankruptcy soon followed, and now the case is before

me on this charge to decide whether this payment, made under such circumstances, is a voluntary preference in contemplation of bankruptcy, and, as such, avoided by law. This case is a curious one, and I believe of the first impression—at least no case at all directly in point has been cited. The doctrine of voluntary preference is a very ancient one in the bankruptcy code, necessarily arising out of the very principle on which bankruptcy is founded, viz., to give equality in satisfaction out of the assets to all the creditors, who equally trusted to the general credit of the trader; and, manifestly this principle would be inoperative if, on the eve of bankruptcy, an insolvent trader could himself select particular creditors amongst whom he could distribute the assets, over which he had still control. Therefore it is, that within this code, any payment voluntarily made to a particular creditor by a trader then in a state of insolvency is avoided for the benefit of the general creditors. Two matters must be clear to work this avoidance—first, the trader must be insolvent; secondly, the payment must be voluntary. If these two occur, the act is void. In the case before me, the insolvency of the traders is not now disputed, and it would be idle to question it; in fact, it was the very reason which led to the act of payment. Therefore, the only question really arising in this case is—whether this payment was voluntary within this rule of law? Confining the case first to the two parties to the act, namely, the bank and the traders, let us see how they mutually stood. The bank was innocent of all knowledge of the circumstances about these bills; they held them as yet current bills; they knew of no right existing in them to demand payment, or to hold out a threat to the bankrupts; they were purely quiescent; the bankrupt alone had the knowledge of the circumstances which could put him in peril with the bank; to his mind alone was disclosed the danger of his position, and this secret knowledge led him, for his own safety, to adopt the course he took; and, influenced by these motives, he voluntarily went to the bank and paid the amount and got up the bills. Now, it is not at all clear in this case that Read knew the whole extent of his danger in this transaction; he knew he had done an act of outrage on the mercantile world in circulating these bills; he knew he had done an act which, if disclosed in this court, would bring on him heavy consequences; indeed, he now suffers for them the heaviest penalty this court could inflict on him; but it is not quite clear that he knew he had committed a high indictable offence. As between the two parties, then, the payment was simply the voluntary act of the bankrupt, induced by no act, threat, or proceeding of the bank whatsoever. *De Tassett's Case* and the case of *Thompson v. Freeman* are important cases undoubtedly, and raise some nice views on the question of voluntarism in making the payment; but in all the cases cited to me, and in every case I have seen, some action existed in relation to the payment made, inducing it, and controlling the act of payment; here the whole case exists in the nature of the debt itself. At the time it was contracted no other motive intervened—no other act arose to lead to its payment; in fear of the jail, he paid that. What would be the case if, by

some disgraceful, but not indictable, mercantile fraud, he contracted a debt and paid it to avoid exposure? Would that be protected? What if something not fraudulent, but merely dishonorable, had occurred? Would the payment to avoid such exposure be protected? Then difficulties would arise if I once admitted these inquiries into the motives of the bankrupt himself, which lead to the volition as being proper subjects of inquiry on this branch. I hold that the payment was voluntarily made to the bank, although he was induced to come to that volition by the knowledge in his own heart of penal consequences from the circumstances under which the debt was incurred. It does not alter the voluntary nature of the act done. To hold the doctrine contended for would be to hold that a bankrupt on the eve of bankruptcy would have a right voluntarily to prefer all such creditors as he had induced to become such by the act which exposed him to prosecution, or, perhaps, to blame. I find no semblance of such a rule, and I would be sorry if I did find it. In this case the payment was made to the bank under circumstances that manifestly avoids it. If the debt was an ordinary one, it was made after the state of insolvency had arisen, and it was voluntary. How, then, arises the case? The bank make title arising out of the fraud committed on them, and now discovered for the first time when his affairs are investigated in this court; and it asks me now to weigh the motives which must have operated on the bankrupt's mind in determining his volition to pay to them. This would be too nice a metaphysical speculation to allow in such a case. Whatever secret motive impelled, it was not created by the bank, or any act of theirs, or of any other party whatever, but solely arose in the bankrupt's own mind, leading him, by reason of no external circumstance, to make the payment voluntarily. I have, therefore, I think, in this case the two elements, that this payment was made after the bankrupts were in a state of insolvency, and was made voluntarily, and that, consequently, the bank is now indebted to the estate for this sum of £441 5s. 7d. so paid to them, and, of course, the costs.

Agent for the Assignees—G. D. Fottrell.
Agents for the Bank—Kernan and Treacy.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister at Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

CREAGH v. CREAGH.—Nov. 10, 11.

*Conveyance under the Incumbered Estates Court—
Fiduciary position of guardian.*

The lands of C. were held for a term of years under B. B. C.'s proposal in writing accepted by M. C., at a yearly rent of £54 7s. 8d., subsequently, however, reduced to £33 12s. By a deed of conveyance from the Commissioners of the Incumbered

Estates Court the landlord's interest under this proposal was granted to A. G. C. "subject to the several tenancies specified in the third schedule annexed" thereto. In this schedule the tenure was represented as being "B. B. C.'s proposal accepted by M. C. dated Dec. 26th, 1837, for 900 years," and the rent column stated the rent to be £33 12s. per annum. At and before the time of this conveyance A. G. C. held also the tenant's interest in these lands, managing it as guardian and trustee for the infant children of B. B. C.

Held that the proposal of Dec. 26th, 1837, was not so incorporated in the deed of conveyance as to make the rent of £54 7s. 8d. reserved by it necessarily the rent payable.

Held also, that even if this were not so, considering the fiduciary character of A. G. C., and the fact of his having been a party to all the proceedings in the Incumbered Estates Court, he was barred from claiming the original rent of £54 7s. 8d. from the infants who had been under his guardianship.

THIS was an appeal from an order of the Master of the Rolls made under the following circumstances:—Benjamin Bonsfield Creagh, of Doneraile, in the County Cork, was in his lifetime and at the time of his death tenant of the lands of Clonbane for the residue of a term of 999 years from May 1st, 1754, under a proposal in writing dated December 26th, 1837, signed by him, and accepted by his brother, Michael Creagh. Michael Creagh was tenant of these lands and others under an indenture of lease bearing date August 1st, 1754, made by the Right Hon. Hayes, Lord Viscount Doneraile, to his grandfather, Michael Creagh the elder. The acreable contents of the lands of Clonbane were, as stated in the proposal, 27a. 2r. 5p. English measure, and the rent payable under it was £54 7s. 8d., being at the rate of £2 per acre. A receiver having been appointed over the landlord's (Michael Creagh's) interest in these lands in the cause of *Cagney v. Creagh*, pending in the Court of Chancery, Benjamin B. Creagh caused an application to be made to the court for the purpose of obtaining an abatement of the rent payable under the proposal of December, 1837; and by a report of Master Henn, to whom an order of reference was made, it was found that £33 12s. was a just and proper rent for Benjamin B. Creagh to pay from the 25th March, 1841. This report having been confirmed, Benjamin B. Creagh continued from that time up to the date of his death to pay this reduced rent to the receiver in the cause. Benjamin B. Creagh died in May, 1846, and by his will appointed Margaret Creagh, his widow, and Arthur Gethin Creagh, his brother, as guardians to his children, infants, the respondents in the present cause. The will was proved by Arthur G. Creagh alone, one of the executors nominated therein. The receiver in the cause of *Cagney v. Creagh* was extended to the cause of *O'Brien v. Creagh*, a general creditors' suit; and a decree for the sale of Michael Creagh's interest in the lands of Clonbane was made in June, 1845. Pending the progress of the suit Michael Creagh died; and the lands having been unsuccessfully put up for sale on five different occasions, a petition for sale was pre-

sented to the Incumbered Estates Court in 1849. In the schedule annexed to the notice prepared in pursuance of the 13th General Rule of the Incumbered Estates Court, in the matter in which the lands of Clonbane were sold, the rent in the rent column was stated to be £32 12s, and in the tenure column was contained the following observation:—"Benjamin B. Creagh's proposal dated the 26th of December, 1837, for 900 years." These two statements were again repeated in the rental published for the purpose of the sale. The lands of Clonbane, with six other denominations, having been set up for sale in one lot in the Incumbered Estates Court, were knocked down to Arthur G. Creagh for the sum of £1,250. A conveyance of these lands was accordingly made to him by the Commissioners; and after reciting two other leases under which certain other portions of the lands were held, the deed of conveyance continued:—"To hold the residue of the lands and premises granted, including the said lands of Clonbane, under the denomination of Whitefield, for the residue unexpired of the term of 999 years from the 1st day of May, 1754, subject to the several tenancies specified in the third schedule annexed hereto." In the third schedule here referred to, the lands of Clonbane were thus described:—"Clonbane, called Whitefield; tenant, Arthur Gethin Creagh; acreable contents, 17a. Or. 28p. Irish plantation measure, 27a. 3r. 12p. statute measure; rent, £33 12s.; gale days, 25th March and 29th September." And in the column headed "tenure by which the tenants hold" was written, "Benjamin Bonsfield Creagh's proposal accepted by Michael Creagh, dated December 26th, 1837, for 900 years." On the death of Benjamin B. Creagh, Arthur Gethin Creagh, as his personal representative, entered into possession of the lands, and was in possession of them at the time of his purchase of the landlord's interest under the Incumbered Estates Court, managing the property as executor and guardian for the benefit of his brother's infant children. Shortly after the purchase of the head interest, Margaret Creagh, who was then in needy circumstances, was induced to sign a copy of the following letter, prepared by Arthur G. Creagh's solicitor:—

"MY DEAR SIR,—Referring to your letter of Jan. 18th, 1852, and our subsequent correspondence respecting Clonbane, I can have no doubt that for some time past the farm has been more a loss even at the reduced rent than any benefit to my children. A year's rent is now nearly due, and whilst I must on their part gratefully acknowledge your kindness in remitting it, as also for the sum of £20 which you have this day given me for them, I request as a further proof of your kindness that you will take up the farm and relieve their small means from liability to future rent. I need not advert to the fact, that as landlord you have now the power to demand the original rent of £57 for twenty-seven statute acres of land, which another placed in your position would do; and for this forbearance also, I cannot refrain repeating the great obligations my children are under to you."

"To Arthur G. Creagh, Esq., Doneraile."

After the lapse of some years Arthur Gethin Creagh died. In 1857 a cause petition was filed in the Court

of Chancery by Benjamin B. Creagh, John Bagwell Creagh, and M. Shaw Creagh, children of Benjamin B. Creagh before mentioned, and the respondents in the present appeal, infants, by Albert A. William the guardian of their fortunes and next friend, against Elizabeth Creagh, widow of Arthur G. Creagh, and petitioner in the present cause, and others, for an administration of the real and personal estate of Benjamin B. Creagh. In taking accounts in the cause petition matter in reference to the lands of Clonbane and the rents and profits of them, it was first contended on the part of Elizabeth Creagh that any right under the accepted proposal of December, 1837, had been surrendered by the letter above quoted; and afterwards it was insisted that if there had not been a surrender, Arthur G. Creagh, from the time he became purchaser of the landlord's interest, or at all events from the date of the discharge of the receiver in the cause of *O'Brien v. Creagh*, was entitled to the rent of £54 7s. 8d. reserved by the proposal of December, 1837; and that in taking an account of the rents and profits of the lands of Clonbane from the time of the conveyance of them to Arthur G. Creagh, as purchaser of the landlord's interest, Elizabeth Creagh, his executrix, should be allowed credit for the annual rent of £54 7s. 8d. By an order, however, of Master Murphy, to whom the cause petition matter had been referred, it was declared that Elizabeth Creagh, as personal representative of Arthur G. Creagh, was liable to account for the rents and profits of Clonbane from the date of the conveyance; and that in taking accounts, Elizabeth Creagh was to be allowed credit only for the abated rent of £33 12s.; and it was adjudged that the interest in the lands under the accepted proposal, subject only to the annual head rent of £33 12s., formed part of the personal estate of Benjamin B. Creagh. From this order of Master Murphy Elizabeth Creagh appealed to the Master of the Rolls, who affirmed the Master's order.

Brewster, Q. C. (with him *Rogers, Q. C.*), for the appellant.—There is no matter pertinent to the cause except the proposal of 1837. This is incorporated in the deed of conveyance; and amongst parties under the Incumbered Estates Court the rights of landlord and tenant depend on the conveyance alone. The land was declared to be subject to the tenancies comprised in the third schedule. The tenure column in this schedule refers to the proposal; and when an instrument is thus incorporated in the conveyance the tenure is according to that instrument. In *Booth v. Daly* (6 I. C. L. R. 460), the land was granted subject to a certain lease, and a reference was made in the same manner to the schedule annexed. In this the tenure column stated that "the rent reserved by lease was £23 19s., abated to the sum stated in rental." The rent in the rent column and rental was £11 7s. 4d., and yet it was held that the full rent under the lease was payable. The lease having been referred to, the error in the rental was not regarded. In the present case the fact of the rent being represented as £33 12s. in the rent column is immaterial.—*Rockfort v. Ennis* (6 Ir. Jur. N. S. 169). If the tenure had been for three lives, renewable for ever, and the conveyance, after referring to the instrument by which it was created should say "for three lives,"

could it be contended that the tenant would be deprived of his right to renew? There is no necessity for referring in the conveyance to the rent, and therefore a misstatement of it cannot be of any moment, on the principle that "*fabula demonstratio non nocet*."

Serjeant Sullivan (with him *F. Walsh, Q.C.*, and *Graydon*.) for the respondents.—The reference to the instrument creating the tenancy, does not necessarily cause it to be incorporated. The definition of tenure is "duration of the tenancy." There are five columns in the schedule, viz.—tenant's name; rent; acreage; gale days and tenure: and effect must be given to all of them, unless the contrary be absolutely necessary. The case of *Rochfort v. Ennis* was different in principle. There the lease was mentioned in the body of the deed; here the proposal is referred to only in the schedule annexed. Here there is no lease, only a proposal, a contract that might be waived, and the land is declared to be subject, not to any instrument, but to the "tenancies" in the schedule annexed.—*Lysaght v. Delacour* (8 Ir. C. L. R., 453) *Errington v. Burke* (7 H. L. Cas., 617; 9 Ir. C. L. R., 357); 12 & 13 Vic., cap. 77, sect. 23.

F. Walsh, Q.C., for respondents.—The fiduciary position of Arthur G. Creagh was such that the present claim cannot be maintained. The case of *Blomfield v. Eyre* (8 Beav., 250), decides that an infant is entitled to treat a person who enters on his estate during his infancy, as his bailiff, and accountable as such. He should have given notice to the Commissioners of the Incumbered Estates Court, if he had known that the lands were subject to a higher rent. The Commissioners had power to settle the tenancies, and the conveyance expresses the result. [*Lord Justice of Appeal*.—The conveyance under the Incumbered Estates Court is the record of a judicial decision.] [*Lord Chancellor*.—It is not to be regarded as an ordinary conveyance: it is a mistake to do so. The position of a purchaser under the Incumbered Estates Court is fully and ably laid down in the judgment of Baron Greene in *Errington v. Burke* (6 Ir. C. L. R., 292).]

Rogers, Q.C., in reply.—The abatement was only temporary. The true definition of "tenure" is given by Perrin J., in *Booth v. Daly* (6 I. C. L. R., 469), where he states it to be "the estate of the tenant in the land, the rent, the nature of the lease, and other circumstances which may bear upon it." If the Commissioners had regulated or altered the rents, there must have been an adjudication, and that will not be implied by the conveyance. The Master of the Rolls put the following case:—If the rent had been set down as £333, instead of £33, or if the tenants' names had been transposed, what would have been the effect? [*Lord Chancellor*.—I cannot separate the idea of rent from the idea of tenancy. As to the cases suggested, it is time enough to consider them when they actually occur.]

THE LORD CHANCELLOR.—In the present case we have to consider two questions. In the first place supposing the legal point to be for the moment put out of view, we have to determine whether Arthur G. Creagh, in his fiduciary character, would be entitled to make the present claim; and secondly, the question arises whether such a claim is legally sustainable. (If's

lordship then referred briefly to the leading facts of the case.) With regard to the reduction of the original rent from £54 7s. 8d. to £33 12s., I find as a matter of fact, that it took place in the following manner. In the course of the equity proceedings an order was made to the Master, not, as has been alleged on behalf of the appellants, to grant temporary abatements, but to receive surrenders from the tenants on Michael Creagh's estate, if it should be considered advisable. In pursuance of this order, the Master reported that he did not regard it as expedient to receive surrenders, but that it would be in many respects more beneficial to continue the existing tenants at reduced rents. This report was confirmed, and a reduced rent of £33 12s. was from that time paid for the lands of Clonbane. Accordingly when the lands came subsequently into the Incumbered Estates Court, in the rental prepared for the purposes of the sale, the rent was set down as £33 12s., and although the inheritor was a party to these proceedings, no exception was taken, nor any objection made to this statement. The petition which sought the sale, represented that the lands were held by Mr. Arthur G. Creagh, at a yearly rent of £33 12s. and in no way led it to be supposed that this was but a temporary abatement. In accordance with the 13th General Rule of the Incumbered Estates Court a notice was served upon the tenants, specifying the tenancies, leases, and agreements, and calling upon all parties who had claims for others, or who considered these tenancies, leases, or agreements as incorrectly stated, to come forward and apply for an amendment of the order. This notice, which stated the rent of Clonbane as £33 12s., was served upon Arthur G. Creagh amongst others, and he, acting wisely and properly, made no appearance, but along with all, acquiesced in the rent being taken as £33 12s. What he bought and what the Commissioners sold was, in fact, this rent of £33 12s., and a conveyance stating this was accordingly prepared and executed. Being already in possession as a trustee for the minors, he continues to manage the property for their benefit, until an attempt is made to obtain a surrender of the interest. (His Lordship then read and commented on the letter signed by Mrs. Creagh and given above.) Let us now consider what were Arthur G. Creagh's duties towards these minors. Here is an executor and guardian in possession of the lands for them and managing them for them. A representation has been made to him by the landlord, and by every one concerned, that the rent payable is £33 12s. per annum. Can he, having given value for a smaller portion, claim more rent than he has actually bought? It has been said that this transaction cannot be noticed in the present suit, but, in truth, the question is, whether he, Arthur G. Creagh, is entitled to this claim under the circumstances. He was a party to all the proceedings in the Incumbered Estates Court. The sale was effected on a series of representations made by him, by the landlord and by the Court. Taking all this into account, and considering the fiduciary position in which he was placed, I think he could not advance the present claim. The Master of the Rolls has put his decision on a question of pleading, but the matter appears to me to be determined by the substantial equities of the

case. It is said that we must go further into other questions, and decide upon the effect of the conveyance from the Commissioners of the Incumbered Estates Court, and, although I regard the case as satisfactorily decided by the considerations I have referred to, I can enter into the second question without any hesitation. The Incumbered Estates Act was passed to remove *manu forti*, a cloud of difficulties. A powerful remedy was given with as much caution as possible, and everything was framed with a view to leaving no question open for future litigation. The Commissioners were bound to give faith to their conveyances. In the present case they declare the lands to be subject to certain tenancies. A good deal of discussion has taken place as to the proper definition of the word "tenancy," but to me it seems to be in a measure equivalent to "a holding of land." In ordinary parlance it signifies "a holding under another," and comprises a great deal more than the conveyance. The Commissioners go outside the instrument and declare the terms under which the land is held, as in the present instance they state the term of years as 990, and the rent as £38 12s. We are not now so embarrassed as we might be in the case of an actual lease. Here there is but a proposal constituting a tenancy from year to year, and from the time the rent was reduced, the rent of £33 12s. would have continued payable as long as no move was made in the matter. The Commissioners proceed to ascertain the tenancies; they give notice to the landlord and tenants, and all the parties interested. These, by their conduct, may be assumed to have acquiesced, and a conveyance is made in which everything is mentioned that is required by the Act. To open questions behind the Commissioners would be most dangerous; therefore, looking to the various modes in which the abatement might have been effected, and in accordance with the doctrines of *Errington v. Borge*, in the House of Lords, the present appeal must be dismissed.

THE LORD JUSTICE OF APPEAL briefly concurred.
Appeal dismissed.

Exchequer Chamber.

[Reported by William Woodlock, Esq., Barrister-at-law.]

[CORAM LEFROY, C. J., MONAHAN, C. J., BALL, KEOGH, CHRISTIAN, O'BRIEN, HAYES, AND FITZGERALD, JJ.]

WARD v. MCKELVEY.—Nov. 7, 1862.

Appeal—Amendment—Misdirection—Public port or haven.

The judge at the trial of an action having refused to allow an amendment, and the Court of Exchequer having refused to grant a new trial on the ground of such refusal by the learned judge, held that the decision of the court upon this point was not a subject of appeal within s. 41 of the Common Law Procedure Act, 1856.

Action of trespass qu. cl. fr. Defence that the locus in quo was not the close of the plaintiff. At the trial

it appeared that plaintiff was owner of the townland of K., which was situate by the sea; that a pier was built there partly upon the foreshore above high water mark, and partly running into the sea below high water mark; and that defendant in unloading a vessel placed the cargo upon the pier and carried it across it, refusing to pay a toll demanded by plaintiff. On the part of plaintiff acts of ownership of the foreshore and of the land adjoining were proved. Defendant went into evidence of the former state of the place, but the judge directed the jury to find for the plaintiff if they believed his evidence. The Court of Exchequer having refused to grant a new trial on the ground of misdirection, this court disallowed an appeal brought against that decision.

This was an appeal brought by the defendant against an order of the Court of Exchequer, dated the 1st February, 1862, discharging a conditional order for a new trial obtained by the defendant, dated the 6th November, 1861, whereby it was ordered that the verdict had for the plaintiff at the then last Summer Assizes for the county of Down, should be set aside and a new trial had, on the ground of the misdirection of the judge at the trial, and on the ground that the learned judge ought to have allowed a further defence, or defences, by way of amendment, to be pleaded at the trial. The summons and plaint contained three counts, the first complaining that the defendant broke and entered a close of the plaintiff called Kircubbin Quay, situate in the county of Down, and placed and deposited large quantities of bricks in and upon the said quay; the second, for the defendant's use, by the plaintiff's permission, of a pier or quay of the plaintiff; the third, upon an account stated. The particulars endorsed upon the summons and plaint were six items of one shilling each for harbour dues on cargoes of bricks per the defendant's vessel "the Sapphire." The defendant pleaded to the first count, first, that the close therein mentioned was not at the time of the supposed grievances the close of the plaintiff as alleged; and, secondly, leave and licence; to the second count, that he did not use the pier or quay in the second count mentioned by the plaintiff's permission; and to the third, that no money was found to be due as alleged. There were the usual issues, that upon the first defence to the first count, upon which the chief question arose, being, "whether the close in the first count of the summons and plaint mentioned was, at the time of the grievances therein complained of, the close of the plaintiff." At the trial it appeared that all the townland of Kircubbin belonged to the plaintiff, and that in the year 1838 a pier or quay, running out into the sea, was built, partly by subscription and partly out of the rents of Mr. Ward's estate. In the year 1861 the plaintiff claimed a toll of 1s. per cargo from all vessels using the pier, and published certain harbour regulations, dated 1st January, 1861. The defendant, who was the owner of a small vessel, of under fifteen tons, called the Sapphire, refused to pay the toll, and persisted, notwithstanding a notice served upon him on the 12th day of April, 1861, in landing bricks upon the quay or pier without paying the toll demanded,

whereupon the action was brought. The pier stood upon the sea side of a narrow strip of ground which intervened between the sea and the town of Kircubbin, and it was partly built upon the foreshore above high-water mark, and partly extended into the sea below high-water mark. There was no access to the pier on the land side except across the piece of land just spoken of. Acts of ownership of the foreshore and of the strip of land were proved to have been done by the plaintiff. It was also proved that the defendant had placed his bricks on the main body of the pier, and that when taking bricks to his vessel he took them over ground which stood above the ordinary high-water mark. At the close of the plaintiff's case counsel for the defendant called upon the judge to nonsuit the plaintiff or direct a verdict for the defendant, upon the ground that the plaintiff had not proved such a possession as entitled him to maintain his action and that no injury to the freehold had been proved. This the judge refused to do, and counsel then applied for liberty to file a new defence, to the effect that the place was a public port or harbour, or that there was a public right of way. The judge refused this also. The defendant then went into some evidence as to the former state of the pier, but the judge told the jury that if the defendant's cars or horses went over ground, the property of the plaintiff, in loading or unloading the defendant's vessel, they should find for the plaintiff; that it was proved that all ground up to the ordinary high-water mark was the property of the plaintiff, and that it was proved, if they believed the evidence, that part of the pier or quay over which they must have passed, was built on ground above the ordinary high-water mark. The jury returned a verdict for the plaintiff, on the issues raised on the two first defences, and for the defendant on the other issues, and assessed the damages at sixpence. The defendant subsequently, as already stated, obtained a conditional order for a new trial, and that order having been discharged, he brought the present appeal, submitting that there ought to be a new trial, on the grounds, first, that there was some evidence for the defendant upon the issue, whether the close in the first count mentioned was the close of the plaintiff, inasmuch as there was evidence that said close, being the quay of Kircubbin, was part of a port or haven, and the soil of all public ports and havens in the United Kingdom is, *prima facie*, the property of the Crown; whereas this evidence was withheld from the jury, notwithstanding the contention of the defendant at the trial, by the learned judge, who told the jury that if they believed any part of the ground on which the defendant placed his bricks, or over which he passed in coming to or going from the quay, was above the ordinary high-water mark, they ought to find for the plaintiff; secondly, that the learned judge ought to have complied with the defendant's application to amend the defences by adding a plea, to the effect that the *locus in quo* was a public port or haven, to which vessels under fifteen tons burden might come as of right, and load and unload thereat, and that the acts complained of were done by the defendant in exercise of this right, and the above amendment ought to be allowed, inasmuch as it was apparent, from the publication of the regulations dated

the 1st January, 1861, the notice served on the defendant by the plaintiff, 12th April, 1861, the frame of the summons and plaint itself, and the evidence, that the action was brought for the purpose of enforcing the said regulations of the 1st January, 1861, and that the real controversy between the parties was, whether the defendant had a right to use the quay at Kircubbin with his vessel, the "Sapphire," being a vessel under fifteen tons burden, against the will of the plaintiff, and without payment of any toll or harbour dues.

Ferguson, Q.C., and Falkner for the defendant.—The amendment which we asked for ought to have been allowed. [*Monahan, C.J.*—The Court of Exchequer refused to allow the amendment, and their decision upon the point is not a subject of appeal under the Common Law Procedure Act of 1856. If, indeed, we thought the Court of Exchequer wrong in not granting a new trial, we might have jurisdiction to order an amendment as incident to the new trial.] The refusal of the judge to allow an amendment was a ruling under s. 41 of the Act, and that being so, the decision of the Court of Exchequer upon that ruling is a subject of appeal. The words of the section are remedial, and ought to receive a liberal construction. [*Monahan, C.J.*—The refusal of the judge to allow the amendment was not a ruling at the trial; it was rather the refusal of a motion. A ruling means some such thing as a refusal to direct the jury. *Lefroy, C.J.*—In old times there could not have been a bill of exceptions for refusing leave to amend, and there has been no such change in the law as would give an appeal on the point now. *Christian, J.*—There is a proviso in sec. 41 of the Act, that when the application for a new trial is on matter of discretion no appeal shall be allowed. The refusal to allow an amendment is a matter of discretion.] Then upon the other point the ruling of the judge was wrong. There was some evidence that the *locus in quo* was not the plaintiff's. This was a public port, and that differs from a highway in this, that there is no presumption as in the case of a highway, that the adjoining land belongs to a private owner, and there is a presumption that it belongs to the Crown. [*Lefroy, C.J.*—What is your definition of a port?] Any place for arriving and unloading of ships and vessels is a port.—*Hale de Jure Maris*, cap. 2. Against this presumption there was only a presumption given on the other side, and the whole ought to have been left to the jury.

Joy, Q.C., Law, Q.C., and Harrison, contra, were not called upon.

LEFROY, C.J.—We are all of opinion that the refusal of the amendment is not a subject of appeal; and with respect to the principal part of the case what we have to say is, that according to the evidence there was no misdirection, and that even if there had been any, the misdirection which is now set up was not pointed out by the objection taken at the trial.

Appeal disallowed, with costs.

REGISTRY APPEALS.

[CORAM, CHRISTIAN, HAYES, AND FITZGERALD, J.J.,
AND FITZGERALD AND DEASY, B.B.]

MICHAEL PATRICK HOWLETT, APPELLANT; CHARLES
TOTTENHAM, RESPONDENT.—December 1, 1862.

Free Burgess of New Ross—Admission before Reform Act—Residence.

A Free Burgess of New Ross, admitted before the passing of the Reform Act, is a person "now by law entitled to vote" within s. 9 of the Reform Act, 2nd and 3rd Wm. 4, c. 88 and comes, therefore, within the provisions of that section, and of s. 14 of st. 13 and 14 Vict. c. 69, as to residence.

The case of Tottenham, app., Meadows, resp. (2 Ir. C. L. 572, and 5 Ir. Jur. 127), distinguished.

THE following case was stated by the Chairman for the county of Wexford. "The name of Charles Tottenham, Esq., of Ballycurry, having been returned by the clerk of the Town Commissioners for the borough of New Ross, as being entitled as a free burgess to vote in the election of a member of Parliament for the said borough, was duly objected to by Michael Patrick Howlett, Esq., on the ground that the said Charles Tottenham had not resided for six calendar months next previous to the 20th July last, within the said borough, or within seven statute miles of the usual place of election therein, and further, that he was not on the 20th day of July last, duly qualified in such a manner as would have entitled him to be registered as a freeman or a free burgess under the 2nd and 3rd Wm. 4, cap. 88. In support of said objection evidence was laid before me, that said Charles Tottenham had not resided in said borough, or within seven statute miles, for six calendar months previous to the 20th of July last, and the books of the late corporation were produced, by which it appeared that said Charles Tottenham was admitted and sworn in a free burgess of said corporation of New Ross on the 29th day of June, 1829; but there is no entry in said books of the payment of any stamp duty on said admission, nor upon the admission of any of the other free burgesses. The name of Mr. Charles Tottenham appears upon the list of voters for the first time in 1857 as a free burgess. I overruled the objection and allowed Mr. Tottenham's name to stand upon the register, as I consider the ruling in the case of *Tottenham, appellant—Meadows, respondent*, has decided that residence is not required in the case of free burgesses, and that franchise is not abrogated by the 2nd and 3rd Wm. 4, cap. 88, s. 9. Dated at New Ross, the 20th October, 1862. WILLIAM N. BARRON, Chairman for the County of Wexford."

Frederick Shaw (with him *J. P. Hamilton*) for the appellant.—The present case differs essentially from *Tottenham, app.; Meadows, resp.* (2 Ir. C. L. 572, and 5 Ir. Jur. 127). The admission of Mr. Tottenham as a free burgess in the present case took place before the Reform Act; in the other case the admission was subsequent to it. The present case comes directly within s. 9 of the Reform Act as that of a person who, "by reason of any corporate or other right is now entitled to vote," and therefore residence

is necessary, both under the Reform Act and under st. 13 and 14 Vict. cap. 69, s. 14.

There was no appearance for the respondent.

CHRISTIAN, J.—The court is of opinion that the decision of the Chairman in this case must be reversed. He seems to have proceeded upon the assumption that the case of *Tottenham app.; Meadows, resp.*, ruled the present case. With respect to that it is not necessary to say more than that the facts of the two cases are very different. In that case the admission of the party as a free burgess of New Ross did not take place till after the passing of the Reform Act. It was not an admission in right of birth, marriage, or service, or by virtue of any statute, nor was the party an honorary freeman. The consequence was that he did not come within any of the classes provided for by s. 9 of the Reform Act. Not within the first class which is that of freemen and so forth "now entitled to vote," because he did not obtain his franchise until after the Act; not within the second class, because, although he was admitted after the Act, it was not by reason of birth, marriage, or service, or of any statute then in force; and not within the third class because for the reasons stated in that case he was not an honorary freeman. The court there seems to have assumed, without much discussion, that it followed from the fact of the party not being within s. 9 of the Reform Act, that he was not within s. 14 of the st. 13 and 14 Vict. cap. 69. I say nothing upon that. I only say the party in the present case plainly comes within the words of the 9th section of the Reform Act as a person "now by law entitled to vote," and therefore comes within the provisions of the section as to residence, and therefore, also within section 14 of the st. 13 and 14 Vict. cap. 69. The decision, therefore, of the Assistant Barrister must be reversed.

Shaw applied for costs.

CHRISTIAN, J.—The 83rd section of st. 13 and 14 Vict. cap. 69, expressly enacts that we are not to be at liberty to make any order for costs against or in favour of a respondent who does not appear before us.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

STUDDART v. JELICO AND ANOTHER.—Nov. 19, 21.

Policy of Insurance—Interest—St. 3 & 4 Vic., c. 105, ss. 53, 54.—Operation of Statute.

Sec. 53 of st. 3 & 4 Vic., c. 105, extends to the case of a policy of insurance effected before the passing of the statute, but becoming payable after its passing; and when such a policy was sued upon, it was held that the jury was justified, the proper notice having been served, in giving the plaintiff interest upon the principal sum secured by the policy.

THIS was a motion on behalf of the plaintiffs, to show cause against a conditional order obtained by the defendant, on the 4th of November, directing that the verdict had for the plaintiffs at the last summer assizes for the city of Limerick, before Christian, J.,

should be set aside, and a verdict entered for the defendant instead thereof, pursuant to leave reserved, on the ground of misdirection of the learned judge. The action was brought by the executors of Mr. Jonas Studdart, against the defendant, the Secretary to the Eagle Insurance Company, upon a policy of insurance, dated the 19th October, 1827, upon the life of the said Jonas Studdart, for the sum of £500. By the particulars endorsed on the plaint, there was claimed (besides the principal sum of £500) £80 4s. 11d., for interest from the 24th September, 1859, till the 29th April, 1862, the day of the commencement of the action, with further interest until paid. The defendant lodged in court £500. The only issue was, whether the plaintiffs had, by reason of the breach by the company of their agreement, sustained any, and what, further or greater damages than the said sum of £500. Jonas Studdart died on the 25th September, 1859. Several letters passed between his executors and the company, which at first declined to pay the policy without some proof of the age of Jonas Studdart when he effected it. On the 5th November, 1861, the plaintiffs' attorney wrote to the officers of the company a letter, stating that he had peremptory orders to proceed for recovery of the amount of the policy, with interest, if not paid forthwith. The amount not having been paid, the present action was brought. Upon the trial of the issue stated above, the learned judge ruled that the letter of the 5th November, 1861, amounted to a demand of interest within s. 53 of the st. 3 & 4 Vic., c. 110, and that that statute affected policies of insurance in existence at the date of its passing, and left as a question to the jury, whether they thought fit to allow interest from the 5th November, 1861, to the issuing of the writ. To these rulings and directions counsel for the defendant objected, and his lordship reserved liberty for the defendant to apply to enter a verdict for the defendant in case he should not have so ruled. The jury found for the plaintiffs £12 1s. 8d. The only question upon the present argument was, whether interest was payable upon a policy of insurance effected before the passing of the st. 3 & 4 Vic., c. 105, and in existence at the date of its passing.

Carke, Q.C. (with him *Barry, Q.C.* and *M. B. Smith*), for the plaintiffs.—If any question should arise upon the subject, *Mowatt v. Lord Lonsborough* (3 E. & Bl., 307), and s. c. on appeal (4 E. & Bl., 1), are authorities to show that the letter of the 5th November, 1861, was a sufficient demand of interest. Then as to the main question in the case. Previous to the st. 3 & 4 Vic., c. 105, interest was not recoverable upon demands of this description. Sec. 53 of that statute enables a party to recover interest. It will be said that, because certain policies are provided for by s. 54, policies of insurance cannot come at all within s. 53. But it is plain that *prima facie* they do come within it; the amounts secured by them are sums payable "at a certain time" in one sense, and certainly are sums payable "otherwise," within the very words of the section. The words of the section are large enough to include policies then in existence. Sec. 54 applies only to policies effected after the passing of the Act. There is no case directly bearing upon the present question.

Heron, Q.C. (with him *Jellott*), for the defendant.

—The Legislature having provided for policies of insurance in certain cases, by s. 54 of the Act, they cannot be held to be within s. 53. The only true way to construe the Act is by having regard to the rule, that, except in cases expressly mentioned, a statute is to be held to be prospective only, and not retrospective. [*Hayes, J.*—The sum secured by the policy never became a sum payable until after the passing of the Act, although the contract was entered into before the Act. The Legislature might have intended to provide for the case of policies made after the Act by the 54th section, and as to policies existing at the date of the Act, to leave the parties to take the course of making a demand of interest, as pointed out by sec. 53.] An Act of Parliament is not to be taken to vary contracts existing at the date of its passing. At common law no interest was payable on a contract which did not expressly provide for it: *Woolley v. Jackson* (8 E. & Bl. 778); *Moss v. Durdan* (2 Exch., 35); *Perry v. Skinner* (2 M. & W., 471); *Broom's Legal Maxims*, 29; *Edmunds v. Lawley* (6 M. & W., 285); *Moore v. Philips* (7 M. & W., 576); *Chappell v. Purday* (12 M. & W., 363); *Ashburnham v. Bradshaw* (2 Atk., 36); *Attorney-General v. Lloyd* (3 Atk., 541); *Gilmore v. Shuter* (2 Lev., 487). Assuming that the sum secured by a policy of insurance is a sum payable either "at a time certain" or "otherwise," there was no object in introducing the 54th section.

O'Brien, J.—The sum in this case is a very small one; but the amount must be thrown out of consideration, and we must decide the case upon the law only, without any reference to the merits or demerits of the opposition made by the company. It has been contended that policies of insurance are not within section 53 of the statute 3 & 4 Vic., c. 105, because they are provided for by sec. 54. It has been remarked by my brother Fitzgerald, that a certain class of policies, as marine and fire policies, would not be provided for by the 53rd section. Then the question is, whether, because life policies effected subsequently to the passing of the Act are expressly provided for by the 54th section of the Act, we are prevented from giving their natural construction to the words of the 53rd section, on which construction they would include policies effected after the passing of the Act, as well as the 54th section. Now, where the words are large enough to include one class of a particular thing, I am yet to learn that we are to restrict their meaning because another class of the same thing is provided for by another section. That would not, in my opinion, be sufficient reason for restricting the clear and natural construction of the words of the 53rd section. Well, the next argument for the conclusion at which we arrive is, that the words of the 53rd section are clearly sufficient to include a policy such as this. The sum secured by it is a debt or sum certain. There is nothing to be implied—no reason why this policy effected before the passing of the Act should not be included in the section. It is difficult to separate this argument from the other, that the operation of this section is not retrospective in this sense, that it should not be considered to apply to debts which had their inception before the Act, and we were told by Mr. Heron that there was no case leading to the conclu-

sion that any of the sections of the Act were to be considered as retrospective. Other sections of the Act, however, have been held to apply to a state of things existing before the Act, and that, too, in cases of much greater hardship than the present one. A question upon this very 53rd section was raised in the case of *Berrington v. Phillips* (1 M. & W. 48). The Act upon which that case came before the court, was the 3 & 4 Wm. 4, c. 42, the 28th and 29th sections of which are analogous to those, the effect of which we are now discussing, and that Act, it is to be remembered, was passed in 1833. The question in the case arose upon a bill of costs, the last item in which bore date in 1831. A claim for interest was made and resisted, but upon other grounds than the Act not being retrospective, and finally was rejected, but it never occurred to anyone to suggest that the costs were incurred before the Act, and that, therefore, the Act did not apply. The matter, however, does not rest there. Looking at the subsequent sections of the same Act, we find an important provision relating to writs of error in section 30, which enacts that if any person shall sue out any writ of error upon any judgment in any personal action, and the Court of Error shall give judgment for the defendant therein, then interest shall be allowed by the Court of Error for such time as execution has been delayed by such writ of error for the delaying thereof. That section is clearly prospective, and consequently, on that ground, the court, in the case of *Burn v. Carvillio* (1 Ad. & Ell. 895), where the writ of error had been sued out before the Act, granted an application to disallow interest which the Master had allowed. In a note to that case, another case is referred to upon another section of the same Act. That is the case of *Freeman v. Moyes* (1 Ad. & Ell. 338). The 31st section of the Act gives costs against executors who have been non-suited, or against whom a verdict has passed, and in the case which I have mentioned it was held that where an action was commenced by an executor before the Act, and the trial took place after the Act, and there was a verdict against the plaintiff, he was liable to the costs. We were referred to Lord Tenterden's Act. There are repeated decisions shewing that that statute applies to cases which had arisen before its passing. Under these circumstances, it is too much to contend where the words of the statute are large enough to embrace the case of policies in existence at the passing of the Act, and the words of another section, expressly apply to policies effected after the Act, that we are bound on the general doctrine to give judgment for the defendant. In my opinion we are not so bound, and the point must be ruled in favour of the plaintiffs.

HAYES, J.—It may be some satisfaction to have a judicial decision on the question in this case; but I confess I thought, on a reading of the Act, that the point was clear enough without any decision. It appears to me on the 53rd section, that without giving it a retrospective effect, we may come to a conclusion in this way. It deals only with "debts or sums certain, payable at a certain time or otherwise," and it would seem to me that this means, that wherever after the passing of the Act there should be a debt or sum certain, payable at a time certain or otherwise,

then the creditor to whom that money is so payable should not be at the mercy of his debtor, to be kept aloof from time to time by the debtor refusing to pay that which was properly due, and that when he would at last be driven into a court of justice, he should not merely get a verdict which would fail to do complete justice, by not giving him interest, but the Act says the jury may give interest where the debtor will not pay the debt which he fairly owes. Apply that here. In 1827, the policy is effected; but it never becomes a debt or sum certain, until Mr. Studdart died, which is not until 1859, nineteen or twenty years after the Act passed. Then for the first time it can be said that there is a debt or sum certain, and then the Act applies, as I think, without any retrospective operation being given to it. The company refuse to pay, and a jury says they ought to pay, and we think that there is law to make them pay, both principal and interest. The 53rd section is large enough to give the interest, and we do not think that its force is taken away by the 54th section, because that section happens expressly to give interest on policies of assurance made after the passing of the Act.

FITZGERALD, J.—I also think that the 53rd section applies to debts which have become payable after the passing of the Act, and that there is no foundation for the argument that you must exclude from the operation of the Act all contracts entered into before its passing. I think in that sense the Act is retrospective, where the contract is entered into before the Act, and the debt becomes due after it; I do not think there is any hardship in so holding, as the party gets notice that interest will be demanded, and can avoid it by paying what he really owes. A policy of insurance on a life, is, no doubt, a debt. I do not think it a debt payable at a time certain, but it is a debt payable otherwise than at a time certain, namely, at a time to be ascertained by the occurring of a certain event. The case, then, is within the words of the 53rd section, which are general, and intended to apply generally. I asked if there would be any difficulty at all in the case but for the 54th section. There would be none; and that section appears to me to raise no difficulty. It puts all policies effected after the Act upon this footing, that the jury may give damages in the nature of interest over and above the money recoverable upon them, without any notice being served. The other section, which embraces all policies, requires the service of a notice claiming interest.

Conditional order discharged, with costs.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

LITTLE v. COMYN.—Dec. 4.

Unattested Will—Evidence of Handwriting—Further proof.

In cases of unattested wills, made before 1st Vic. c. 26, which are impeached, evidence of the hand-

writing of the deceased is not of itself sufficient; there must be additional evidence to connect the will in some way with the deceased.

THIS was the last, it is believed, of the venerable cases which flourished in the Prerogative Court; the litigation first commenced in 1837, as to the earlier will, and in 1843, as to the later. The case had gone to the Court of Delegates on an appeal from an interlocutory order, and the proceedings were stayed by that court until the promovent should give security for costs; but, after the Probate Act passed, the case came back to the Probate Court, and, by consent, it was now heard on the evidence already had. The case had been fully argued.

Dr. Darley and Graydon for the promovent.

Dr. Walsh, Dr. Ball and Beytagh for the impugnant.

KEATINGE, J.—This suit was instituted by Mrs. Anna Maria Bennet Little, as a principal legatee in the alleged will of John Stanislaus Comyn, deceased, dated the 28th March, 1834, to obtain a decree in favour of that will. The citation issued on the 8th June, 1843, and the promovent propounded that will as unattested, and as all in the handwriting of the deceased. It purports to have been written at Holyhead, on the 28th March, 1834, and it gave all the testator's property to his brother, Francis Comyn, "he first paying to my dear friend, Anna Maria Bennett Little, the annual sum of £500, by quarterly payments, for her life." [The learned judge then proceeded to refer to an earlier, but an attested, will, of the 22nd September, 1832, which had been also alleged by the promovent to the same effect, and which had been decreed for by the late Dr. Radcliff, the former judge of the Prerogative Court, but whose decree had been reversed on appeal by the Court of Delegates; and, on a review of the evidence, in this cause, he held that the will of the 28th March, 1834, was a fabrication, and was not written or signed by the deceased.] But distrusting, as I do, my own judgment on the question of handwriting. I will assume that I am wrong in the conclusion I have, on the evidence, arrived at; and that the will alleged is all in the handwriting of the deceased. I will now proceed to consider if, on other grounds, the will can be admitted to probate. It is quite settled that, in cases of unattested wills, proof of handwriting alone is not sufficient, and that, in addition to the evidence of handwriting, there must be something more proved, to connect the document with the deceased. That connection may be established in a variety of ways. No specific rules can be laid down as to what that evidence shall be, as no two cases are, perhaps, exactly alike; but the ordinary mode is to show that the paper was found in the usual depositories of the deceased, or that he conversed about it to his friends, or alluded to the provisions of it, which are not found in any other paper; but here there is nothing of the kind; there is no evidence that it ever was in the possession of the deceased, save the evidence in the case, that it was transmitted in a franked envelope from Holyhead to London. It is not alleged that the deceased ever spoke of it, or that it was ever alluded to in his presence. The

authorities are clear and express on this point, *Machin v. Grindon* (2 Cas. temp. Lea, 333, 406), *Saph v. Atkinson* (1 Add. 215), *Constable v. Steibel* (1 Hag. 60), *Bussell v. Marriott* (1 Curt. 9), *Rutherford v. Maule* (4 Hagg. 224), and in *Hichings v. Wood*, (2 Moo. P. C. C.), Lord Lyndhurst was quite satisfied with the handwriting, but held that there must be something more to connect it with the deceased. For these reasons I am of opinion that if the handwriting were proved to my satisfaction, it would be necessary still for the plaintiff to go further, and first to establish that the deceased was at Holyhead at the date of the will. [His lordship then went minutely through the evidence, and arrived at the conclusion that the deceased had not been at Holyhead at or about the alleged time, but was then in Galway, and on a review of all the evidence in the cause he pronounced a decree condemning the will.]

Landed Estates Court

[Reported by R. H. V. Archer, Esq., and H. Fewcott, Esq.
Barristers-at-Law,

[BEFORE JUDGE HARGREAVE.]

THE ESTATE OF WILLIAM M'AULEY AND OTHERS,
OWNERS; EX PARTE ANDREW MARSHALL, PETITIONER,

Lease of lands in mortgage made by mortgagor and mortgages—Rent reserved to the mortgagor—Nature of such a rent—The lands sold in the Landed Estates Court.

A., a lessee under a perpetuity lease of 1829, mortgaged his interest by assignment of the lease to B. Subsequently, in 1831, A. and B. demised a part to C. for lives renewable for ever, at £6 rent; but the rent was expressly reserved to A., the mortgagor. And in 1836, A. and B. demised the whole in perpetuity, at £55 rent, to D., saving the existing under-leases. No rent was paid by C. since 1839, and in 1861, D. brought an action of ejectment to recover the rent, in which he failed, on the ground that the rent was reserved to the mortgagor, who had no estate at law. The court having made an order to sell D.'s interest under the lease of 1836, the petitioner sought to sell that interest subject to C.'s lease of 1831. C. objected on these grounds—first, that the rent under the lease of 1831 being reserved to the mortgagor, was a mere rentcharge, which had been barred by non-payment for over 20 years; secondly, that on the construction of the deed of 1836, the reversion expectant on the lease of 1831 did not pass to D.; and, thirdly, that even if the reversion passed, the rent did not pass, not being a rent service, incident to the reversion, but a mere rent-charge, and so requiring a separate grant, and the deed of 1836 contained no mention of the rent. Held, that the rent (though reserved to the wrong party) was a rent reserved by a lease for the use and occupation of land, and that it continued to be payable as long as the use and occupation continued under the lease; and that C., the

tenant, could not in the Landed Estates Court raise the question of construction on the deed of 1836, this being a question of title for the court alone. The tenant cannot look further than is necessary for the preservation of his lease; he cannot do more than insist that the lands, if sold, shall be sold subject to his lease; he has no right to question the authority of the court to sell the lands.

THIS case arose upon the final notice to the tenants under the 24th General Rule, which stated, amongst the leases subject to which the lands were sought to be sold, a certain lease in perpetuity dated the 13th Jan. 1831, of certain premises in Cromac-street, in the town of Belfast, at the yearly rent of £6, and a person named James John Hannan was returned as the tenant entitled to the lease, and in possession of the premises under it. To this notice Mr. Hannan filed an objection, alleging that the premises in his possession formed no part of the estate of the owners in the matter, and that he had paid no rent to anyone for over twenty years. The interest sought to be sold was a lease for lives renewable for ever, dated the 26th November, 1836, from William Wauchop and Bryan Cooney to John M'Auley, the title to which was derived as follows:—On the 12th June, 1829, the Marquis of Donegal demised to Bryan Cooney, for lives renewable for ever, certain premises on the West side of Cromac-street. Cooney subsequently mortgaged these premises to one William Wauchop by assignment of the lease; and Cooney and Wauchop, the mortgagor and mortgagee, sub-demised a portion of the premises by lease of the 13th January, 1831, for lives renewable for ever, at the rent of £6. This lease reserved the rent to the mortgagor, Cooney, and the lessee covenanted with both mortgagor and mortgagee to pay the rent. By deed of the 26th November, 1836, Cooney and Wauchop demised to John M'Auley, amongst others, the premises in the lease of 1831, in perpetuity, at the rent of £55. This deed was very unskillfully drawn. The description of the premises purported to be demised, followed the head lease of the 12th of June, 1829, "excepting all such grants and leases as had theretofore been made by Cooney (the lessee in the head lease) to the different tenants." The tenant, Hannan, did not deny that he held the premises No. 109 Cromac-street, under the lease of the 13th January, 1831. The case made by him was that he was not tenant to M'Auley, the owner, in this matter, and that he was not liable to any person for the rent of £6 reserved by that lease. In point of fact, an action of ejectment had already been brought by the M'Auleys against Hannan to recover the rent, in which action Hannan had been ultimately successful, on the ground that the rent was not incident to any reversion, being reserved to the mortgagor. Mr. Law, on behalf of Hannan, in support of the objection, contended, first, that the rent reserved by the lease of January, 1831, was not a rent service. It was a rent reserved not to the owner of the reversion, but to a person who had no estate at law. It was reserved to the mortgagor, Cooney, who, at law, was a stranger to the estate; consequently, the rent was a mere rent-charge, and not incident to the reversion expectant on the determination of the lease.

This rent has not been paid to anyone since the year 1839, and being a mere rent-charge, is now bound by the Statute of Limitations. Mr. Hannan has, in fact, obtained a verdict in an action of ejectment brought against him by the owners in this matter for the recovery of the rent. If the court should convey the premises subject to the lease, it might injure the tenant, by giving a new remedy against him for the recovery of this rent. Secondly, the assignment of the 26th of November, 1836, did not pass the premises comprised in the lease of the 13th of January, 1831; it did not pass the reversion expectant on that lease. The deed does not mention this reversion; it only purports to demise such part of the premises in the head lease of 1829, as had not theretofore been granted away, or leased by Cooney, the lessee, in the head lease. It excepts "all such grants and leases as are heretofore made by Cooney to the different tenants." It appears clear, therefore, that the M'Auleys, deriving title under the deed of 1836, are not the owners of these premises in Cromac-street, demised by the lease of January, 1831. And thirdly, even if that deed did pass the reversion expectant on the lease of January, 1831, it did not pass the rent. The rent did not pass as incidental to the reversion, for it is a mere rent-charge, and not a rent service. The rent is not mentioned in the deed of 1836. There is no grant of the rent. A grant of lands will not pass a rent-charge issuing out of them.

Mr. Charles Andrews (with him *Mr. W. Andrews*) for the owners.—Although the deed of 1836 is very informal, and in some respects obscure, yet it is quite clear that it was the intention of the parties to demise the premises in the lease of 13th January, 1831, and that the reversion expectant on that lease did in fact pass by the deed. The exception in the deed of the parts "granted and leased by Cooney to the tenants," was not an exception of the premises, but only of the "tenants' interests." The meaning plainly was this, that the deed of 1836, should be an assignment of the entire premises, but subject to the leases theretofore made by the assignor, Cooney. The deed, therefore, clearly operates as a grant of the reversion expectant on the lease of January, 1831; and as to the nature of the rent reserved by that lease, it is not a mere rent-charge. It is a rent reserved by a lease, though by mistake reserved to the wrong party, and there is a covenant to pay the rent during the term. This is clearly not a rent-charge, and the Statute of Limitations does not apply to a rent of this kind. The court is about to sell the premises comprised in the lease of January, 1831, and must, therefore, sell them subject to that lease, and thereby preserve all the rights and obligations of the tenant under the lease.

HARGREAVE, J.—This is an objection filed by a person who has been served with the usual notice to tenants, representing him as holding certain houses on the west side of Cromac-street, in Belfast, under a lease of 13th Jan. 1831. The objector raises various points; he denies that he is Macauley's tenant, and, in effect, claims to hold free from rent during the term created by the lease, but not as tenant to any person. The facts are these:—By a lease of 12th June, 1829, the Marquis of Donegal, the owner in fee, demised to Bryan Cooney, for lives renewable for

ever, a piece of ground on the west side of Cromacstreet, containing 173 feet in front, and 92 feet in depth, at £5 rent. Cooney subsequently mortgaged the field, by assignment of the lessee, to William Wauchop, and Wauchop and Cooney both joined in the demise of 13th Jan., 1831. The rent was, thereby, reserved to Cooney, who had no interest at law, and the tenant covenanted with Wauchop and Cooney to pay the rent. The instrument under which Macauley derives title is a deed of 26th Nov., 1836, by which Wauchop and Cooney purport to demise to Macauley for lives renewable for ever, at £55 rent. It is one of the questions in the case, whether this demise included the piece of land demised by the lease of 1831. No rent has been paid for more than 20 years under the lease of 1831; and on an ejectment for non-payment of rent Macauley was defeated, in consequence of the rent being reserved to the mortgagor, who had no reversion at law. The tenant is apprehensive, and not without reason, that if this court should convey subject to the lease of 1831, he will hereafter be estopped from questioning the fact of his tenancy, and will lose the benefit of the technical point which served him in the ejectment. If the court, however, comes to the conclusion that the rent is still payable under the deed of 1831, and that the reversion passed by the lease of 1836, the court must convey subject to the lease of 1831; and would, certainly, not go out of its way to prevent the just and beneficial operation of the Act of Parliament, in attaching the rent to the reversion, and making it recoverable as rent due to a landlord. In the next place, he contends that the rent created by the deed of 1831 is a mere rent-charge; and that, as such, it is extinguished by the fact of its non-payment for 21 years. It appears to me, however, that this is rent reserved by lease (although it is reserved to the wrong party) for the use and occupation of land; and so long as the use and occupation continue under the lease, so long is the rent payable, although it cannot, at present, be recovered by ejectment. I should consider the point as more doubtful, if the rent had been granted to some party not in privity with the reversioner either at law or in equity. But here the rent is reserved to a mortgagor, who, so long as anything remains due on the mortgage, is a trustee for the mortgagees, the legal reversioner. It has not been, and could not be, successfully contended that the reversion is barred by the non-payment of rent; and, when the lives in the lease have dropped, Mr. Hannan will not be able to

renew without recognising the relation of landlord and tenant, and paying some portion, at least, of the arrears of rent. If I am correct in the views which I have taken as to the position of Mr. Hannan, it appears to me that the further point which he has raised, viz., whether the reversion passed by the deed of 1836 to Macauley, is one which he is not in a position to raise. A tenant has no right, in this court, to question the authority of the court to sell the land of which he is tenant. All that he can legitimately do is, to take care that if the court sell the land his lease is properly preserved. The point is fully open to him upon an ejectment, or upon any proceeding to recover the rent; for, otherwise, he might be made liable to pay the rent twice over. But if this court convey the lease of 1836 subject to the lease of 1831, the tenant's rights are fully protected; and it is a question of no interest to him, whether the court be or be not justified in conveying the lease of 1836. I allowed the case, however, to be argued on his behalf, as he insisted on a right to be considered not as a tenant at all; but I shall not decide the question definitely, until Cooney or his representatives have been brought before the court.* The construction of the deed is one of great difficulty; but I incline to think that, notwithstanding the recital of an agreement to demise a portion of the field included in the lease of 1829, the whole of the field passed by the operation of the deed. If any part was excepted, I find it impossible to determine what the part is, for the clause added immediately before the execution of the deed shows clearly that it was not intended to except all which had been sub-demised to tenants; and indicates that the exception of previous grants and leases meant a saving of those grants and leases, but not an exception of the reversion expectant on them. As to costs, I cannot regard Mr. Hannan's conduct as meritorious; and, on the other hand, there has been extraordinary neglect on the part of those interested in Macauley's estate. I will direct Hannan to pay £8 costs, which are to cover the costs given by my former order; and the petitioner must have the residue of his costs, including those of the motion of 12th June, as costs in matter.

* If the reversion expectant on the determination of the lease of 1831 did not pass by the deed of 1836; it would remain vested in the representatives of Cooney, the grantor in that deed, who have, therefore, a right to be heard on the question.

Law and Equity Index,

TO

THE IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE FOURTEENTH VOLUME OF THE IRISH JURIST, (THE SEVENTH OF THE NEW SERIES,)

AND IN THE

TWELFTH VOLUME OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

* * The letters at the conclusion of each paragraph indicate the titles of the Reports digested, and the names of the respective Courts, thus:—*Ir. Jur.*, Irish Jurist—*Ir. C. L. R.*, Irish Common Law Reports—*Ir. Ch. R.*, Irish Chancery Reports—*C.*, Chancery—*R.*, Rolls—*Q. B.*, Queen's Bench—*C. P.*, Common Pleas—*E.*, Exchequer—*Cir. Cas.*, Circuit Cases—*Ex. Cham.*, Exchequer Chamber—*Reg. C.*, Registry Cases—*Crim. Ap.*, Court of Criminal Appeal—*L. E. C.*, Landed Estates Court—*Adm.*, Admiralty Court—*M. O.*, Master's Office—*Consol. Cham.*, Consolidated Chamber—*P. C.*, Judicial Committee of the Privy Council—*B. C.*, Bankrupt Court—*H. L.*, House of Lords.

ACQUIESCENCE, *see* DECREE, HUSBAND AND WIFE, STATUTE OF LIMITATIONS, STATUTE.

ADMINISTRATION BOND, *see* PROBATE (COURT OF).

ADMINISTRATION, LETTERS OF, *see* PROBATE (COURT OF).

AMENDMENT, *see* BILL OF EXCEPTIONS.

ANNUITY.

Payment of and recovery of arrears.] A testatrix, having devised several annuities, directed that they should be a lien only upon the yearly income of her lands, real, freehold, and chattel real, but not upon any other personal estate or money. She also directed that if the yearly income of her lands should fall short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be visited upon her personal estate. After satisfying the above annuities she devised the residue of her property, real and personal, to the residuary legatee. The rents of the lands were not sufficient to discharge the annuities in full. Held, that the annuities were satisfied by the payment of proportionate shares, and that the arrears were not charged on the future rents. *Fitzgerald v. O'Connell*, 7 Ir. Jur., N. S., 6.

By a deed dated the 4th of November, 1858, the incumbent of a parish granted an annuity to A., payable on the 1st of May and the 1st of November, charged upon the tithe-rent charge, and the rents of the glebe lands; the deed contained a power of entry and distress in case any half yearly gale of the annuity should be twenty-one days in arrear. On foot of

a judgment obtained against the incumbent in Hilary Term 1861, a sequestration was issued against him on the 19th of April in the same year. The sequestrator collected the rents and tithe rent-charge due on the 1st of May then ensuing. Held, that the grantee of the annuity was entitled to the monies collected by the sequestrator; and that the annuitant's rights were in nowise impaired by the fact of the half yearly gale not being twenty-one days in arrear at the time of the filing of his cause petition. *Irvine v. Frew*, 7 Ir. Jur., N. S. 72; and 12 Ir. Ch. Rep. 418.

By articles under seal between X., father, and Y., his eldest son, in consideration of the son's intended marriage, the father granted an annuity, during his life, to the sons; and after the death of the father it was agreed that the son should pay to B., a daughter of X., an annuity of £15 a year; if she should marry without assent, the annuity to return to the son. Then after limiting the lands, the articles conclude,—“And it is further agreed that the said X. is to give up to the said Y., after his death, all the said lands, he, the said Y., paying and fulfilling all and every the covenants recited in this article?” Held, that these articles operated as a covenant to stand seised, and that Y. took the estate, subject to B's annuity. *Maguire v. Scully*, 12 Ir. Ch. Rep. 153.

See STATUTE OF LIMITATIONS, WILL, (Construction.)

APPEAL.

Costs pending appeal to House of Lords.] Where the Court of Appeal in Chancery reverses a decree of the Court of Chancery, dismissing a petition with costs, it will not restrain the respondent from levying his costs, pending an appeal to the House of Lords, even upon security for them being given, save under very peculiar circumstances. The court will not regard the solvency of the parties. *M'Carthy v. M'Carthy*, 11 Ir. Eq. 399, distinguished. *Spread v. News*, 7 Ir. Jur., N. S. 11; and 12 Ir. Ch. Rep. 335.

ARBITRATION AND AWARD,

Costs in.] Where an action for 109*l.* 11*s.* 4*d.* was after service of summons and plaint, and before defence filed, referred to arbitration, the submission providing the costs should abide the result of award; and that the arbitrator should inquire into certain claims of set off on the part of the defendant which otherwise would have been barred by the Statute of Limitations, and the award adjudged that the defendant was indebted to the plaintiff in the sum of 18*l.* 10*s.* Held that the plaintiff was entitled to full costs. *Owens v. Vanhomrigh*, 7 Ir. Jur. N. S. 200.

Enlarging time for award.] A. and B. parties in three actions, submitted all matters in dispute between them to the arbitration of C. B. became bankrupt after the arbitration had been entered upon, and before any award had been made by C., who had inadvertently allowed the enlarged period within which the award was to be made to expire without further enlargement. The assignees of B., without having become privies to the proceedings under the submission, moved the court, under the Common Law Procedure Act (Ireland), 1856, s. 18, to enlarge the time for making the award. Held, that the court, even if it had the jurisdiction, would not enlarge the time, there being no mutuality between A. and the assignees of B. *Gaffney v. Killen*, 12 Ir. C. L. Rep., app. xxv.

ARRANGEMENT, *see* BANKRUPTCY AND INSOLVENCY.

ARREST.

Privilege from.] A barrister attending the taxing master to explain charges in costs, being fees paid to him in a suit in which he was counsel, but not being professionally instructed to make such explanation, is not privileged from arrest. *Gibson v. —*, 7 Ir. Jur., N. S. 206.

ASSIGNMENT.

Notice of.] *See* NOTICE, BANKRUPTCY AND INSOLVENCY.

ATTACHMENT.

Money in the sheriff's hands levied under an attachment for costs, awarded by a decree, remains *in custodia legis*, and is not, without further order, the property of the party who has issued the attachment. *Williams v. Reeves*, 12 Ir. Ch. R., 178.

An attachment for costs was issued by A. and B. (A.'s solicitor) against C., who paid the amount to the sheriff, and lodged with him a sequestration for a larger amount against A. Held that the sheriff was not justified in paying the amount received on the attachment to the sequestrators without the order of the court. *Id.*

Costs are decreed to be paid by C. to A., or B., his solicitor. An attachment is delivered to the sheriff. C., who has a demand against A., issues a sequestration for it, pays the costs to the sheriff, and lodges the sequestration with the sheriff. *Semble*—If the money be paid into court, B's lien for costs will prevail over C's sequestration. *Id.*

ATTORNEY AND SOLICITOR.

Admission of.] C. F. M. applied to be admitted an attorney of the Court of Queen's Bench, before the expiration of his apprenticeship, and was admitted, upon satisfying the court by affidavit of his professional competency, and that his admission was necessary to the interests of, and in accordance with the wishes of, the family and clients of his deceased father, who also had been an attorney. *In re Mulhall*, 12 Ir. C. L. R., app. xxi.

ATTORNEY AND CLIENT.

Authority of attorney.] Where an attorney signs a consent for judgment in an action, in which the writ of summons and plaint was never served on the defendant, it lies on the plaintiff to prove that he had the authority of the defendant to do so. *Synnott v. Greene*, 7 Ir. Jur. N. S., 278.

Under the above circumstances, and the plaintiff failing to prove the attorney's authority, the court will set aside the judgment as irregular. *Id.*

Solicitor's lien for costs.] Where a solicitor whom his client has ceased to employ, produces a deed of the client, upon which the solicitor claims a lien for antecedent costs,

and thereby enables the client to recover a fund in a suit in which the solicitor has acted, his lien upon that fund is confined to the costs due to him in the suit in which the fund was so recovered. *In re Bayley's Estate*, 12 Ir. Ch. R., 815.

H., solicitor of B., held possession of the title deeds of B's estate, and claimed a lien thereon for antecedent costs. H. then presented a petition on behalf of B., for a sale of the estate in the Landed Estates Court. An order for costs having been made, B. changed her solicitor, and a judge of the court made an order that H. should lodge the title deeds subject to lien. Held, that H.'s lien upon the fund realised in the Landed Estates Court was confined to his costs in that matter. *Id.*

Duty of solicitor having carriage of proceedings in Landed Estates Court.] The solicitor having the carriage of the proceedings cannot act as solicitor for the purchaser in a claim for compensation against the funds, because his duty in the one capacity is inconsistent with his duty in the other. As solicitor having the carriage of the proceedings, it is his duty to protect the estate from claims to compensation, and all similar demands, and consequently he cannot be allowed to make or support such claims. *O'Callaghan, owner; Reeves petitioner*, 7 Ir. Jur. N. S. 86.

Where the solicitors for the owners, not having the carriage of the proceedings, filed an objection impeaching certain tenants' leases, without the leave of the court, and served a notice of motion that the objection be allowed, and the leases set aside accordingly; and it appearing, the objection having been overruled on the merits, that the owners were unable to pay the costs incurred by the tenants, the court made the solicitor personally liable for the costs, as this was a proceeding clearly contrary to the practice of the court. *Freeman, owner; Connolly, petitioner*, 7 Ir. Jur., N. S., 88.

The solicitor having the carriage of the proceedings is the only person who can take any active steps towards the sale in a matter, unless the court, in any particular case, shall otherwise direct. *Id.*

BANKRUPTCY AND INSOLVENCY.

Act of Bankruptcy.] A creditor of the bankrupt had notice of a deed of sale executed by the bankrupt to another creditor, which was in terms a conveyance of all his stock in trade, but evidence *abundante* was given that the residue of the bankrupt's property was of some value. Held, that such deed of sale constituted an Act of Bankruptcy. *Re John O'Brien*, 7 Ir. Jur. N. S. 148.

Held, also, that the first-mentioned creditor having had notice of the execution of that deed, had notice of an act of bankruptcy, where the surrounding circumstances were sufficient to draw an inference that the bankrupt's property had been substantially conveyed. *Id.*

Quare, is notice of an execution of a deed by a trader notice of an act of bankruptcy where the deed, on the face of it, does not disclose an act of bankruptcy? *Id.*

A deed of assignment by a trader executed to trustees for the benefit of all his creditors, in which the forms prescribed by the 93rd section of the Bankruptcy and Insolvency Act are complied with is valid, although it contains a clause excluding creditors who should not come under it within a specified time, from all benefit thereunder. Such deed will not be deemed an act of bankruptcy under the 92nd section of the Act, but will be protected by the 93rd section when more than three months elapse between its execution and the bankruptcy. *Re Patrick Phelan*, 7 Ir. Jur. N. S., 281, and 12 Ir. Ch. R., 467.

Adjudication.] Where a person who has traded in England comes to reside in Ireland, after such trading had discontinued, and never traded in Ireland, and then, after a residence of three years here, commits an act of bankruptcy, by filing a declaration of insolvency, and then a friendly petition for adjudication is presented; this is not a trading that will support such adjudication. But even if all the requisites of trading existed, if the bankruptcy is had recourse to to rid the bankrupt of his liabilities, and not for any purpose beneficial to his general creditors, the court, in the exercise of its equitable jurisdiction, will annul the bankruptcy upon the petition of the creditors dissenting, although some of the creditors may be in favour of the bankruptcy proceedings being continued, and the petitioning creditor will have to pay the costs. *Re W. A. Day*, 7 Ir. Jur. N. S. 163.

The 31st section of the Irish Bankruptcy and Insolvency Act, does not make it necessary that there should be a rat-

dung in or to Ireland, although the trader may be exclusively resident in Ireland, to give the court jurisdiction to make him bankrupt. Where an English trader comes to Ireland, for the purpose of getting an adjudication to rid him of his liabilities, and that adjudication is annulled, the trader is then arrested at the suit of a creditor, and presents his own petition for adjudication, the court will refuse to adjudicate on the same ground that the first adjudication was annulled. *Re W. A. Day*, 7 Ir. Jur. N.S., 207.

Order and Disposition.] Where a trader executes a bill of sale of chattels, by way of mortgage, which contains a clause that he is to retain possession of the goods until a certain day, by which time he was to have paid the advances made him—the mortgagee, notwithstanding this clause, demanded possession of the goods three days after the execution of the mortgage, which was refused by the bankrupt on the ground that it was inconsistent with the terms of the deed, in which refusal the mortgagor appeared to acquiesce, and they continued in the apparent ownership of the mortgagor at the time of his bankruptcy. Held, that the goods and chattels were in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner, and that they passed to his assignees. *Re A. Sim*, 7 Ir. Jur., N.S., 264.

Where a trader dies owing debts to a considerable amount, and leaving assets, and his widow continues the trading in the same way as her husband did, and contracts new debts on her own account, and in the mean time takes out administration over husband's assets, those assets will be liable in the first place to pay the debts due by her husband, and although they remain in her possession a considerable time, and a large portion of them are sold to pay a bond debt due to the trustees of the marriage settlement of the bankrupt, they will not be held to come under the order and disposition clause, but as far as they have been ascertained to belong to the deceased, they will be applied to the payment of this debt where there has been no unnecessary delay on the part of the trustees. *Re L. Roberts*, 7 Ir. Jur., N.S., 339.

Fraudulent Preference.] Although a debtor may legally prefer one creditor to another, under certain circumstances, and pay him by a transfer or handing over of goods to him, yet if that transfer takes place by night, or in a surreptitious manner, it is, at least, *prima facie* evidence that the trader contemplated bankruptcy, and where bankruptcy immediately followed, and it appeared that the trader was then in insolvent circumstances, the creditor will be compelled to pay the assignees the value of the goods so obtained with costs. *Re F. Johnson*, 7 Ir. Jur., N.S., 124.

Where a trader, as security for money borrowed, makes an assignment of teas to the creditor, who has no intimation that the trader is embarrassed, when that assignment is made without any application on the part of the creditor, it will be deemed a fraudulent preference, and the assignees will be entitled to the property so assigned. *Re J. McCoots*, 7 Ir. Jur., N.S., 188.

Where traders get fictitious bills discounted in a bank as ordinary trade bills, and before those bills become due, the traders find themselves embarrassed, and in order to prevent a prosecution or exposure, the traders go to the bank and take up those bills, and bankruptcy ensues when those facts are disclosed—Such payment will be deemed a fraudulent preference, and the bank will be compelled to bring in the amount for the benefit of the general creditors. *Re F. and R. Reid*, 7 Ir. Jur., N.S., 404.

Refusal of certificate or protection on ground of misconduct of bankrupt or insolvent—Remand.] Where an insolvent attempts to account for property disposed of immediately before his insolvency, by saying he paid a debt he owed to a person, who he alleged had left the country, and swears positively he can give no other account, he will be remanded the fullest period the law will permit, instead of dismissing his petition. *Re Smith*, 7 Ir. Jur., N.S., 120.

Where an insolvent is sued in an action for damages, for not fulfilling his contract by delivering a horse purchased from him, and after two trials, the plaintiff gets a verdict for one farthing damages, but whilst the litigation is pending, the insolvent sells and assigns his property, and pays his brother and his landlord, and when arrested for the costs he has no property, he will, notwithstanding, be entitled to his discharge. *Re P. Maglone*, 7 Ir. Jur., N.S., 130, *coram* Major, Chairman Co. Monaghan.

Where a trader petitions under the arrangement clauses,

and obtains protection for person and property upon untrue statements, and whilst the arrangement is pending disposes of his property, and keeps no books. Upon the case being adjourned into bankruptcy, the examination will be adjourned *sine die* and protection refused. *Re P. Kelly*, 7 Ir. Jur., N.S., 122.

Where an attorney is adjudicated a bankrupt as a bill broker, and on coming up for final examination, it appears that he lost large sums by betting on horse racing, his examination will be adjourned *sine die* with a view to prevent him obtaining his certificate. *Re R. J. Parsons*, 7 Ir. Jur., N.S., 206.

Where a trader disposes of partnership property for his own use, unknown to his partner, his certificate will be suspended for eighteen months. *Re Alexander Sim*, 7 Ir. Jur., N.S., 262.

Although the demeanor and deportment of a bankrupt in court, when under examination, is calculated to make a favorable impression as to the truth of his statements when accounting for money alleged to have been lost by him out of his portmanteau, still when the facts connected with that loss are of a suspicious character, and that the statement is not corroborated, the court will not pass the final examination. There is a vast difference between the grounds on which the court may see reason to doubt the truth and fulness of the discovery of a bankrupt, and the evidence that would warrant a criminal prosecution. *Re J. McCoots*, 7 Ir. Jur., N.S., 18; and 12 Ir. Cl. Rep. 454.

Statutable allowance to bankrupt, how calculated in a case of partnership.] R. L., of the firm of L. and Co., trading in England, and also in Ireland, was made bankrupt in Ireland. The other member of the firm was made bankrupt in England. R. L. having obtained his certificate in Ireland, applied for the statutable allowance under the 802nd and 803rd sections. Held, that the allowance should be calculated on his separate estate and on his share of the joint estate, but not on the whole joint estate. *Re Lunham*, 7 Ir. Jur., N.S., 408; and 12 Ir. Cl. Rep. 471.

Litigation by a bankrupt or his assignees.] When a bankrupt has stated and settled an account with his partner, and where afterwards there is a decree of the Court of Chancery deciding that such account ought not to be reopened, the Bankrupt Court will not, under the circumstances, give its sanction to the bankrupt or his assignees to continue litigation by way of appeal for the purpose of going behind the decision of the Court of Chancery, except it can be shown that there is manifest error on the face of the account that was not discovered during the Chancery proceedings; or unless it can be shown that some substantial benefit will result to creditors. But, as the Master in Chancery was of opinion that the account ought to be opened, although the Court of Appeal was of a different opinion, the Bankrupt Court will not hold that the bankrupt, who filed a bill for an account, was guilty of wanton litigation. *Re Alexander Sim*, 7 Ir. Jur., N.S., 262.

Proof of debts—Election.] Where a suit is instituted in Chancery for the administration of a deceased trader's assets, and one of his creditors files a claim, it will not be deemed an election, or prevent the trader from proving on the estate of his administrator, who becomes bankrupt. *Re L. Roberts*, 7 Ir. Jur., N.S., 339.

Liability of petitioning creditor to costs.] Where a creditor procures an adjudication in bankruptcy for the purpose of overreaching a trust deed executed for the benefit of creditors, and where there are no assets, unless he succeeds in doing so, he will be compelled to lodge a sum of money to meet the costs. *Re P. Phelan*, 7 Ir. Jur., N.S., 281.

Mortgages and Mortgagees.] Where a mortgagee makes his proof under the arrangement clauses, and the case was afterwards turned into bankruptcy, such proof under the arrangement will not be deemed an abandonment of his right as mortgagee, but, on the contrary, it will be deemed an establishment of that right where the mortgage property had been valued, and credit given for what it was worth, and this is not in contravention of the ruling of the Landed Estates Court, that a specific incumbrancer, proving in an arrangement matter as a general creditor, could not afterwards, when the case was turned into bankruptcy, claim on foot of his specific charge. *Re G. Wilson*, 7 Ir. Jur., N.S., 328.

Fixtures.] Although a water-wheel can be removed by taking off the caps, and removing the boxes, and this may be done without injury to the freehold, still it is a fixture not coming under the order and disposition clause; and although

the shafting and gearing put in motion by, and in connexion with it, may be also removed without injury to the freehold, they are also fixtures. Beating engines standing upon stones raised above the floor, attached to one another, made steady by their own weight, and attached to the joists above by stays, and, when at work, put in motion by the driving shaft of the outside wheel, are also fixtures, and, in case of a mortgage by the bankrupt, they go to the mortgagee. *Re R. and T. Dill*, 7 Ir. Jur., N.S., 123.

Notice of assignment of choses in action.] Where policies of insurance are assigned by bill of sale as security for money advanced to a trader, and no notice of the assignment is given to the Insurance Company before the bankruptcy, the assignees are entitled to the proceeds. *Re J. M'Coote*, 7 Ir. Jur., N.S., 188.

Rights of vendee against assignee.] Where goods were sold for which a bill was passed, and a memorandum given to the purchaser that they were to be kept to his order subject to the amount of the bill, and they are in possession of the vendor at the time of the bankruptcy of the vendee, he has a right to retain them, and, an application by the assignee, to get them for the general creditors, leaving the vendor to prove for his debt, will be refused with costs. *Re T. Gilbert*, 7 Ir. Jur., N.S., 121.

Where a third party purchases bonded whiskey from a trader who afterwards becomes bankrupt, and who has acquired his title thereto by the lodgment of delivery orders, and that third party does all he can to get possession of the property before bankruptcy takes place, his title will prevail against the assignees. *Re T. Hughes*, 7 Ir. Jur., N.S., 386; a.c., 12 Ir. Ch. Rep. 450.

Stoppage in transitu.] The 4th section of 11 & 12 Vic. cap. 122, refers only to contracts to be recognised by the excise, as enabling parties to deal with whiskey in bond, and still to be continued in bond in the changed proprietorship consequent on the contract, and it has nothing to do with the immediate delivery to the party purchasing. Possession of bonded whiskey from the vendor to the vendee is transferred by the lodgment of the delivery orders, with the bonded storekeeper, without any transfer being made by the excise officers in their books, and after the lodgment of the delivery orders, the right of stoppage *in transitu*, on the part of the unpaid vendor, is gone; the goods after the lodgment of the delivery orders being regarded by the excise officers as the property of the party named in the delivery orders, and that the whiskey would be delivered to the party named in such order, notwithstanding a countermand from the distiller. *Re T. Hughes*, 7 Ir. Jur., N.S., 386; a.c., 12 Ir. Ch. Rep. 450.

Assignee, liability of.] Where an assignee files an account and never proceeds to vouch it for upwards of twenty years; and in the meantime undertakes to make a lease of the insolvent's real estate to his own son, and then sells the property in the Landed Estates Court, subject to this lease, thereby obtaining a confirmation of it, the court will, in the first instance, compel him to file a new account, and to vouch it, and the previous one filed. And it will, notwithstanding such confirmation by the Landed Estates Court, charge him with the letting value of the lands during the whole term of the lease; and he will be directed to lodge that amount in court, together with interest at five per cent. And he will be disallowed the amount of his poundage and expenses, and directed to pay the costs of creditor's making the application against him. *Re J. F. Comyn*, 7 Ir. Jur., N.S., 226.

Bail rule—Habeas Corpus.] Where the case of an insolvent was partly heard before an Assistant Barrister, or chairman of a county, after and ascertaining the merits of the case, he adjourned it to the next quarter sessions, and directed the protection to be withdrawn, the court will not entertain either an application for a bail rule, or for liberty to apply to the Queen's Bench for a *habeas corpus* to have the insolvent brought up to be heard in Dublin. The 202nd section of the Act does not apply to such a case. *Re John Paul*, 7 Ir. Jur., N.S., 20.

Jurisdiction in petitions for arrangement.] Where a creditor proves his debt for the purpose of voting against an arrangement which he alleges is not legally carried, and the arranging traders apply for an order to quash the affidavit of debt, and an injunction to restrain the creditor from proceedings; the court has jurisdiction to grant the application, although the course of proceeding pointed out by the 104th section is to apply for an extension of time to pay or compound the debt, and if such application had been made, an extension

would have been granted, beyond the time, for carrying out the arrangement. Where mere irregularities, not affecting the merits of the case, take place in the reception of proofs, the court will allow them to be corrected in a subsequent *ex parte* application on the part of the arranging traders. *Re A. and B.*, 7 Ir. Jur., N.S., 207.

BENEFICE, See ECCLESIASTICAL LAW.

BILL OF EXCEPTIONS.

Amendment.] Where, upon the settling of a bill of exceptions, the judge before whom the case was tried has sanctioned the insertion into it of answers given by the jury to questions propounded to them at the trial, but which questions formed no part of the original issues, but were eliminated by the judge, and left to the jury with a view to their arrival at a true verdict, it is not competent to the court out of which the record came, upon motion by the plaintiff and defendant, to amend the bill of exceptions, or the *postea* with which it is incorporated, by striking out the answers so inserted. (Christian, J., *dissentiente*.) *Thelwall v. Yelverton*, 7 Ir. Jur., N.S. 260, C.P.

BILL OF EXCHANGE AND PROMISSORY NOTE.

Defence in action on note.] In an action against the maker of a promissory note, it is competent to him to plead, by way of equitable defence that the note in question was made in consideration of recovering back securities which had been deposited with the plaintiff by the defendant on account of a bill of exchange, of which the defendant was the acceptor, the plaintiff representing to the defendant at the time of the deposit that the defendant was then liable upon the bill of exchange, when, in fact, he was not liable, owing to the intervening acts of the plaintiff. *Bristow v. Brown*, 7 Ir. Jur., N.S. 153.

Practice under Summary Procedure on Bills of Exchange Act, 24 & 25 Vict., c. 43.] Application for leave to defend an action brought on a bill of exchange under this Act should be moved before a judge in Chamber. *Andrews v. Ball*, 7 Ir. Jur. N.S. 13.

A summons and plaint issued under the Summary Bills of Exchange Act (Ireland), 1861 (24 & 25 Vict., c. 43) must be confined to causes of action on foot of bills of exchange; but it may, in addition to the usual counts on bills of exchange, include one for an account stated, if the particulars indorsed be limited to the bill of exchange. *Gray v. Murphy*, 12 Ir. C. L. R., 547, and 7 Ir. Jur. N.S. 60.

Summons and plaint set aside, it being brought under the Summary Procedure on Bills of Exchange Act, and containing counts for money lent, money paid, also on an account stated. *Parkinson v. Cooke*, 7 Ir. Jur. N.S., 335.

A motion to restrain the plaintiff from proceeding with an action under the recent Bills of Exchange Act until he should give security for costs, the plaintiff being out of the jurisdiction, must be grounded on a full affidavit of defence, and not on the mere statement that he has a valid defence on the merits. And, *semble*, the defendant should previously have had liberty to appear and defend. *Martin v. Wilson*, 7 Ir. Jur. N.S. 335.

The 97th section of the Common Law Procedure Act, 1856, will apply to actions of contract brought under the Summary Bills of Exchange Act, 24 & 25 Vict. c. 43, so as to deprive a plaintiff of costs when the sum recovered is less than £20. *Copeland v. Armstrong*, 7 Ir. Jur., N.S., 82.

Money paid within six days from the service of a summons and plaint issued under the Summary Bills of Exchange Act is money "recovered" within the meaning of the 97th section of the Common Law Procedure Act, 1856. *JA*.

BILL OF SALE, See VENDOR, BANKRUPTCY.

Sufficiency of affidavit to register.] The witness to a bill of sale was therein described as "now of no occupation," and this was repeated in the affidavit filed pursuant to the statute. The jury found that no better description of his occupation could have been given. Held, that the bill of sale was valid as complying with the requirements of the Act in this particular. *Trousdale v. Shepherd*, 7 Ir. Jur. N.S., 275.

CARRIERS.

Reasonableness of conditions in special contract. Railway

and Canal Traffic Act, 17 & 18 Vict., c. 81.] A special contract for the conveyance of horses by railway was signed by the person sending them, whereby it was agreed that the defendants should in no case be responsible for the delivery of said horses at any particular time, and should be free from all liability with respect to them, whether in loading or unloading during conveyance, or while in the Company's vehicles or on their premises. This contract was contained in a printed form, and was called condition A.; under condition B., at a higher rate, the company were to be liable for any injury pointed out at delivery. Plaintiff paid at lower rate. The horses were injured in transit by the rail, and the special contract was pleaded in defence to an action for damages. To this there was a replication by plaintiff, and on demurrer to the replication it was Held—

That condition A., by itself, was unreasonable, and that the contract could only be made reasonable in case the alternative condition B. were reasonable; that condition B. was unreasonable in obliging the party to point out the injury at the time of unloading, and consequently that the contract was unreasonable. *Lloyd v. Limerick and Waterford Railway Company*, 7 Ir. Jur. N. S., 240.

CERTIFICATE, See COSTS, VERDICT.

CHARGING ORDER.

Debtor under decree of Court of Chancery.] A debtor under a decree of the Court of Chancery is not one whose interest in a fund in the Landed Estates Court can be charged under section 185 of the Common Law Procedure Act (Ireland) 1853. *Commissioners of Charitable Donations and Bequests v. Archbold*, 7 Ir. Jur. N. S. 74.

CHARITY.

What amounts to a charitable bequest.] A bequest of £2000 to certain specified purposes, or to such other purposes of promoting industry and art, as my executors in their discretion may think fit. Held, a charitable bequest, and therefore free from legacy duty. *Attorney General v. Bagot and Leech*, 7 Ir. Jur., N. S. 82.

Lodgment of money in court, and petition for reference to approve of a scheme.] Where an executor had lodged the amount of a charitable legacy in court, under the Trustees Relief Act, and presented a petition praying for a reference to the Master to approve of a scheme, Held, that the petition so presented ought to be entitled, under Sir Samuel Romilly's Act, 53 Geo. III., c. 101, and ought to be sent to the Attorney-General. *Kelly's Trust*, 7 Ir. Jur. N. S., 278.

COLONIAL JUDGMENT.

Examination of, in this country.] The court held a colonial judgment good notwithstanding an error in the pleading, where the time for appealing to the Privy Council had long elapsed, and the declaration disclosed a cause of action. *Jack v. Teaze*, 7 Ir. Jur., N. S., 9; s.c., 12 Ir. Chan. Rep., 279.

COMPENSATION.

In case of Incumbered Estates Court conveyance.] Upon the petition of S., an order for the sale of the estate of O., a tenant for life, was made by the Commissioners of the Incumbered Estates Court. A survey of the estate was ordered by the Commissioners, and the printed rental stated that "a book of maps, approved of by the Commissioners, may be inspected at the office of the solicitor having the carriage of the sale." The description and quantities of "Lot 14" in the rental and in the map were identical. Amongst other denominations therein comprised, was "Coolacarra, Mountain, held in common by tenants, 363a. 2r." In 1855 Lot 14 was conveyed to the wife of A., as representative of a deceased son, whose guardians had purchased it in 1853. Upon the application of Mr. A., it was ordered that a map of Lot 14, approved of by the Master of the Incumbered Estates Court, should be endorsed upon the conveyance. The conveyance contained no reference to the map, but the denominations and quantities in both were the same. Shortly after possession had been given by the sheriff to A. and his wife under the conveyance, upon the application of S., an order was made by the Commissioners of the Incumbered Estates Court, dismissing the petition and order for sale as to the unsold portions of O.'s estate, the latter undertaking to pay the petitioner's post costs, and the

balance of interest due on foot of certain incumbrances discharged by the produce of the sale, mentioned in a schedule, and also to abide any further order of the Commissioners in the matter. The title of A. and his wife to portion of the lands of Coolacarra having been disputed, in 1859, A. and his wife brought an action for trespass against H., and gained a verdict. At a second trial, obtained upon the ground of the admission of illegal evidence on the preceding one, the conveyance of the Incumbered Estates Court was rejected, and the jury found that 270 out of the 368 acres described as Coolacarra in the rental, conveyance, and map, were never known by that name, and were the property of H. A. and his wife applied to a judge of the Landed Estates Court, that the order dismissing the petition and order for sale of O.'s estate should be varied, and further portions of O.'s estate sold, to pay them compensation for the loss and severance of the 270 acres, as also the amount of the costs incurred by them in both trials. The judge of the Landed Estates Court ruled that A. and his wife were entitled to compensation for the value of the 270 acres, and that, pursuant to O.'s undertaking in 1855, he was bound to pay the same; but he refused to give any compensation for the costs incurred, or for severance. O. having appealed from the whole of this order, and A. and his wife having appealed from the latter portion of it. Held, that the map was not so incorporated with the conveyance as to pass the lands comprised within its ambit. *Otway's Estate*, 7 Ir. Jur. N. S., 189.

That the doctrine of compensation, as applied to conveyances under the Court of Chancery, does not apply to conveyances from the Incumbered or Landed Estates Court, who alone are responsible for the vendor's title. *Id.*

That no order could be made against O. personally, as the undertaking by O., upon which the order for the sale of his estate had been dismissed, applied only to the matters mentioned in the schedule thereto. *Id.*

That O.'s creditors could not be compelled to bring back into court the sums paid to them. *Id.*

And that (reversing the order below) A. and his wife were not entitled to any compensation whatsoever. *Id.*

CONACRE LETTING.

Effect of, in case of covenant against subletting, &c.] A letting in conacre is not a "parting with the possession," or a "ceasing to occupy" premises, within the meaning of a covenant in a lease reserving a penal rent, in case the lessee should at any time underlet, set, assign, or make over, or part with the possession or occupation of the premises, to any person, or cease to occupy the same, or do any act whereby the premises or any part thereof, should come into the possession or occupation of any person other than the landlord, without the landlord's consent. (*Fitzgerald, B., dissentiente.*) *Booth v. M'Manus*, 12 Ir. C. L. Rep. 418.

Effect of, upon franchisee, see FRANCHISE.

CONDITIONS OF SALE, See VENDOR AND PURCHASER.

CONTRACT.

Yearly hiring subject to be determined on notice.] F. agreed with B. in the following terms:—"I agree to serve Major B., as steward from May 31st, 1858, for £80 per annum, &c. &c.; three months' notice required on either side." F. was wrongfully dismissed from the employment by B. during a current year, without any previous notice. Held, that the hiring was a yearly one, subject to be determined by either party, by giving to the other three months' notice before the end of the current year, and that damages should be assessed on that principle. *Forgan v. Burke*, 12 Ir. C. L. Rep. 490.

Construction of.] A contract for the sale of a cargo of mixed maize then on its way from New York to Sligo contained a condition that should the vessel which carried it not arrive at Sligo on or before the 20th June, 1861, the contract should be void. Held, that this condition requiring parol evidence to explain it, and issue being taken upon its fulfilment, the construction of the contract was a question for the jury. (*Monahan, C. J., dissentiente.*) *Montgomery v. Middleton*, 7 Ir. Jur. N. S. 870.

Specific performance.] In 1857, a landlord, in reply to an application from his tenant, wrote to him, "I will give you a lease of one life or twenty-one years, containing the usual covenants," &c. The tenant wrote, "In reply to your letter,

I beg to propose paying you for all the land I hold in E., thirty shillings per Irish acre, subject to survey, from the 1st day of May next. As to a lease, you may do that as you please, and whatever you choose to insert in it, as I only want the land during my life which is now midway between sixty and seventy." The landlord replied, "I conclude that you meant to add 'and so in proportion to any fractional part of such Irish acre,' if so, I agree to complete that proposition. I will have a survey made as soon as possible," &c. And he afterwards wrote, "If you have a wish for any particular life to be named, I will leave it to you to do so." And in another letter, "I think you said that you wished for the lands only for your own life; if that be so, I am willing to meet your wishes." A dispute arose as to the quantity of land, and nothing further was done until 1859, when the tenant furnished a draft lease, for the life of the Prince of Wales, adopting the landlord's measurement. After the death of the tenant the court refused a specific performance. Letters will not constitute an agreement which the court will specifically perform unless the answer is a simple acceptance without the introduction of a new term. *Wright v. St. George*, 12 Ir. Ch. Rep. 226.

Statute of Frauds. R. was put into possession of certain lands by H., the bailiff of F.B., the son and agent of R.B., the owner of the lands. H. made at the time an entry in his field book of the terms upon which he put R. into possession, and R. paid the fine and rent mentioned in the terms. Sometime afterwards H. copied the entry of the letting from his field book into the office book of the owner of the lands, and signed it. In a suit for the specific performance of the agreement disclosed by the above entries, Held, that the entry in the office book was an agreement within the Statute of Frauds; that it was sufficiently put in issue by the petition, which alleged generally an agreement in the terms of the entry in the field book; that, under the circumstances, the adoption by F.B. of the letting made by H. was a ratification binding upon R.B.; that in suits for specific performance, this court will grant relief when satisfied of the terms of the contract, notwithstanding that the evidence for the petitioner may be conflicting in some details; that the words, "subject to the existing leases and lettings made to the under-tenants of the said R.B." are words of qualification only, and will preserve the rights of such under-tenants against a purchaser claiming under a registered deed, although without notice. *Rice v. O'Connor*, 7 Ir. Jur. N.S. 109; and 12 Ir. Chan. Rep. 424.

Specific performance, uncertainty of contract. The court refused to grant a decree for the specific performance of a covenant to plant and replant a particular place with forest trees, the contract being too uncertain to be enforced by a court of equity. *Bernard v. Meara*, 7 Ir. Jur. N.S., 383; and 12 Ir. Ch. Rep. 389.

Notice of abandonment of contract. A. went into possession of a house and land immediately adjoining the house and land of the lessor, under an agreement for a lease. The lessor insisting upon a reservation of game in the lease, as to which the agreement was silent, A. abandoned the agreement, but did not give notice in writing of his having done so for some months after he had left the premises. Held, that the lessor, by reason of A.'s movements being known to him and his servants, had notice of A.'s abandonment of the agreement when A. quitted the premises. *Guillamore v. Peacocks*, 7 Ir. Jur., N.S., 24; and 12 Ir. Ch. Rep., 354.

Objection for want of consideration. The summons and plaint stated that P. applied to plaintiff to lend him £100, and proposed to give to plaintiff a deed of assignment of premises at, &c., together with the original title deeds, to be held by plaintiff as an equitable mortgage for securing the repayment of said £100; to which application plaintiff agreed to accede, on the condition that said deed of assignment should be duly registered. Averment, that defendant undertook and promised to act as plaintiff's attorney in carrying into effect said agreement, and, as such, undertook and promised to have said deed duly registered, and by writing undertook, when same should be duly registered, to hand same to plaintiff with the original deeds, to be held by plaintiff as an equitable mortgage until said £100 should be paid by P.; that relying on said promise and undertaking of defendant, plaintiff lent P. said £100 on the security aforesaid. That defendant, not regarding his duty as plaintiff's attorney, nor his said undertaking, neglected to register said deed, and to hand same to plaintiff with the original deeds: by reason whereof P. was enabled to assign and did assign said deed of assignment to

one K., who by virtue of such assignment claimed to be entitled to said deeds, on the security of which plaintiff lent said £100; and that by reason of such negligence of defendant, plaintiff lost the security for and also said £100. Demurrer on the ground that no sufficient consideration for the promise of defendant was stated in the summons and plaint, overruled, the action being maintainable on the ground of defendant's retainer as plaintiff's attorney, and the failure of his duty as such, whereby the plaintiff was damaged, as also upon the ground of the violation, by the defendant, of his undertaking to effect the agreement between the parties. *O'Hanlon v. Murray*, 12 Ir. C. L. Rep., 161.

Illegality of consideration. An agreement between a creditor and an insolvent, whether founded upon a pecuniary or other consideration, that the creditor will discontinue a threatened opposition to the discharge of such insolvent, being in contravention of the policy of the Insolvent Code, is invalid. *Dillon v. Stephenson*, 12 Ir. C. L. Rep., 81.

Action upon a bond.—Defence, that before the making of the bond, one T. was indebted to D. and divers other persons, and being so indebted, and being a prisoner for debt, petitioned the Court for the Relief of Insolvent Debtors for his discharge; that the court appointed a day for said T. to be brought up, &c. That said D. had notice of the premises and had threatened to oppose the discharge of said T. That said T. omitted from the schedule the debt of D, but not at the instance of D. That before the hearing of said petition, and while D. so continued such creditor, and continued and expressed his determination to oppose the discharge of said T., it was agreed between said D. and the defendant, that said D. should not oppose the discharge of said T., and that, in consideration thereof, the defendants should make and deliver said bond. That upon the faith of said illegal contract, defendants executed said bond, and that said D. in performance of his part of said illegal contract, did not oppose the discharge of said T. Replications, first, that the said debt so due to said D. was not returned upon or mentioned in the schedule of said T. Second: That said bond was not made and delivered upon said agreement and consideration as in defendants' plea stated. Demurrer to the replications allowed. *Id.*

Per Fitzgerald, J.—When a statute is passed for the purpose of carrying out a particular object, any contract or arrangement entered into to defeat or contravene that object is against the policy of the Act. *Id.*

What amounts to an acceptance. G. a merchant residing in D., having sent some guano from D. to L., employed an agent to sell same at 12½ 5s. per ton, net cash. C. a merchant in L., in consequence wrote to G., offering to take the guano, provided G. would purchase in return another lot belonging to C. G. wrote in reply, accepting the offer for the purchase of his lot, but agreeing to take only five tons of C.'s lot to be paid for by a bill. On receipt of this letter, C. at once shipped the five tons for D., consigned to G. In the course of the same day, G.'s agent called on C., to inform him that G. declined to sell his lot of guano to C. unless the carriage from D. to L. were paid, in addition to the price of 12½ 5s. This being refused, G. refused to deliver his lot to C., or to receive the five tons from C., who brought an action accordingly. The jury found that the mercantile meaning of the term "net cash" was, that the seller, and not the buyer, should pay the freight to L. Held, that the fact of C. putting the five tons of guano on board, consigned to G., prior to the conversation with G.'s agent, was such an acceptance as rendered the contract complete and binding on G. (*Christian, J., dissente*) *Clarke v. Gardiner*, 12 Ir. C. L. Rep., 472.

CONTEMPT, COMMITMENT FOR.

Power of Court of Common Pleas to consider the propriety of the decision of the Queen's Bench in case of. A party in contempt was ordered by the Court of Queen's Bench to be imprisoned for the term of six calendar months then next ensuing, in the Richmond Bridewell, South Circular Road, in the county of the City of Dublin; and by a subsequent order, the custody was changed, for the remainder of the term, to the Richmond Female Penitentiary, Grange-gorman, in place and stead of the said Richmond Bridewell. She afterwards obtained a writ of *habeas corpus*, returnable in the Court of Common Pleas; and upon a return to the writ by the governor of the last-mentioned prison, setting forth the order of the Queen's Bench as the ground of the prisoner's detention, it

was argued on her behalf, that the Court of Queen's Bench, since the 7 G. 4, c. 74, s. 114, had no power to commit to the prison in question, so that the prisoner was in illegal custody. Held, that without deciding the question of the authority of the Court of Queen's Bench to commit the prisoner to the Richmond Female Penitentiary, the Court of Common Pleas had no power to consider the propriety of the decision at which they had arrived, and that the prisoner should accordingly be remanded. *In re Ayleard*, 12 Ir. C. L. Rep., 448.

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Action for piracy.] The summons and plaint in its several paragraphs complained that the defendant in two books of his printed, &c., for sale, divers parts of the plaintiff's book, and thereby pirated the said parts of the plaintiff's books contrary to the statute 5 & 6 Vict. c. 45. To this the defendant pleaded that J. R. M. was the author as well of the defendant's books as of the plaintiff's book; that he composed the plaintiff's book in 1855, and the defendant's books in 1860; that the books were of a different character; and that the entire of each of them was composed partly from certain knowledge, learning, and ideas which said J. R. M. then had in respect of the subject matter of the said work, and partly from common sources of information, and every part of defendant's books was the result of fair mental operations of J. R. M. upon said common sources of information; and that no part of defendant's books or either of them was copied or colourably altered from the plaintiff's book. Held, first, that the summons and plaint disclosed a sufficient cause of action; and secondly, that the defence was bad. *Rooney v. Kelly*, 7 Ir. Jur., N.S., 213.

COSTS.

Where less than 20l. or 5l. recovered in Superior Court.] Action for work and labour. Pleas; first, a set-off of 10l., and secondly, never indebted except as to a balance of 45l. tendered. This sum had been tendered before action brought. Issues on the fact of tender, and as to whether the defendant was indebted to the plaintiff over and above the sum lodged in court, and if so, to what amount. The jury found for the defendant on the first issue, and on the second, a verdict was had for the plaintiff for 8l. over and above the 45l. lodged in court. The plaintiff did not obtain a certificate that the cause was proper to be tried in a superior court. The taxing-master refused to certify for full costs. Held, (Fitzgerald, J., dissenting), that the plaintiff was entitled to full costs. *O'Rourke v. McDonnell*, 7 Ir. Jur., N.S., 140.

A plaintiff recovering less than 20l. in an action against common carriers for the loss of goods delivered to them, is disentitled to full costs by the Common Law Procedure Act, 1853, s. 243. *Keenan v. Lancashire and Yorkshire Railway Company*, 7 Ir. Jur., N.S., 378.

The plaintiff recovered 5l. in an action in the superior courts, for trespass upon premises previously recovered in an action of ejectment between the same parties. The judgment in ejectment failing to describe the premises more minutely than as being "part of a house, part of shop," &c., Held, that the action of trespass was one which could not have been tried in the Civil Bill Court, and that the plaintiff was entitled to costs. *Lyons v. McDonnell*, 7 Ir. Jur., N.S., 350.

Certificate that action was proper to be tried in a superior court.] Where, after the jury have been sworn, the subject-matter of the action has been by consent referred to a few of their number, with a condition that the finding of the majority of them should be conclusive of the questions pending between the plaintiff and defendant, and the award of the selected jurors has not been made until subsequently to the assizes, and when the judge before whom the case came is no longer sitting, the court, on the grounds that there has been no trial within the meaning of the 97th section of the Common Law Procedure Act, 1856, will entertain an application to have endorsed upon the record a certificate that the action was fit and proper to be tried in one of the superior courts (reluctantly following *McAllister v. Callan*, 4 Ir. Jur., N.S., 4.) *Bennett v. Scott*, 7 Ir. Jur., N.S., 299.

Where the plaintiff substantially contends that he had a right to have the water of a stream flowing in one particular way, and the defendant claims a right to have the same water flowing in another particular way, and the number of witnesses examined is considerable, the court will grant a certificate that the case was fit and proper to be tried in one of the supe-

rior courts, the damages having been assessed at a sum not exceeding 5l. *Id.*

Costs of affidavit made for purposes of motion to set aside defence as embarrassing.] Plaintiff had made, for the purpose of a motion to set aside a defence as embarrassing, an affidavit as to the merits of the case. He succeeded upon the motion. Held, that the costs of this affidavit should be excepted from the costs of the motion which were to be paid by the defendant. *Johnstone v. Sloane*, 7 Ir. Jur., N.S., 28.

Costs of special jury.] The party applying for a special jury must pay the costs of same, unless the judge certifies, even in a case where there are no more costs than damages. Where a plaintiff obtains a verdict for a sum which entitles him to no more costs than damages, such damages determine the amount of costs which he is to receive in respect of the entire suit, including those of a demurrer upon which he succeeds. *McGovern v. McNamara*, 12 Ir. C. L. Rep., app. xv.

Counsel's fees.] The taxing-master having reduced counsel's fees on taxation between party and party, not because the amount was excessive, but because the fee had been increased at the instance of the counsel, the court referred it back to the master to review his taxation as to those items. *O'Brien v. Cantwell*, 12 Ir. Ch. Rep. 231.

Semble, it would be illegal for the bar as a body to fix a minimum fee for any class of business; but any individual member of the bar may decline to take a fee less than a certain amount. *Id.*

The taxing-masters, in taxation between party and party, should only allow the usual and accustomed fee payable on each particular class of business, though a larger fee has been paid to counsel. *Id.*

Reference for taxation.] Where an action has been brought by an attorney for a sum of 68l., balance of untaxed costs, more than twelve months after the delivery of the bill thereof; and it appeared that, before action brought, the attorney had offered to take a sum of 40l. in full. Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient, under the 12 and 13 Vict., c. 33, s. 2. *Hughes v. Murray*, 7 Ir. Jur., N.S., 161.

Where there has been a new trial.] Where there has been misdirection at the first trial, and the conditional order is silent as to costs, the successful party in the second trial is entitled to the costs of both. *Powell v. Atlantic Steam Packet Company*, 7 Ir. Jur., N.S., 118.

Payment of, out of money lodged in court where default by plaintiff in not going to trial.] The costs to which a defendant is entitled by reason of a plaintiff's default in not going to trial will not, pending the cause, be made payable out of money lodged by the plaintiff in court in lieu of security for costs. *Tupper v. Dawson*, 7 Ir. Jur., N.S., 325.

Security for costs.] Where the plaintiff had resided for fourteen years in the United States of America, and took lodgings in Ireland, and the defendant applied for a rule that he should give security for costs, Held, (Lefroy, C.J., dissenting), that these grounds were not sufficient to compel the plaintiff to give security for costs. (Hayes, J., assents.) *Redwood v. Mooney*, 7 Ir. Jur., N.S., 277, Q. B.

Where a trial was, on the defendant's motion, postponed from the Spring to the Summer Assizes, and notice of trial served for such assizes, it is too late for the defendant then to apply for security for costs on the ground of the poverty of the plaintiff, and that he is only the nominee of others. *Buston v. Purdon*, 7 Ir. Jur., N.S., 324.

Semble, that (independently of laches) if the plaintiff has himself an interest and is *bona fide* asserting it, such an order would not be made, though others who have also interests have contributed funds to carry on the suit. *Id.*

Security for costs in action to recover penalties under statute 17 & 18 Vict. c. 102.] In a personal action brought to recover penalties under the Corrupt Practices Act (17 & 18 Vict. c. 102), the court will not, under the 24th section of that statute, order the plaintiff to give security for costs, solely upon the ground that he is a pauper. *Hamill v. Henry*, 12 Ir. C. L. Rep. 467.

In Landed Estates Court.] see LANDED ESTATES COURT.

In Probate Court.] see PROBATE (COURT OF.)

Under Landlord and Tenant Act.] see LANDLORD AND TENANT.

COVENANT.

The assignor of a judgment, who by the deed of assignment

covenantants not to do anything to vitiate or defeat the assigned judgment, is not entitled to enforce prior securities vested in him, so as to exhaust the property subject to the assigned judgment. *Williams v. Williams*, 12 Ir. Ch. Rep. 507.

Continuing breach of.] A lease in 1808 contained a covenant by the lessee, that he, his executors, administrators, and assigns, would at all times during the continuance of the term, well and sufficiently support, uphold, repair, maintain and keep all the houses, edifices, buildings, and improvements, which then were, or thereafter should be, at any time, built or erected on the premises, in staunch, good, and sufficient tenantable repair, order, and condition; and would at the end or other sooner determination of the term, deliver up the same in like good order, repair and condition. The lease contained a proviso for abatement of the rent, upon two dwelling-houses being built by the lessee, on the demised premises; which dwelling-houses were built accordingly. The plaintiff, who was assignee of the reversion, having evicted the lease by ejectment for non-payment of rent, brought an action against the defendant, who was assignee of the lease, for breach of the covenant to keep in repair during the continuance of the term. Defence, that the defendant, upwards of twenty years ago, and while he was assignee, had pulled down the two dwelling-houses, (which was the breach complained of) and built on their site a valuable foundry, which he had, until the eviction of the lease, duly kept in repair. Demurrer to this defence. Held, allowing the demurrer, and overruling the judgment of the Court of Queen's Bench, that the breach of covenant continued *de die in diem*, while the defendant was assignee, and, therefore, that the defence was no answer to the action. *Maddock v. Mallett*, 12 Ir. C. L. Rep. 173.

Effect of in imposing continuing obligation.] The owner of the manor of B. demised certain lands, parcel of the manor, for a long term, with a covenant to build houses thereon, and to make an area round such houses. The houses were built, and an area made, according to the terms of the lease. The lessee subsequently sub-demised one of the houses, by an instrument which did not recite, nor refer to, the original lease, nor contain any covenant respecting the area, but did contain a covenant to do suit and service to courts of the manor of B. The sub-lessee, more than twenty years before the commencement of the suit, built over a portion of the area, and subsequently assigned his sub-lease to the respondent. Held, that the covenant to make an area imposed a continuing obligation to keep the area open. *Herbert v. Maclean*, 12 Ir. Ch. Rep. 84.

That the covenant to do service in the manor courts was sufficient to have put the sub-lessee and his assignee on inquiry, and that the assignee was bound to carry out the terms of the original lease. *Id.*

That, so far as the portion covered in before his assignment he was entitled upon that to erect a porch. *Id.*

CRIMINAL LAW.

Conviction under statute 3 and 4 Vict. c. 91.] A conviction under the 3 & 4 Vict. cap. 91, (an Act for the more effectual prevention of frauds and abuses committed by weavers, sewers, and other persons employed in the linen and woollen manufactories of Ireland) s. 6, should set out that the yarn suspected of being embezzled was found in the dwelling-house of the prisoner. *Matthews, appellant, Strong, respondent*, 7 Ir. Jur., N.S., 127, Armagh Quarter Sessions.

Evidence, sufficiency of to sustain indictment.] Under the 24 & 25 Vict. c. 97, s. 51, evidence of damage committed at several times, in the aggregate, but not at any one time exceeding £5, will not sustain an indictment. *Queen v. Williams*, 7 Ir. Jur., N.S., 304.

Evidence, deposition.] To the deposition of a marksman, the Petty Sessions' clerk attached the prisoner's name, so that it appeared to have been signed by the prisoner's mark. Held, that this deposition was properly received in evidence against the prisoner. *Queen v. Mullan*, 7 Ir. Jur., N.S., 304.

Cruelty to animals; statute 12 & 13 Vict. c. 92.] The penalties imposed by the 3rd section of the 12 & 13 Vict. c. 92, on persons assisting at a cockfight are restricted to combats of that character conducted in a place particularly kept for this purpose. *Coyne v. Brady*, 7 Ir. Jur., N.S., 105; s.c., 12 Ir. C. L. Rep. 577.

Practice where writ of error in criminal case.] What is the course of practice when a writ of error issues in a criminal

case, under the Attorney General's fiat, to procure the reversal of an illegal judgment, and to have a legal judgment duly pronounced. *Queen v. Corberry*, 12 Ir. C. L. Rep. app. H.

When such an illegal judgment of a Court of Quarter Sessions has been reversed, the Court of Error will not, under the 11 & 12 Vict. c. 78, s. 5, itself pronounce the proper judgment, if the statute which enacted the punishment left its amount, within certain limits, in the discretion of the judge of the court below; but will remit the record to that court in order that the judge before whom the prisoner was tried, and who knows the circumstances of the case, may award the proper punishment. *Id.*

CROSS REMAINDERS, *see* WILL (CONSTRUCTION.)

CUSTOM.

Unreasonableness of.] A count in an action against a builder for having taken away the lateral support of a house, and having shored up and braced a certain party-wall in a negligent and unskillful manner, whereby same gave way and fell, and by reason thereof plaintiff's house fell and was destroyed, contained an averment of a custom in the city of Dublin, and in the building trade thereof, that whenever a builder takes down a house for the purpose of erecting another house on the site thereof, it is his duty to use care and skill and to take proper precautions in and about the bracing, shoring up and otherwise supporting and protecting the party walls between said house so taken down and the next adjoining houses, so as to prevent said party wall from falling or being otherwise injured from want of said care, skill and precaution. There was an averment that the defendant might, by the exercise of proper care and skill, have shored up and protected said party wall, and have prevented any injury to the plaintiff by the removal of said adjoining house. The jury having found that such a custom existed in the city of Dublin in the building trade, Held, in arrest of judgment, that such custom was unreasonable and void. *Kempston v. Butler*, 12 Ir. C. L. Rep. 516.

DAMAGES.

In an action to recover damages for the loss by the defendant, executrix of an attorney, of a certain deed of settlement, a direction was given by the judge, "That the jury might give ample damages where a party is out of possession of his property; but that such was not the case here, for the party is in possession of part of the property." It appeared that one construction of the lost deed was, that the plaintiff took an absolute interest subject to the life estates of three other persons. Held, that this was a mis-direction, that question not having been submitted to the jury in estimating the damages. *Lloyd v. Sadleir*, 7 Ir. Jur. N. S., 15.

Also, where a plaintiff has all the rights which he could get by the deed of settlement, he ought not to get heavy damages for its loss. *Id.*

DECREE IN CHANCERY.

Going behind decree after long lapse of time.] In a suit by a mortgage creditor, a decree was pronounced in the year 1818, by which S., a party to the suit, was declared entitled to the sum of 8,000*l.* under a marriage settlement of 1776. The decree was erroneous and informal, no day having been named for R., an infant tenant in tail (party to the suit), to show cause. Interest upon the sum of 3,000*l.* was paid to S. for forty years by R., and those from whom he derived, in ignorance of the true construction of the settlement. S. having filed a cause petition praying that the above sum of 8,000*l.* might be declared a charge upon the lands belonging to R., relied upon the decree of 1818 as evidence only of acquiescence by R. and his predecessors in the decree. Held, that the construction put upon the settlement of 1776 by the decree of 1818 was erroneous. *Sturum v. Richards*, 7 Ir. Jur., N.S., 69; and 12 Ir. Chan. Rep. 823.

That (reversing the order of the court below) not being pleaded, but only relied upon as evidence, the respondent could go behind the decree, and show it to be erroneous by filing a supplemental petition in the nature of a bill of review. *Id.*

Acquiescence in by minor.] The acquiescence of a minor, represented in a suit by a guardian who is interested adversely to him, is not entitled to much weight.—*Id.*

DEED.

Construction.] A. having in his marriage settlement conveyed certain leasehold estates of which he was then possessed, to trustees to hold to his own use during his life, and after his decease to the use that his intended wife should receive thereout a jointure of 80*l.* a year, covenants to charge all the lands of which he was seised at the time of his execution of the settlement, or of which he should at any time thereafter become seised, with the payment of the said jointure. The settlement then proceeds:—"And further, that the said lands, after the decease of the survivor," should be to the use of the children of the marriage. Held (affirming a decision of Judge Hargreave in the Landed Estates Court), that the words "said lands" referred to the lands then conveyed to the trustees, and that the children of the marriage did not, under the settlement, acquire any interest in the after-acquired property. *In re Hammerly's Estate*, 12 Ir. Ch. Rep. 319.

By indenture of settlement, executed previously to the marriage of A., freehold lands were settled upon trust for the younger sons of the marriage successively in tail male; and in the settlement was contained a proviso, "that if after the death of A. any of the aforesaid younger sons shall become an eldest son, and by the death of an eldest brother without issue, male, become the heir, male, of the body of the said A., then, and so often as such case shall so happen after the death of the said A., the trust for such younger son shall become void; and the trust of the said premises shall go and remain over as if such younger son becoming such heir, male, was dead without issue, male." Held, that a *quasi* estate tail vested in the second son of A. immediately on his birth, and was not divested by the death of the eldest son in the lifetime of A. *In re Friend's Estate*, 12 Ir. Ch. Rep. 367.

Held, that notwithstanding the absence of words of inheritance an estate in fee passed under a marriage settlement, the parties to which clearly intended to convey an estate in fee. *Nunn v. Donovan*, 7 Ir. Jur. N. S., 813.

See DECREE.

Consideration.] A covenant by the assignee of a term of years to pay the rent reserved in the original lease, and to indemnify the assignor against its other covenants, does not amount to a consideration in law which will support the assignment against creditors, and exclude the operation of the statute against fraudulent conveyances (10 Chas. 1, sess. 2, c. 8). *Gardiner v. Gardiner*, 7 Ir. Jur. N. S., 81; and 12 Ir. C. L. Rep. 565.

A. being seised in fee of lands, by the marriage settlement made in contemplation of his marriage, settled them upon himself for life, remainder to his first and other sons in tail. Held (the Lord Chancellor dissentiente), that A. was not a purchaser for valuable consideration of the life estate limited to him by his marriage settlement. *Re Brown's Estate*, 7 Ir. Jur. N. S. 289.

DETINUE.

In detinue, but not in trover, the defendant may release himself from liability by giving up the chattel. *Lloyd v. Sadler*, 7 Ir. Jur. N. S., 15.

The judgment in detinue must be for the ascertained value of each article, and for separate damages for the conversion. *Id.*

If a remittitur is entered for the plaintiff he may elect between his goods or their value, and his damages for their detention. *Id.*

DOCUMENTS, see PRACTICE.

DOMICIL, see PROBATE (Court of).

ECCLESIASTICAL LAW.

For matrimonial matters], see HUSBAND AND WIFE.

For testamentary matters], see PROBATE.

Chaplain to district lunatic asylum.] Officiating and preaching to the inmates and officers of a district Co. lunatic asylum without the consent of the incumbent of the parish, is an infringement of his rights as such incumbent. *The office of the Judge promoted by the Rev. Wm. C. Nelson v. the Rev. Thos. Bedford Jones*, 7 Ir. Jur. N. S., 89.

A chaplain to such a lunatic asylum is not included under the word "officers" in the statute authorising the Lord Lieutenant to appoint such. And a chaplain so appointed has no

right to officiate in such asylum without the consent of the incumbent and the licence of the bishop. *Id.*

Right of presentation to benefice: joint owners.] In 1836 a parish was, pursuant to 7 & 8 W. 4, c. 43, duly divided into three separate parishes, A., B., and C. The patronage of the original parish belonged to six persons as joint owners, whether as parsoners, joint tenants, or tenants in common, did not appear. By a deed of the 10th of June, 1851, executed by the several persons then entitled, as representing the said six persons as patrons, reciting the intention to make partition of the advowson, donative, and right of presentation to those three parishes, the said several parties mutually covenanted with each other, that those representing two of said patrons, and their heirs and assigns, should for ever have the advowson, donative, and presentation to A., and those representing two others to B., and those representing two others to C., as tenants in common for their share and proportion; and the deed contained mutual covenants by said several persons, that said respective persons should hold their share of said rectories, &c., freed and discharged from all right, &c., of the other parties and for further assurance. But no express grant was contained of any of the benefices. By a presentation of the 11th October, 1861, the persons to whom A. had been so allotted, presented the promovent to it. The other patrons did not join in that presentation. Held, that the deed of June, 1851, did authorize the parties to whom it was allotted to present without the concurrence of the others, and that the effect was in reality "a composition to appoint by turns, though not applying to each benefice. *The Rev. Robert Fitzgerald Meredith, Clerk, promovent; the Bishop of Limerick, Ardfert, and Aghadoe, impugnant*, 7 Ir. Jur. N. S., 246.

Semble, that the covenants and agreements in the said deed did amount to a legal release of the right of the other patrons. Held, also, that after service of an inhibition from the metropolitan on the bishop, the bishop could not act on a second presentation served on him after, though dated and executed before such service. *Id.*

If the church were litigious, the bishop himself should issue the writ "*jus patronatus*." *Id.*

EVIDENCE.

Incumbered Estates Court proceedings.] In an action of ejectment on the title brought to recover the lands of B., as proof of his title, the plaintiff produced and read in evidence an order of the Incumbered Estates Court for a partition of certain lands held in undivided moieties, of which one moiety was allotted in severalty to the plaintiff. It was further proved that the lands now sought to be recovered were parcel of that moiety. It was objected at the trial by the defendant, first, that the plaintiff ought to have proved the petition for partition and sale which had been presented to the Incumbered Estates Court, and on which the partition order purported to have been made, in order to show that the court had jurisdiction; and secondly, that the order was no evidence of the plaintiff's title. Held, first, that having regard to the 43rd and 49th sections of the Incumbered Estates Act, 12 & 13 Vict. c. 77, the partition order was *per se* conclusive evidence that the court had jurisdiction to make it. *Blake v. Jennings*, 12 Ir. C. L. Rep. 458.

Held also, that the partition order being only evidence that the estate to be partitioned was divisible in divided moieties, but not of the ownership of such, consequently, that it did not prove the plaintiff's title. *Id.*

Probate granted by the court in a case of real estate; notice.] Where the notice required by the Probate Act (Ireland), 1857, s. 68, 20 & 21 Vict. c. 79, has been given and no counter notice served, probate of a will obtained prior to the passing of that Act, and sealed with the seal of the Prerogative Court, is admissible in evidence upon a question relating to real estate, and does not require for that purpose to be sealed with the seal of the Court of Probate. *Irvine v. Callwell*, 12 Ir. C. L. Rep. 144.

Section 68 of the Probate Act (Ireland), 1857, only requires that the notice to be given thereunder shall state that the party giving it means to rely on the probate of the will or a copy thereof, and does not require the party giving such notice to specify the particular purposes for which he intends to make use of the probate, or a copy thereof. *Id.*

Proof of registration of judgment as mortgage.] Three links of evidence are necessary to prove a judgment mortgage under the 13 & 14 Vict. c. 29, s. 6; viz.—first, the judgment,

second, the affidavit filed in the court in which the judgment is entered; and third, the due registration of such affidavit in the office for registering deeds and wills in Ireland. *Duncan v. Brady*, 12 Ir. C. L. Rep. 171.

Semble, the proper evidence of the affidavit is an examined or attested copy, or a copy signed and certified as a true copy by the officer to whom the original is entrusted. *Id.*

Quare, whether a copy of the registered affidavit given by the Assistant-Registrar of the office for registering deeds and wills, can be produced as evidence of the registered affidavit without two days' previous notice pursuant to the 2 & 3 W. 4, c. 87, a. 87. *Id.*

A release to uses for the purpose of barring an entail was alleged to be lost. At the trial it was proved that search was made for it among the papers of the releasee to uses in the possession of his solicitor and executor, and also among the papers of the releasor in the possession of his executrix. Held, that the search was sufficient to establish the presumption that the deed was lost, and that a memorial of the deed was properly received as secondary evidence. *Moriarty v. Grey*, 12 Ir. C. L. Rep. 129.

In action of quare impedit] In an action of *quare impedit* the memorial of a deed registered after action brought is inadmissible to support an issue whether the said deed was duly registered on a given date, which issue has been joined upon a plea pleaded in bar of the action generally. *Whalley v. Lord Massareene*, 7 Ir. Jur. N. S. 278.

Secondary evidence.] A document more than thirty years old, purporting to be a copy of a lost instrument, and coming out of the proper custody, is not made evidence by an indorsement in the handwriting of the deceased family solicitor of the person claiming under the lost instrument, that he has compared the copy with the instrument, and knows the handwriting of the witnesses to the original, and of one of the parties to be genuine. *Kerin v. Davoren*, 12 Ir. Ch. Rep. 352.

EXECUTOR AND ADMINISTRATOR.

Power and liability of.] A. being tenant for life, with remainder to B. for life, of certain estates, by his will empowered his executors "to pay and satisfy any debts owing or claimed to be owing by or from the testator or his estate, and any liability to which he or his estate ought to be subject, and to accept any composition, or any security, real or personal, for any debt or debts owing to him or his estates, and to allow such time for the payment of any such debts, or composition for a debt, either with or without taking security for the same, as should be reasonable, and also to compromise and compound, or submit to arbitration and settle, all debts, accounts, transactions, matters, and things which should be owing from or to him or his estate, or be dependant or otherwise between the testator or his executors and any other person or persons, and generally to act in relation to the premises in such manner as they should think expedient, without being liable for any loss which might be occasioned thereby." The executors of A. sold arrears of rent, amounting to 45,000*l.*, to B., the incoming tenant for life of the estates, for 20,000*l.* Held, that under the above clause the executors were not empowered to sell arrears of rent. *Alexander v. Alexander*, 7 Ir. Jur. N. S. 89, overruling the decision in the Rolls, 12 Ir. Ch. Rep. 1.

That under the circumstances they had not exercised proper deliberation, nor made sufficient investigation into the condition of the estate. *Id.*

That they were doubly bound to have exercised caution in the sale, from the fact of the legatees of the arrears being minors and wards of court. *Id.*

And that as all the arrears were collected by one of the executors who had been appointed agent to B., the only measure of the executors' liability was the difference between the amount actually collected and the price at which the arrears had been sold. *Id.*

If an executrix of an attorney set up a lien for costs on deeds entrusted to her husband, she makes herself bailee of the deeds, and liable for their conversion. *Lloyd v. Sadler*, 7 Ir. Jur. N. S. 15.

Legacy to executors.] The testator by his will, after certain legacies to charities, gave to three persons whom he appointed his executors, nineteen guineas each, and then "gave and bequeathed the whole of his estate and effects whatsoever absolutely" to them, their executors and administrators, charging so much thereof as should consist of long annuities with the gifts therein mentioned, and his other stocks and funds at

three per cent. reduced annuities with certain other payments, with directions for accumulations in certain cases, with power to the executors to select and vary the investments. And his will contained a clause indemnifying the executors against any loss to be sustained by his estate otherwise than from their own wilful default; and lastly, that they should be at liberty to reimburse themselves all costs and charges out of the estate or any part of it. The M. R. held that the executors did not take the residue beneficially, but only as trustees for the next of kin—and on appeal their lordships affirmed his Honor's decision. *Saltmarsh v. Barrett*, 7 Ir. Jur., N. S., 187.

Lord Justice Turner, without reference to the statute 11 G. 4 and 1 W. 4, c. 40, but on the ground of the previous gifts to the charities and to the executors, on the ground of the gift to the executors being in joint tenancy, and of the indemnity clause to the trustees themselves, thought that the executors were merely trustees for the next of kin, and that the gift in the will was not beneficially to them. Lord Justice Knight Bruce, however, thinking that the executors were residuary legatees for their own benefit absolutely. *Id.*

Executors de son tort] Where the rightful administrator sues an executor, *de son tort*, in an action of trover, it is competent to the latter to give evidence of lawful payments in mitigation of damages. *McCarthy v. Donovan*, 7 Ir. Jur. N. S., 146.

EXTINGUISHMENT OF RIGHT OF ACTION.

To an action brought by surviving partners against defendant for a debt alleged to be due to the firm, the defendant pleaded that he had been tenant to the deceased partner of a house in which he had an interest; and that pursuant to an agreement between himself and said deceased partner, he had surrendered the said house in satisfaction and discharge of the debt in question. There was no allegation that the plaintiffs were parties to said agreement. Held to be a good defence, because the effect of the agreement having been to suspend the right of action during the life of the deceased partner, that could not revive upon his decease, but was altogether extinguished. *Crowe v. Lysaght*, 12 Ir. C. L. Rep. 481.

FEE-FARM GRANT.

Covenant in.] Action by the plaintiff, assignee of R. G., for arrears of a fee-farm rent, reserved by an indenture of grant and demise, granted by R. G. to the defendant. Defence—that by said indenture, the said R. G. did for himself, his heirs, and assigns, covenant, &c. with the defendant that he, the said R. G., his heirs and assigns, would allow out of the rent by said indenture reserved or otherwise, the price of slates and timber for the roofing of one suitable dwelling-house, and offices and entrance-lodge, if same should be erected by defendant on the lands of G., in said indenture mentioned, within seven years from the date of said indenture, but not otherwise; such dwelling house and offices to be erected by defendant, his heirs or assigns, in a permanent and substantial manner. Averment—that before the accruing of the said rent, defendant purchased slates and timber, for the roofing of one suitable dwelling house and offices, and entrance-lodge, and did erect such suitable dwelling-house in a permanent and substantial manner on said lands, within seven years from the date aforesaid, and used said slates and timber in the roofing of same; the price of which slates and timber amounted to the sum of £206 2*s.* 11*d.*, that at the time when plaintiff became entitled, plaintiff had notice of said covenant in said indenture contained; and that defendant had erected said house and offices in manner aforesaid; that said sum of £206 2*s.* 11*d.*, was, at the commencement of the suit, and still was due to the defendant, and that same exceeded the rent due by defendant under said indenture, and that defendant was entitled to be allowed, as against said rent, so much of said sum as would discharge same.

Held, upon demurrer, by O'Brien and Fitzgerald, J.J., that this defence was an answer to the action, the covenant on the part of R. G. being a stipulation regulating the mode of payment of the fee-farm rent, which attached to the fee-farm rent in its inception, and which was binding not only upon R. G., but upon plaintiff as his assignee, and of which the defendant was entitled to take advantage.

Semble, by O'Brien and Fitzgerald, J.J., that under the 12 & 13 Vict., c. 105, and 14 & 15 Vict., c. 20, inasmuch as

the plaintiff, as assignee of R. G. the grantor, took the rent with all the remedies which R. G. as grantor was entitled to for its recovery, so he took it subject to the same conditions and to all defences to which R. G., as grantor, was subject.

But, by Lefroy, C. J. and Hayes, J., that this defence was bad; the covenant on the part of R. G. being merely a personal covenant, and binding only on R. G. and his representatives.

By Lefroy, C. J. and Hayes, J., although the 12 & 13 Vict., c. 105, gives the assignee of a fee-farm rent, as against the grantee of the land, the same remedies for the recovery of the fee-farm rent, which the assignee of a reversion has for the recovery of rent reserved on a lease, yet it does not confer on the grantee of the land, as against the assignee of the fee-farm rent, the like remedy, which by the 32 Hen. 8, c. 34 (Eng.) and the 10 Car. 1, sess. 2, c. 4 (Ir.) was expressly given to the lessee as against the assignee of the reversion. *Butler v. Archer*, 12 Ir. C. L. R., 104.

FELONY.

Effect of plea of conviction for felony. A right of action for damages is not forfeited to the Crown upon a conviction for felony; but a right of action, in respect of money had and received, money paid, and upon an account stated is forfeited. Plea to the money counts that the plaintiff had been convicted of felony, and sentenced to six years' penal servitude; and that the several causes of action arose after the plaintiff was convicted, and before he had reduced the punishment to which he was adjudged; and that by reason of the conviction the said moneys and rights of action for recovery thereof became forfeited to the Crown, and had not since been restored.

Replication, that the felony was not punishable with death; and that before action and after sentence the Lords Justices had commuted the sentence and punishment; and that the plaintiff had endured the full term of the commuted punishment. Held, no answer to the defence. The 5 G. 4, c. 81, s. 26, enables a felon who has obtained a remission of sentence to maintain an action in respect only of property to which he has acquired a title after conviction. *Fleming v. Smith*, 12 Ir. C. L. Rep. 404; and 7 Ir. Jur. N. S., 64.

Quare, whether that section applies to a home convict whose sentence has been commuted by the Lords Justices? *Id.*

FRANCHISE.

I. ELECTORAL FRANCHISE.

Conacre letting, effect of. Held, that a letting in con-acre is not such a parting with the occupation of land as will deprive the owner of his franchise. (*dissentientia*, Hayes, J.) *McKeown, appellant; Bradford, respondent*, 7 Ir. Jur. N. S., 175.

Residence within seven miles of borough. Where a person's dwelling-house in which he actually lives is more than seven miles from a borough, but an angle of a field attached to the dwelling-house is within the seven miles, the person is not entitled to have his name retained on the list of freemen for the borough, as entitled to vote for a Member of Parliament for the borough. *McCafferty, appellant; Leckey, respondent*, 7 Ir. Jur. N. S., 187.

Residence in case of Free Burgess of New Ross. A Free Burgess of New Ross, admitted before the passing of the Reform Act, is a person "now by law entitled to vote" within s. 9 of the Reform Act, 2nd & 3rd Wm. 4, c. 88, and comes, therefore, within the provisions of that section, and of section 14 of stat. 13 and 14 Vict. c. 69, as to residence. *Howlett, appellant; Tottenham, respondent*, 7 Ir. Jur. N. S. 411.

The case of *Tottenham, appellant; Meadows, respondent*, 2 Ir. C. L., 572, and 5 Ir. Jur. 127, distinguished. *Id.*

Freedom by grandbirth. The grandsons of freemen of the City of Dublin, in the maternal line, are entitled to the freedom of that city. *Brodie's Case*, 7 Ir. Jur. N. S. 40.

Appeal—omission of appellant's place of abode from the indorsement upon the statement of the case. The provision in the 58th section of the statute 13 & 14 Vict., c. 69, requiring the Assistant Barrister to endorse upon every statement of a case the place of abode of the appellant and respondent in the appeal, is directory only, and not mandatory, and therefore held that the court will entertain an appeal notwithstanding the omission of the place of abode from the indorsement upon the statement of the case. *McKeown, appellant, Bradford, respondent*, 7 Ir. Jur. N. S. 169.

Wanklyn v. Woollett, 4 C. B. 86, considered and distinguished. *Id.*

II. MUNICIPAL FRANCHISE.

A person claiming to be enrolled as a burgess under section 80 of the 3 & 4 Vict., c. 108, sec. 80, must be possessed of the several qualifications required by that section upon the 31st of August in each year. Where, therefore a person, although possessed of the other qualifications, did not attain his full age of twenty-one years until the 31st of the following October. Held, that he was not entitled to be enrolled as a burgess. *The Queen v. McCarthy*, 12 Ir. C. L. R. 61.

The occupation of "a store and coal yard," of the yearly value of not less than 10*l.*, is a sufficient qualification to entitle a person to be enrolled a burgess of a borough, under the Irish Municipal Corporation Act (3 & 4 Vict., c. 108, s. 80.) *The Queen v. McCarthy*, 12 Ir. C. L. R., 79.

R. claimed to be enrolled under the 3 & 4 Vict., c. 108, s. 80, as a burgess, in respect of a public-house and the premises therewith. It appeared that the business was carried on under the name of the former proprietor, A. O'N. (R.'s mother-in-law); that the declaration for the purpose of obtaining a licence required by the 3 & 4 Wm. 4, c. 68, s. 13, was made by A. O. N., and the licence granted in her name; and that the certificate upon the renewal of the licence under the 17 & 18 Vict., c. 89 was given to her. R. swore positively (which was not contradicted) that he was in the sole occupation of the house and premises since 1856; and that A. O. N. had no interest whatever in them. Held, that R. was entitled to be enrolled as a burgess, the court being satisfied that he was in the sole occupation of the house and premises, and that as he had complied with the requisitions of the 3 & 4 Vict., c. 108, his right to be so enrolled was not prejudiced by the declaration made by A. O'N., in compliance with the Excise Laws. (*Fitzgerald, J., dubitante.*) *The Queen v. McCarthy*, 12 Ir. C. L. R., 67.

Per Lefroy, C.J.—The principle of law is that the party whose name appears upon the burgess roll, previously to the revision, has a *prima facie* right to have it retained thereon; and it lies upon the party who disputes that *prima facie* right to make out such a case as will displace it. *Id.*

Observations upon the policy of the Excise Laws. *Id.*

GRAND JURY LAW.

Illegality of presentments—Representments for arrears. A very large amount of county cess was in arrear in several of the baronies of the County Mayo, and many of the former collectors had left this country. The grand jury, at the Spring Assizes, 1861, represented a portion of those arrears upon the county at large, other portions upon every barony: all these representments were entitled, "pursuant to 7 Will. 4, c. 2, sec. 15," and the respective sums were presented to be levied by *twenty instalments*. The grand jury also presented the sum of 500*l.* to be paid to Mr. D., the solicitor to the Grand Jury, on account of the expenses of soliciting a private Act of Parliament in relation to those arrears of cess; this presentment was entitled, "pursuant to 6 & 7 Will. 4, cap. 116." No objection was made to the above presentments at the Spring Assizes, 1861, and they were duly stated by the judge. On the 12th of June, in the same year, a conditional order for a writ of certiorari was applied for, and obtained by a cess-payer of the County Mayo, to quash the above presentments upon the grounds of their illegality, and of the absence of jurisdiction in the grand jury. Upon motion to make absolute the conditional order, held, that all the above presentments were illegal, and bad *prima facie*. *In re the County Mayo Presentments*, 1861, 7 Ir. Jur., N. S., 96.

That they all were wrongly entitled, nor was the error a technical one, as the provisions of neither the 6 & 7 Will. 4, c. 116, s. 145, nor of the 19 & 20 Vic., c. 68, s. 6, had been complied with. *Id.*

That the representments of arrears of county cess should have been made under the 19 & 20 Vic., c. 68, s. 6. *Id.*

(Per O'Brien, J.) That the operation of that section is not limited to those counties only in which the general valuation has been completed. *Id.*

That arrears of county cess cannot be represented by instalments: nor can the arrears of one barony be represented upon the county at large, or upon any other barony. *Id.*

That a presentment for costs can be made only after taxation, under the 16 & 17 Vic., c. 136, s. 6. *Id.*

That the granting of the writ of certiorari is not of right,

but is within the discretion of the court, when satisfied that there are strong grounds for its issue. *Ib.*

That although the court refuses to go behind a presentment to see whether it has been properly obtained, yet it will grant a certiorari when there is *prima facie* error on the face of it, and in the very source from which all presentments derive their efficacy. *Ib.*

That although, in the case of an individual, his not objecting at the assizes, or his subsequent laches, will be construed most strongly against him, yet that the court will overlook delay, where the objection to the presentment is not one which could have been rectified by the judge of assize, or where the applicant for a writ of certiorari complains of an injury inflicted upon the public. *Ib.*

Malicious burning.—Proceeding in cases of compensation under the Dublin Improvement Act. The town council of Dublin has no jurisdiction to investigate cases of malicious injury, except in presence of a judge of the Queen's Bench. *Re Kirby*, 7 Ir. Jur., N. S., 898.

In case of the rejection, by the town council, acting with the assistance of a judge, of an application for compensation, the applicant cannot have the decision reviewed, but, in case the application is allowed, any of the rate-payers may traverse the presentment which shall be made. *Ib.*

GUARDIAN AND WARD.

Fiduciary position of guardian. The lands of C. were held for a term of years under B. B. C.'s proposal in writing accepted by M. C., at a yearly rent of 54l. 7s. 8d., subsequently, however, reduced to 33l. 12s. By a deed of conveyance from the Commissioners of the Incumbered Estates Court the landlord's interest under this proposal was granted to A. G. C. "subject to the several tenancies specified in the third schedule annexed" thereto. In this schedule the tenure was represented as being "B. B. C.'s proposal accepted by M. C. dated Dec. 26th, 1837, for 900 years," and the rent column stated the rent to be 33l. 12s. per annum. At and before the time of this conveyance A. G. C. held also the tenant's interest in these lands, managing it as guardian and trustee for the infant children of B. B. C. *Creagh v. Creagh*, 7 Ir. Jur., N. S., 406.

Held that the proposal of Dec. 26th, 1837, was not so incorporated in the deed of conveyance as to make the rent of 54l. 7s. 8d. reserved by it necessarily the rent payable. *Ib.*

Held also, that even if this were not so, considering the fiduciary character of A. G. C., and the fact of his having been a party to all the proceedings in the Incumbered Estates Court, he was barred from claiming the original rent of 54l. 7s. 8d. from the infants who had been under his guardianship. *Ib.*

HABEAS CORPUS.

In case of an insolvent committed under a remand. Where the warrant for commitment of an insolvent debtor, who was admitted to bail previous to the hearing, but had been in custody under a *ca. sa.* issued by the creditor who opposed his discharge, was silent on the causes for which it was awarded.—Held, that a writ of *habeas corpus* did not lie. *Re John Paul*, 7 Ir. Jur., N. S., 152.

Jurisdiction of judge to grant habeas corpus in vacation returnable before himself. A. was arrested in Dublin, under a civil bill decree of the Recorder of Dublin, by two special bailiffs of the plaintiff in the decree. He was then taken, at his request, and with the acquiescence of the plaintiff, and in company of the bailiffs to Kingstown, to look for a friend to assist him in a compromise of the debt. Held, that a judge of the Queen's Bench has, in vacation, jurisdiction to order a writ of *habeas corpus* at common law, returnable immediately before himself. *In the Matter of Henry Everard*, 7 Ir. Jur., N. S., 846.

Held also, that this was a voluntary escape on the part of the bailiffs, and that further custody was illegal, and there could be no re-capture. *Ib.*

See INFANT.

HUSBAND AND WIFE.

Marriage validity of. A. being seised in fee of the lands of R., was privately married to B. in the year 1823, by a degraded Presbyterian minister. The guardians of C., a minor, and ward of Chancery, presented a petition praying that it

might be referred to a Master to inquire whether the purchase of the R. estate would benefit the minor. The Master reported in the affirmative, and, under the Lord Chancellor's directions, a private Act of Parliament was obtained to enable the guardians of C. to carry out an agreement for the sale of R., entered into with A. The conveyance of R. to C. was subsequently executed by those persons, who were found by the Master's report to be the proper and necessary parties thereto. A. having died, B. claimed dower out of the lands of R. Held, that the marriage of A. and B., which was void in its inception, was validated by the 5 & 6 Vict. c. 118. *Corry v. Lord Cremorne*, 7 Ir. Jur., N. S., 21, and 12 Ir. Ch. Rep. 186.

That the purchase of the lands of R. by C. was "an act done under the authority of a court," within the meaning of section 8 of the 5 & 6 Vict., c. 118, and consequently B.'s claim to dower was barred. *Ib.*

A marriage celebrated by a Roman Catholic priest between a Roman Catholic and a Protestant, who it was sworn represented himself at the time as a Roman Catholic, but who had always before been a member of the Established Church, and within the previous twelve months attended its services, Held, void under the 19th Geo. 2, c. 19. *Gibbons v. Gibbons*, 7 Ir. Jur., N. S., 63.

Upon the trial of an issue whether or not goods had been supplied to the defendant's wife, evidence was given of the fact of a Scotch marriage, and conflicting professional evidence upon the Scotch law of marriage. Held, that the judge was right in leaving the entire question as a question of fact to the jury, and that he ought not to have decided the law of Scotland in those respects in which the professional witnesses differed; nor to have applied it to the facts of the case in those respects in which they agreed so as to give the jury a direction. *Theobald v. Yelverton*, 7 Ir. Jur., N. S., 347.

Upon the question of the validity of an Irish marriage which again depended upon the question of the defendant's religion, during the twelve months immediately preceding its celebration, it was proved that the defendant was born and brought up a Protestant. Held, per Monahan, C. J., that occasional attendances at places of Roman Catholic worship, and statements respecting his own religious belief made by him in private conversations, the whole of which occurred within the twelve months, together with the representations of himself given by him to the officiating priest, at the time of the ceremony, were evidence from which a jury might infer that he had been a Roman Catholic throughout the twelve months. *Ib.*

And, per Keogh and Christian, JJ., that the above constituted no evidence to go to a jury, and that the judge ought to have directed them that the defendant had not ceased to be a Protestant. *Ib.*

The 19 Geo. 2, c. 18, in common with the penal code generally, regarded men theologically as well as politically, and by the designation Protestant meant a person who did not believe in the doctrines of the Roman Catholic religion.—Per Monahan, C. J. *Ib.*

The 19 Geo. 2, c. 18, in common with the penal code generally, regarded men politically and not theologically, and by the designation Protestant meant a legal Protestant or one born and brought up a Protestant, or who, having been born and brought up a Roman Catholic, had filed a certificate of conformity, and by the description of one "who hath professed himself to be a Protestant," it meant a Roman Catholic who had not filed a certificate of conformity, but by some open and unequivocal religious act had demonstrated his non-adherence to the tenets of the Roman Catholic Church.—Per Keogh and Christian, JJ. *Ib.*

The jury returned as their verdict that they found a valid marriage had taken place in Scotland between the defendant and his alleged wife, and that they also found a valid marriage had been celebrated between the same parties in Ireland, and the judge entered these findings upon the record. Held, per Monahan, C. J., that in the event of all the exceptions which related to the former of these marriages being overruled, and any of the rest allowed, the plaintiff would be entitled to retain his verdict. *Ib.*

And, per Christian, J., that the judge ought not to have inserted these findings upon the record, and that the court, ignoring their existence upon the argument of the bill of exceptions, was bound to award a *cessat de novo* in the event of any of the exceptions being allowed. *Ib.*

Acquiescence by wife, when dis-covert, in breach of trust. The trustee of property settled to the separate use of a mar-

ried woman without power of anticipation, at her urgent request and with her knowledge applied portion of the trust funds to the benefit of her husband. When discovered, she received for many years, without demur, the reduced income arising from the residue of the trust funds. Held, that by such subsequent acquiescence she had condoned the breach of trust. *Rutherford v. Masiera*, 7 Ir. Jur., N. S., 210.

Right of wife over property settled to her separate use.] A married woman can dispose of freehold settled to her separate use as if she were a *feme sole* (*dissentiente* the Lord Chancellor). *Adams v. Gamble*, 12 Ir. Ch. Rep. 102.

Liability of husband for necessities supplied to wife.] A husband, without misconduct on the part of his wife, refused to receive her into his house. Held, that assumpsit might be maintained against him for money averred to have been lent to his wife at his request, and for money averred to have been paid for her necessary support and clothing at his request, it being proved that the money so lent and paid was actually expended for and in the purchase of necessities for the wife. *Johnston v. Manning*, 12 Ir. C. L. Rep. 148.

ILLEGALITY.

Effect of acquiescence in.] Election for town commissioners under 17 & 18 Vict. c. 103. Thirty-one females voted; ten for the relator and twenty for the defendant. Other votes objected to. A rule nisi for an information in the nature of a *quo warranto* had been obtained, on the grounds that the election was irregular, illegal, and void; and that the relator had a greater number of legal votes than the defendant. As the poll stood, the latter had a majority of votes. On showing cause, held, that acquiescence in any illegality cannot confer a right not allowed by law. *The Queen v. Mayne*, 7 Ir. Jur., N. S., 201.

INCUMBERED ESTATES COURT.

Jurisdiction of.] In 1853 the lands of L. were conveyed by the Incumbered Estates Court to a purchaser, subject to a certain outstanding freehold lease, the interest in which was vested in M. for life, remainder to F., the plaintiff. The under-tenants of said lands having refused to attorn to the purchaser, an absolute order was made by the court to put the purchaser in actual possession of the said lands, so as to extinguish the said lease. Held, that whatever otherwise might have been the effect of the order of the Incumbered Estates Court, it had no power, under section 29 of the Incumbered Estates Court Act, to divest or extinguish an estate created by a lease, subject to which the lands were conveyed to the purchaser, and that accordingly, notwithstanding the terms of the order, the lease was still in force. *Fitzpatrick v. Hughes*, 12 Ir. C. L. Rep. 488.

INCUMBERED ESTATES COURT CONVEYANCE, see COMPENSATION, GUARDIAN AND WARD.

INFANT.

Confirmation of lease made by infant.] A., while an infant, made a lease to B. Subsequently, and while A. continued an infant, a demand of possession was made, and an ejectment brought, by A. by C., his next friend. Before the trial of the ejectment A. attained his age of 21 years, and made a lease of the lands to C. Subsequently, and still before the trial, A. received rent from B., and executed a confirmation of his lease. At the trial, on this state of facts, a verdict was directed for the defendant, and the verdict was upheld by the court. *Slater v. Trimble*, 7 Ir. Jur., N. S., 255.

Habeas corpus at instance of person having legal right to custody of infant.] Where a child has been traced to the actual or virtual custody of a person who has no legal right to that custody, such person becomes responsible for the safe keeping of the child, and the court will issue a *habeas corpus* at the instance of the person having the legal right to the custody, in order that the child may be brought into court, or that it may be ascertained by the return how the child has been disposed of. *In re Matthews, an infant*, 12 Ir. C. L. Rep. 233.

INTEREST.

Upon policy of insurance effected before the passing of st. 3

§ 4 Vict. c. 105.] Sect. 53 of st. 3 & 4 Vict. c. 105, extends to the case of a policy of insurance effected before the passing of the statute, but becoming payable after its passing; and when such a policy was sued upon, it was held that the jury was justified, the proper notice having been served, in giving the plaintiff interest upon the principal sum secured by the policy. *Studdart v. Jellico*, 7 Ir. Jur., N. S., 411.

INVESTMENT.

Transfer of a fund settled in New Three per Cent. Stock to Bank of Ireland Stock, where the petitioner was a widow, entitled to the income for her life, with remainder to her children, the court by the order directing the petitioner to be liable to the costs of the petition, and of the transfer of the stock. *Ex parte Tufnell*, 7 Ir. Jur., N. S., 95.

JUDGMENT.

Scire facias.] G. devised the lands of L. to his daughters as tenants in common. Upon his death in 1824, J. entered into possession, and so continued until his death in 1831, when his son J. D. entered into possession, and so continued until 1858. A judgment obtained against G. in 1811 was revived by *scire facias* in 1831 (before J.'s death) against J., as co-heir-at-law, against the co-heiresses and against terre-tenants of other lands, but the lands of L. were not mentioned in the return to the *scire facias*. Held, that J. D. had acquired an estate in fee in the lands of L. by twenty years' possession; and that the lands were not affected by the judgment of 1811, J. not having been made a party to the *scire facias* as to those lands. *In re Bodkin's estate*, 12 Ir. Ch. Rep. 61.

Redocketing.] In the attorney's affidavit, and the redocketing book, the attorney redocketing a judgment under the 9 G. 4, c. 35, was described as "J. N. of the city of W.," instead of his registered residence in Dublin. There was no other attorney of the same name practising at the time. Held, that the redocketing was not vitiated thereby, nor by the fact that J. N. had not taken out his licence when the judgment was redocketed. *Woodroffe v. Greene*, 12 Ir. Ch. Rep. 473.

Satisfaction of, on the roll.] Two assignees of a judgment, one of whom was in an imbecile state of mind, executed a satisfaction piece. The court refused to allow the officer to enter satisfaction of the judgment on the roll under a 143 of the Common Law Procedure Act, 1833. *Rule v. Baillie*, 12 Ir. C. L. Rep., App. xlix.

JUDGMENT MORTGAGE.

Sufficiency of affidavit to register judgment as mortgage.] An affidavit made for the purpose of registration, under the provisions of the Act 18 & 14 Vict., c. 29, is objected to on the following grounds, viz.:—

1. Because the owner's Christian name is erroneously stated to be William, his correct name being William Henry, he having been sued by the name of William simply. Held, that the affidavit is sufficient, on the authority of the case of Walter John Carew, decided by the Judicial Committee of the Privy Council. Held, also, that the description of a peer by his title alone is sufficient for the purposes of the Act. *Earl of Limerick, owner; Turner, petitioner*, 7 Ir. Jur., N. S., 65.

2. Because the title of the cause is not accurately stated in the affidavit, the words, "in England," having been omitted from the plaintiff's description, and also the words "William" and "defendant" being omitted. Held, that the affidavit sufficiently complies with the Act, the title of the cause being correctly stated in the margin, on the authority of *Humble's case*, 11 Ir. Ch. Rep. 556. *Id.*

3. Because the copy affidavit lodged in the registry office is not a true copy of the affidavit made and filed in the court of law. Held, that the copy lodged is sufficient to satisfy the Act, it having been testified by the officer as an office copy, and being correct and sufficient in the particulars required by the Act. *Id.*

4. Because the affidavit omits to state the parish, the premises being situate in a city—admitted by all parties to be a fatal error. *Id.*

5. Because the affidavit states that the lands are situate in the barony of Bunnuratty, in the County of Clare, there being

no barony of Bunratty *per se*, but two distinct and different baronies of Upper Bunratty and Lower Bunratty. Held, that the affidavit is bad, and does not comply with the Act. *Ib.*

Where a judgment is recovered for two distinct sums, one for debt, and the other for costs, the affidavit made for the purpose of registering the judgment as a mortgage, must state both sums. *Pilson's estate*, 7 Ir. Jur., N. S., 68.

In an affidavit made under the provisions of the statute 13 & 14 Vict., c. 29, for the purpose of registering the judgment as a mortgage, the principal sum recovered by the judgment, 600*l.*, was correctly stated, but the amount of costs recovered, 3*l.* 1*s.* 11*d.*, was omitted from the affidavit. Held, that the affidavit did not comply with the requisites of the 6th section of the statute. *Ib.*

In an affidavit to register a judgment as a mortgage, sixpence appearing by the record of the judgment to have been awarded by the jury for costs, was omitted. Held, that the registration is void. *Gripi, owner; Carey, petitioner*, 7 Ir. Jur., N. S., 119.

An affidavit to register a judgment as a mortgage against premises in the parish of St. Michan's, and city of Dublin, stated the premises to be situate in the parish of St. Michael's. Held, that the registration is void. *Ib.*

The affidavit of judgment stated the lands sought to be charged by this description, "the lands of Carraboola, Cartronfin, and Killendow, situate in the baronies of Abbeyshrule and Moydow, and County of Longford"—Held, that the affidavit did not comply with the Act 13 & 14 Vic., c. 29, which requires that where the lands are situate in two or more baronies, parishes, or counties, the same shall be distinctly stated. *Morrow's estate*, 7 Ir. Jur., N. S., 403.

The affidavit stated the amount of the judgment to be 71*l.* 15*s.* 9*d.* besides 6*l.* 4*s.* 8*d.* costs; when the affidavit was filed the costs, though ascertained, had not been inserted in the judgment roll, a blank having been originally left for the amount of the costs; but subsequently to the filing of the affidavit, the blank for the costs was filled up, so that on the hearing of the motion the roll was perfect, and the affidavit of judgment was in accordance with it. Held, that this court would not enquire into the intermediate state of the roll, as it had been perfected properly and in conformity with the practice of the court. *Ib.*

Operation and effect of judgment mortgage.] The claim of J. T. Eyre was declared by the Court of Appeal—reversing the decision of Judge Longfield, who decided that it was not a charge—to be an equitable charge on the estate of James Sadleir, called lot 1, founded upon an agreement of the 13th of April, 1855, entered into between John Sadleir and J. T. Eyre. It was registered on the 14th June, 1856; it was not under seal, and James Sadleir was not a party to it, and would not have been bound by it, were it not for the deed of the 6th October, 1855, which reciting the previous agreement of 13th April by which John Sadleir undertook that James Sadleir would execute a mortgage of lot 1 to J. T. Eyre; to this deed James Sadleir was a party. There was a covenant in the latter deed that this mortgage was to be executed before the 1st January, 1857. John Sadleir having committed suicide, the additional lots did not become a security for J. T. Eyre. When the case came to the Incumbered Estates Court, the question arose as to the priority of the claim of J. T. Eyre and the judgment mortgage vested in the official assignee. The deed of 6th October, 1855, was registered on the 5th December, 1857. The affidavit of the official manager was filed on the 4th of November, 1856. Judge Longfield decided that the judgment mortgagee had all the rights of a mortgagee by deed. There was an appeal from that decision, and the Court of Appeal affirmed the decision of Longfield, J. On appeal to the House of Lords that decision was reversed, on the ground that a judgment mortgagee had only the rights which a judgment gave prior to the passing of the Mortgage Act, and affected only the estates over which the creditor had a disposing power of at the date of the filing of the affidavit, and that upon the construction of the Registry Act, 6th Anne, c. 2, sections 4 & 5, a judgment mortgage was not an incumbrance within the provisions of that Act. *Eyre v. McDowell*, 7 Ir. Jur., N. S., 41.

Modes of proving the registration of a judgment as a mortgage in actions of ejectment, see EVIDENCE.

LACHES, see LIMITATIONS, STATUTE OF.

LANDED ESTATES COURT.

Jurisdiction of court to sell.] The lands of Blackacre, being subject to heavy charges, are put in settlement, and A. made tenant for life. A. incumbers his life estate, and B., one of his puisne creditors, files a petition for sale. A. and his prior creditors show cause against the order for sale, and question the jurisdiction of the court. Held, that the court has jurisdiction to sell, and will sell, protecting the interests of the prior life estate creditors as far as possible, and giving the owner an opportunity to relieve the fee from incumbrances, before proceeding with the order for sale of the life estate. *Earl of Limerick, owner; Turner, petitioner*, 7 Ir. Jur., N. S., 65.

Right of tenant to have lands sold subject to his lease.] A., a lessee under a perpetuity lease of 1829, mortgaged his interest by assignment of the lease to B. Subsequently, in 1831, A. and B. demised a part to C. for lives renewable for ever, at 6*l.* rent; but the rent was expressly reserved to A., the mortgagor. And in 1836, A. and B. demised the whole in perpetuity, at 55*l.* rent, to D., saving the existing under-leases. No rent was paid by C. since 1839, and in 1861, D. brought an action of ejectment to recover the rent, in which he failed, on the ground that the rent was reserved to the mortgagor, who had no estate at law. The court having made an order to sell D.'s interest under the lease of 1836, the petitioner sought to sell that interest subject to C.'s lease of 1831. C. objected on these grounds—first, that the rent under the lease of 1831 being reserved to the mortgagor, was a mere rentcharge, which had been barred by non-payment for over 20 years; secondly, that on the construction of the deed of 1836, the reversion expectant on the lease of 1831 did not pass to D.; and thirdly, that even if the reversion passed, the rent did not pass, not being a rent service, incident to the reversion, but a mere rent-charge, and so requiring a separate grant, and the deed of 1836 contained no mention of the rent. Held, that the rent (though reserved to the wrong party) was a rent reserved by a lease for the use and occupation of land, and that it continued to be payable as long as the use and occupation continued under the lease; and that C., the tenant, could not in the Landed Estates Court raise the question of construction on the deed of 1836, this being a question of title for the court alone. The tenant cannot look further than is necessary for the preservation of his lease; he cannot do more than insist that the lands, if sold, shall be sold subject to his lease; he has no right to question the authority of the court to sell the lands. *M'Auley, owner; Marshall, petitioner*, 7 Ir. Jur., N. S., 414.

Petition for specific performance of contract for sale.—Practice.] A petition for the specific performance of a contract for sale of an estate, does not bind up a creditor upon the estate, so as to prevent him from filing a petition for sale of the estate to realise his debt, as the proceeding in the former case will not necessarily eventuate in the payment of the debt. *Fentons, owners; O'Reilly, petitioner*, 7 Ir. Jur., N. S., 161.

When there is any unnecessary delay in a proceeding to carry into effect a sale of any lands, the proper remedy for an incumbrancer is to present a petition for sale of the lands for payment of his incumbrance. The practice adopted in the ordinary case of a petition for sale of applying for the carriage of the proceedings, where there is any unnecessary delay in the matter, appears to be inapplicable to the case of a petition to carry into effect a contract for sale. *Ib.*

The court will not carry out a contract for sale entered into by the owner where the charges on the lands exceed the amount of the purchase money, unless the incumbrancers consent—45th General Rule. *Cornwall's estate*, 7 Ir. Jur., N. S., 888.

Sale of lands in mortgage before day fixed for repayment.—Practice.] Where lands in mortgage form the subject of a petition for sale, and the day fixed by the deed for repayment of the mortgage money has not arrived, the mortgagee has a right to have the lands sold subject to his mortgage; but the court will not sell the lands subject to the mortgage, if the day for redemption is near at hand, and the security is ample. *Re John Burke, owner, Ex parte Redmond Burke*, 7 Ir. Jur., N. S., 38.

The mortgagee cannot show cause against the order for sale on this ground. The proper time for him to intervene is on the settlement of the rental before the examiner. *Ib.*

Costs where funds deficient.] Where the prior creditor allowed the proceedings to be carried on to a sale, showed no cause against the order for sale, and actually pressed the pe-

tioner on to a sale, the court allowed the petitioner the general costs of the proceedings in the first priority, although the funds realized by the sale did not extend to the petitioner's demand. *Kennedy, owner; Youelle, petitioner*, 7 Ir. Jur. N. S. 34.

But where the order is for sale of a life estate, there being charges on the fee, the costs of the proceedings will not be allowed in a higher priority than the demand. *Id.*

The rule has not been applied to the case where the petitioner is the owner. He will be allowed his costs of the proceedings out of the funds, though there is no surplus left after payment of the charges. *Id.*

A conditional order was made for sale of a life estate, on the petition of a creditor on the life estate, and cause was shown by the owner against the order, on the ground that as there were charges on the fee the petitioner could not be paid by a sale of the life estate. Judge Longfield disallowed the cause and made the order absolute, but directed that the costs of the proceedings should be allowed only in the priority of the petitioner's demand, stating at the same time that the court would make the same rule as to costs in all cases where an order is made for sale of a life estate, and there are charges affecting the fee. *Gregory's estate*, 7 Ir. Jur. N. S. 34.

Carriage of proceedings.] A motion for the carriage of the proceedings cannot be made before the order for sale has been made absolute. *Tottenham, owner; Goodison, petitioner*, 7 Ir. Jur. N. S. 87.

The court will not transfer the carriage of the proceedings to the owner where there is a large arrear of interest due on the petitioner's demand. *Id.*

The court will not grant any indulgence to the owner, as against the petitioner, where the interest on the petitioner's demand is in arrear. *Id.*

Staying proceedings.] The owner brought forward a motion to stay the proceedings for two months, on an undertaking to pay in the meantime the amount of the petitioner's demand. This motion was instituted with a view of dismissing the petition. In ruling the motion Judge Hargreave said, "It appears from the petition that there is an arrear of interest due on the petitioner's mortgage. This arrear of interest must be paid before the court will stay the proceedings. The mortgage is put in settlement, and possibly the interest forms the income of the parties, on which they depend for their existence. I may say it has now become the practice of the court never to grant any indulgence to the owner where he has allowed the interest to run into arrear. If the owner will now undertake to pay this arrear of interest within ten days the motion may be granted, but on no other condition." *Redmond's estate*, 7 Ir. Jur. N. S. 88.

Side-bar order against conditional order for sale.] The court refused a motion to rescind a side-bar order obtained under the 18th General Rule, allowing the cause shewn against a conditional order for sale where the side-bar order was obtained on the 29th Nov. 1861, and the notice to set aside the order was not served until the 20th January, 1862. The court will not rescind the side-bar order unless the notice of motion for that purpose is served immediately on the petitioner's solicitor being made aware of the order. *Finlay, owner; Daniel, petitioner*; 7 Ir. Jur. N. S. 389.

Partitions.] Where the lands forming the subject of the proposed partition are held by different tenures, or under several leases, each estate must be partitioned separately. The court will not sanction a partition which gives the freehold lands to one owner, and the leasehold lands to another. Each owner must receive a portion of each estate. And in the partition of leaseholds the court will not allow one lease to be given to one owner and another lease to the other owner, but each lease must be partitioned separately. Nor will the court allow the entire rent reserved by a lease to be thrown on one owner. Those rules apply equally to a partition by consent of the parties, under the 81st section of the act, where there is no sale by the court, and to a partition under the 80th section, where the petition prays for a partition and sale. *Foley's estate*, 7 Ir. Jur. N. S. 402.

LANDLORD AND TENANT.

Forfeiture, waiver of:] D., the sub-tenant of a portion of leasehold property, undertook to pay the head-rent, but fraudulently omitted to do so. The head landlord evicted the lease for non-payment of rent. More than six months after the ex-

ecution of the decree the head landlord offered the sub-tenant the option of redeeming or taking out a new lease to himself. The sub-tenant elected to take a new lease. Held, that there was no waiver of the forfeiture in favour of the meane tenant. *Dowding v. Commissioners of Charitable Donations and Bequests*, 12 Ir. Ch. Rep. 361.

What is a reasonable time for tender of renewal fines after demand under st. 19 & 20 G. III. (tr.), c. 80.] A tender of renewal fines made within less than six months after demand on the lessee's agent, held to be made within reasonable time within the meaning of the Irish Tenancy Act, so as to prevent a forfeiture. *Colclough v. Smith*, 7 Ir. Jur. N. S. 342.

Construction of agreement for tenancy.] Agreement by which A. agrees to let to B. certain premises for one year certain, at a yearly rent of 28*l.* payable quarterly in each year during the tenancy, B. to be allowed 1*l.* 10*s.* for repairs out of each of the four first quarter's rent. Held, that this agreement created a tenancy from year to year. *Wharton v. Kelly*, 7 Ir. Jur. N. S. 58.

23 & 24 Vict. c. 154, retrospective operation of.] The 44th section of the Irish Landlord and Tenant Law Amendment Act, 1860, is retrospective to the extent of affecting gales of rent accruing due after its enactment under leases made prior to its enactment, but not to the extent of including gales which accrued due before it was passed. *Mercer v. O'Reilly*, 7 Ir. Jur. N. S. 383.

St. 23 & 24. Vict. c. 154. Meaning of expression, "held at rack-rent," in s. 34.] The expression, "held at rack-rent," in s. 34 of the st. 23 & 24 Vict. c. 154, means held at rack-rent at the period of the ceasing of the landlord's estate. *Mansfield v. McKay*, 7 Ir. Jur. N. S. 113.

What amounts to an interest under a lease for a term certain under Landlord and Tenant Act, 1860, s. 75.] An agreement in writing whereby a tenant is permitted to retain possession of premises for three months in consideration of a rent, is an interest under a lease for a term certain within the meaning of the Landlord and Tenant Law Amendment Act (Ireland), 1860, s. 75. *Lord Dunsandle v. —*, 12 Ir. C. L. Rep., app. xv.

Service of plaint in ejectment.] What shall be deemed good service of a plaint in ejectment by posting premises of which no person is in the actual possession as tenant or undertenant. Landlord and Tenant Law Amendment Act (Ireland), s. 37. *Crossthwaite v. Galbraith*, 12 Ir. C. L. Rep. app. xlix.

St. 23 & 24 Vict. c. 154. Motions for security for costs under s. 75.] An application to discharge a notice of motion for security for costs under s. 75 of st. 23 & 24 Vict. c. 154, must be upon notice. *Aird v. Kirby*, 7 Ir. Jur. N. S. 264.

The notice of motion for security for costs, under s. 75 of st. 23 & 24 Vict. c. 154, must state the day of moving. *Stannus v. Keshan*, 7 Ir. Jur. N. S. 264.

A landlord not producing, on a motion under the 23 & 24 Vict. c. 154, sect. 75, for security for costs, any lease or other instrument regulating the terms of the tenancy, cannot refer to a lease produced by the tenant (the term of which is in existence) in order to ascertain the terms of the tenancy, the landlord contending that the term mentioned in said lease was not now a valid and subsisting term. *Eyre v. Conran*, 7 Ir. Jur. N. S. 325.

The 75th section of the Landlord and Tenant Law Amendment Act, 1850, does not include the case of a tenant holding from year to year without a lease or agreement in writing. *Vernon v. Jordan*, 12 Ir. C. L. Rep. app. xlv.

An order will not be made to compel an alleged tenant, a defendant in ejectment, to give security for costs under the 75th section of the Landlord and Tenant Law Amendment Act (Ireland), 1860, where there is a *bona fide* question of title to be tried. *Pentland v. Murtagh*, 12 Ir. C. L. Rep. app. xi.

LEASE. See INFANT, LANDED ESTATES COURT.

LEGACY.

Doctrine of satisfaction of legacies.] The doctrine of satisfaction of legacies by subsequent portions does not apply in the case of the gift of a legal rentcharge. *Preston v. Lord Gormstown*, 7 Ir. Jur. N. S. 310.

Legacies held to be charged on real estate to the exoneration of the personally. See *Daunt v. Daunt*, 7 Ir. Jur. N. S. 310.

Period of vesting.] Where a testator gives a life estate in his funds, and at the expiration thereof gives the principal to be divided among several, and if any die then to the survivors, without specifying the time of survivorship, he is held to mean the contingency to extend over the whole period which elapses before the time of distribution or expiration of the life estate, unless the context points out another time; in other words, the legacy does not vest till the death of the tenant for life. Therefore where A., by will, gave a life estate to B., and at B.'s death to six persons equally, declaring that "if any die without issue before his share vests, the same shall belong equally to the survivors" there was nothing in the word "vest" to prevent the application of the above rule.

The word "vest" means, *prima facie*, "come into possession," and not "accrue in point of interest." *Richardson v. Robertson*, 7 Ir. Jur. N. S., 269.

Where a testator bequeaths a legacy to a tenant for life, and after her death to his (testator's) surviving children, the survivorship refers to the death of the tenant for life. *Shaw v. Magill*, 7 Ir. Jur. N. S., 298.

Revocation of devise] The revocation of a clear devise can be effected only by words equally clear; and where the construction of a codicil is uncertain and ambiguous, there will be no revocation of the will. *Preston v. Lord Gormanstown*, 7 Ir. Jur. N. S., 310.

Legacy duty.] See CHARITY, WILL.

LIBEL.

Plea of privileged communication.] A plea of privileged communication, which consists of a statement voluntarily tendered after the occasion for making it had passed, will be bad on general demurrer. *Echlin v. Singleton*, 7 Ir. Jur. N. S., 225.

Embarrassing defence in libel.] To a count for libel imputing misconduct to the plaintiff, a medical officer of a dispensary district, the defendant pleaded a plea of privileged communication, setting forth that he was a poor-law guardian, and that he made the communication (the subject-matter of the libel) to the poor-law commissioners in his capacity of guardian, *bona fide*, &c. And the plea alleged the information upon which this communication was founded to have been obtained from "certain faithworthy persons." Held, that the plea was embarrassing, as not containing the names of the persons who gave the information. In such a case the proper mode is to set aside the defence as embarrassing. *Godfrey v. Cross*, 12 Ir. C. L. Rep. 338.

Innuendo; justification.] A publication stated that Archbishop M. had selected for a particular purpose "the Rev. P. C., whose praiseworthy and Christian conduct at the M. election caused him to be prosecuted, &c.; but even his ministrations were too mild and orderly, and a more worthy successor was appointed, the Rev. P. L., whose unruly conduct and disobedience to his superiors had caused him to be removed from Paris by the police." In an action brought for libel by the Rev. P. L., the plaintiff set out this publication with an innuendo, "that the Rev. P. C. was a disorderly and unchristian person, and that the plaintiff was a still more disorderly and unchristian person." Held, by Lefroy, C.J., and Hayes, J. (Fitzgerald, J., dissenting, and O'Brien, J., not taking any part in the judgment), that this innuendo was too large, and that the plea was bad. *Lavelle v. Orammore*, 7 Ir. Jur. N. S. 55.

The defendant to so much of the libel as was contained in the passage beginning with the words, "But his ministrations," &c., to the end, pleaded a justification setting out certain facts, shewing that the plaintiff had for disobedience to his superiors been removed from Paris. Held, on demurrer (Fitzgerald, J., dissenting, and O'Brien, J., not taking any part in the judgment), that this defence was good, as meeting the sting and substance of the libel. *Id.*

Indictment for libel at quarter sessions. *Mandamus.*] The court refused to grant a writ of mandamus to justices at quarter sessions, commanding them to charge the grand jury with, and to try an indictment for libel. *Re W. J. Armstrong*, 7 Ir. Jur. N. S., 77.

LICENCE, (LETTER OF.)

Computation of time in.] In a letter of licence from creditors to a debtor "for and during the term of one year from the date hereof." Held, that the day of the date should be excluded from the computation of the year. *Ammermann v. Digges*, 12 Ir. C. L. Rep. app. i.

LIMITATION OF ACTIONS AND SUITS.

D. being seised of an undivided fourth of fee-simple and renewable leasehold estates, demise his one-fourth to L. for 999 years, subject to a rent. S. acquired L.'s interest and the other three-fourths. C. succeeded to D.'s interest, and S. paid rent to C. up to 1828, when C. died, devising her interest to A. S. after 1828 denied A.'s title, obtained a renewal of the lease in 1835, and paid no rent from 1828 to 1857, when A., who had previously been ignorant of his precise title, filed his petition in the Court of Chancery to have the renewal declared a trust for him. Held, he was not barred by the lapse of time from 1828 or 1835 to 1857, nor by the Statute of Limitations. *Archbold v. Scully*, 7 Ir. Jur. N. S., 1, H. of L.

If any new rights had been created in the interval, or third parties had been prejudiced by the delay, A. would have been barred by laches or acquiescence (per Lord Campbell, L.C.) *Id.*

So long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by nonpayment of rent, for however long a time. The Statute of Limitations merely cuts off the recovery of more than six years' arrears (per Lord Cranworth.) *Id.*

The statute 8 & 4 Will. 4, c. 27, s. 24, only bars equitable rights so far as they would have been barred if they had been legal rights (per Lord Cranworth.) *Id.*

In an action to recover the soil and freehold of a road leading from the public highway to a well, where there was a lease made by one B. B. E. to one T. J., bearing date 31st of May, 1806, and reserving the road for ever. Held, that there must be not only a cessation, but an acquiescence to make the Statute of Limitations apply. *Tottenham v. Byrne*, 7 Ir. Jur. N. S., 14; and 12 Ir. C. L. R. 376.

Also, per Pigot, C.B., that where a person ceases to enjoy for 20 years, by the Statute of Limitations, he ceases to have title, and the party who gets possession gets what is equivalent to an estate in fee. *Id.*

Also, that where there was a user under a grant of a road as such, there was a user under the grantor that prevented the operation of the Statute of Limitations. *Id.*

A testator devised to his daughter a sum of 250*l.*, chargeable on certain lands, and to be paid to her by yearly instalments of 20*l.* from the day of her marriage, with a power of distress in case of non-payment of "such annuity or instalment of 20*l.* per annum." Held, that a rent was created within the meaning of the 42nd section of the Statute of Limitations—3 & 4 Wm. 4, c. 27. *Upington v. Tarrant*, 7 Ir. Jur. N. S., 197; and 12 Ir. Ch. Rep. 262; affirmed on appeal, 7 Ir. Jur. N. S., 199.

Cestui que trusts, under an invalid devise, who remain in possession without acknowledgment of title for more than twenty years, and thus bar the right of the heir-at-law, do not thereby acquire the legal estate in the devised lands, which vests in the trustees, and subject to the trusts of the devise. *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89.

MAGISTRATES.

Ouster of jurisdiction by question of title.] Duncan Graham had been summoned for trespass upon a several fishery. The plaintiff gave in evidence the record of the court showing former convictions for similar offences, and certain patents whereby a several fishery in the neighbourhood was granted to the party through whom he claimed, but whether it was the several fishery in question did not thereby sufficiently appear. The defendants put in evidence of long user, and claimed a right to fish therein, and offered security for costs in case plaintiff would institute a civil action. Held, that this was such a *bona fide* claim of title as ousted the jurisdiction of the magistrates. *The Queen v. The Magistrates of Ballycastle*, 7 Ir. Jur. N. S., 237.

Magistrates remaining on the bench during case in which they have an interest.] Magistrates who were virtually the complainants, and therefore interested in the subject-matter of the proceedings, took their seat upon the bench among the other magistrates on the hearing of the complaint. Before the commencement of the proceedings, however, they announced that they were not there as magistrates, and would not act as such. It was proved that they took no part in the proceedings; and that when the other magistrates retired to consider their decision they did not retire with them, but remained in open court. During the progress of the proceed-

ings they were called upon by the defendants' attorney to retire from the bench, but the chairman decided that they might remain, in which decision the defendant's attorney acquiesced. Held, that their remaining on the bench during the hearing of the complaint did not, under the circumstances, render the court improperly constituted so as to invalidate the proceedings, and a conditional order for a *certiorari* to quash the proceedings on that ground was discharged, but without costs, inasmuch as the conduct of the magistrates in so remaining on the bench was highly culpable. *The Queen v. The Justices of the Peace, Tyrone*, 12 Ir. C. L. Rep., 91.

MANDAMUS, *see* LIBEL.

MARRIAGE, *see* HUSBAND AND WIFE.

MASTER AND SERVANT.

Action by servant for injury while in master's employment. Where a summons and plaint stated that the defendants employed V. upon their premises for the purpose of carrying along a passage a quantity of stones, that defendants, during all the time V. was so employed, and while he was actually carrying the stones along the passage, at their request, were the owners of a wall overhanging the passage over which the defendants had actual control; yet defendants so negligently maintained the wall during all the time V. was so employed, and whilst he was actually carrying the stones along the passage, that the wall became and was ruinous, and fell upon V. while carrying the stones and injured him. Held, that the plaint disclosed a good cause of action. *Vaughan v. Cork and Youghal Railway Company*, 12 Ir. C. L. Rep., 297.

MONEY PAID, ACTION FOR.

Action for rent paid. A lease of sixty-one feet of ground was granted to B., a trustee for the plaintiff's wife. The defendant occupied a house adjoining that of the plaintiff, and built upon fourteen feet of the ground so demised to B. An ejectment having been brought in the name of B. to recover possession of these fourteen feet, pending the action, the matters in dispute were left by agreement of the parties to arbitration. The arbitrators awarded that the defendant should not be disturbed in his occupation of the fourteen feet, he undertaking to pay in respect thereof a proportionate part of the rent payable by the plaintiff in respect of the sixty-one feet of ground so demised as aforesaid. Held, in an action for money paid by the plaintiff for the use of the defendant, that the plaintiff was entitled to recover from the defendant the proportion of the rent which he was bound to contribute as settled by the arbitrators; for, the agreement being executed, and the defendant having enjoyed the full benefit thereof, there resulted the duty which constituted his liability to reimburse the plaintiff the amount which the plaintiff had paid for the defendant in discharge of the defendant's liability. *McConnell v. McGorlick*, 12 Ir. C. L. Rep. 158.

MONKS.

Devise of lands to. A devise of lands "to monks named Christian Brothers" is void. *Hogan v. Byrne*, 7 Ir. Jur., N. S., 228.

MORTGAGE.

Payment of interest. T. G. having obtained a bond and warrant from O. V. J., enters judgment and registers it as a mortgage against his lands. At date of bond T. G. undertakes not to call in the principal so long as each gale of interest is paid in three months after it falls due. A gale does fall due, and a few days after T. G. consents to take a bill at three months' acceptance by O. V. J. in payment thereof. This bill having become due, and having been renewed on the same understanding as that on which the first was given, and eventually been dishonoured, the amount is sent by O. V. J. to T. G. in a cheque and received by the latter. Held, first, that T. G. did not, on non-payment of the renewal bill, become free to demand his principal; secondly, that acceptance of payment as payment of the gale in question estopped T. G. from suggesting impunctuality. *In re Jackson's estate*, 12 Ir. Ch. Rep. 512.

Equitable mortgage. A deposit of title-deeds with the solicitor of a creditor for the purpose of preparing a mortgage to secure the antecedent debt and future advances, without any agreement in writing for a mortgage, constitutes a valid equitable mortgage. *Buflin v. Dunne*, 12 Ir. Ch. Rep. 87.

Right of heir-at-law to have mortgage paid out of personal estate. A testator seized of real estate subject to a mortgage which he had covenanted to pay, by a will made in 1829 bequeathed pecuniary legacies, and directed that all his chattel property whatever (except as before bequeathed) should be sold; and in the first place the produce thereof to be applied to the payment of his just debts and funeral expenses, and in the next place in discharge of his legacies. The mortgaged estate descended to the heir-at-law. Held, that he was entitled to have the mortgage paid out of the personal estate in preference to the legacies. *Burley v. Armstrong*, 12 Ir. Ch. Rep. 270; and 7 Ir. Jur. N. S., 50.

MUNICIPAL CORPORATIONS.

Application of borough fund. Application for a *certiorari* against the Corporation of Dublin, which had applied borough funds to oppose a bill before a committee of the Lords. It was shown that the provisions of the bill would have the effect of reducing the income of the corporation. Held, that the *certiorari* should not issue, as the corporation were justified in opposing the bill, and applying the borough funds for that purpose. *Reg. v. Town Council of Dublin*, 7 Ir. Jur., N. S., 817.

NEGLIGENCE.

Plea of contributory negligence. To an action brought by the administratrix of a servant against his employers for injuries sustained through the defendant's negligence, the defendants pleaded "that the wounding and bruising were caused in part by the negligence of the said servant." Held, a bad plea.

Per PIGOT, C.B., and HUGHES, B.—The plea should have gone on to aver that the servant could have avoided the consequence of the defendants' neglect by the exercise of ordinary care. But that independently of that ground the plea was bad, as not shewing that the servant contributed to the injury "by the want of ordinary care."

Per FITZGERALD, B.—The plea amounted to an averment that the proximate cause of the injury was compounded of the negligence of both parties, and in that view was an answer to the action.

But per FITZGERALD, B.—The plea was bad, as being neither a traverse nor in confession and avoidance. *Vaughan v. Cork and Youghal Railway Company*, 12 Ir. C. L. Rep. 297.

Issue on defence of contributory negligence. In an action against a railway company for injuries resulting to a passenger from alleged negligence, with a defence of contributory negligence, the proper issue to be sent to the jury is, "whether the defendants, by the exercise of ordinary care, might have avoided the consequence of the plaintiff's neglect." *Mills v. Irish N. W. Railway Company*, 7 Ir. Jur., N. S., 401.

NEW TRIAL.

Action of trespass qu. cl. fr.; defence that the *locus in quo* was not the close of the plaintiff. At the trial it appeared that plaintiff was owner of the townland of K., which was situate by the sea; that a pier was built there partly upon the foreshore above high water mark; and that defendant in unloading a vessel placed the cargo upon the pier and carried it across it, refusing to pay a toll demanded by plaintiff. On the part of plaintiff acts of ownership of the foreshore and of the land adjoining were proved. Defendant went into evidence of the former state of the place, but the judge directed the jury to find for the plaintiff if they believed his evidence. The Court of Exchequer having refused to grant a new trial on the ground of misdirection, this court disallowed an appeal brought against that decision. *Ward v. M'Kelvey*, 7 Ir. Jur. N. S., 409.

The judge at the trial of an action having refused to allow an amendment, and the Court of Exchequer having refused to grant a new trial on the ground of such refusal by the learned judge, Held that the decision of the court upon this point was not a subject of appeal within s. 41 of the Common Law Procedure Act, 1856. *Id.*

Rule as to disturbing verdict where there is a conflict of evidence.] The practice in England, not to disturb the verdict where there is a conflict of evidence, and the judge reports that he is not dissatisfied, should also prevail in Ireland, and the exceptions to the rule should be of rare occurrence. *Irvine v. Colwell*, 12 Ir. C. L. Rep. 144. Per FITZGERALD, J.

New trial granted on the ground of verdict being unsatisfactory.] Where a defendant having been sued as executor *de son tort*, pleaded *plene administravit*, and in support of his plea put in evidence a bill of sale, by which the deceased had in his lifetime conveyed to him his household furniture in discharge of a debt due by him to the defendant, and the jury found that the bill was executed *bona fide*, but that possession was not given *bona fide*, the court granted a new trial. *Beatty v. Porter*, 7 Ir. Jur., N.S., 81.

NOTICE.

Notice of assignment.] NOTICE of the assignment of a reversionary interest given to solicitors of trustees was held by Stuart, V. C., to be a sufficiently good notice to the trustees themselves, so as to take the property out of the order and disposition of the assignor at the time of his insolvency, although such notice had been sent prior to the insolvency, and not for the express purpose of being communicated to the trustees. On appeal the decision (Law Times, 5, N.S., 416) was affirmed. *Rickards v. Gledstane*, 1 Ir. Jur., N.S., 149.

B., by deed executed in 1880 for a nominal consideration, assigned a policy of insurance upon his own life to trustees for his children, of whom the petitioner was one, and the entire interest in the policy became vested in S. and the petitioner. No notice of this deed was ever given to the assurance company. S. married the respondent; and by a deed executed in 1884 reciting that she was entitled to a moiety of the policy, this moiety was put in settlement. The respondent acted as solicitor in the preparation of this deed. In October, 1884, B. by deed made without consideration, professed to assign the residue of the policy to the respondent. On the preparation of this deed R. stated that he had led the petitioner to believe that he should have 100*l.* out of the produce, and directed that he should be made a party to the assignment; and a deed was prepared accordingly. The petitioner declined to execute this deed, which was therefore abandoned, and another was prepared; but he did not during the life of B. expressly allege that he had any claim upon the policy. The respondent gave to the company notice of the assignment of October, and after the death of B. obtained the policy from the trustee thereof, and was paid the sum due. Held, that the respondent having obtained the policy from the trustee, must be treated as a substitutionary trustee.

Held, that between volunteers giving notice to the debtor of an assignment of the debt does not affect priorities. *Justice v. Wynne*, 12 Ir. Ch. Rep. 289.

OUTLAWRY.

Effect of judgment of.] A debt upon a promissory note is forfeited to the crown by the outlawry of the payee upon an indictment for misdemeanour. A promissory note was made to J. S., the public officer of a joint stock bank, as such public officer, and for a debt due to the bank. J. S. was outlawed upon an indictment for misdemeanour; and after the outlawry, and while it was in force, he indorsed the note to M'D., the official manager of the bank under the winding-up acts. Held that M'D. had no title to sue upon the note. *M'Dowell v. Bergin*, 12 Ir. C. L. Rep. 391.

PATENT, GRANT OF LANDS BY.

Quit-rent.] The corporation of Dublin, in the reign of Henry the Third, enfeoffed M. F. and his heirs of the lands of B., subject to a certain rent. The lessee's interest subsequently vested in the crown by forfeiture, and was afterwards by letters patent, pursuant to the 17 & 18 Car. II., c. 2 (Act of Explanation), regranted to F., subject to a yearly quit-rent. The patent did not notice the rent payable to the corporation, but dealt with the grant as one immediately from the crown. Held, that the effect of the patent, as construed by the Act of Parliament, was to regrant the lands, subject not only to the quit-rent reserved thereby, but also to the original rent, payable to the corporation.

Held also, that whether or not the original tenure still subsisted, the latter rent was one for the arrears of which an action of debt would lie at the suit of the corporation under the 14 & 15 Vict. c. 20. *Corporation of Dublin v. Herbert*, 12 Ir. C. L. Rep. 502.

PLEADING (LAW)

Defence in action of contract.] A defence to an action for goods sold and delivered, that the goods delivered were not according to sample, or were not of the description contracted for, which omits to add that the defendant only kept the goods a reasonable time, and only used a reasonable quantity, is bad on general demurrer. *Coventry v. M'Enery*, 7 Ir. Jur. N.S., 144.

It is no defence to an action upon a bill of exchange by the indorsee against the acceptor, that an agreement for the conveyance of an estate by the plaintiff having been entered into between the plaintiff and the drawer of a bill of exchange accepted by the defendant, such bill was drawn and accepted to secure the purchase-money of such estate; that when due, and the drawer unable to pay the amount, the bill of exchange now being sued upon was drawn and accepted as a renewal of it, and that the plaintiff had not, in pursuance of his agreement, conveyed the estate in question. Neither, under the above circumstances, will a defence that the plaintiff in a bill by him filed in an equity suit had disclaimed the agreement, be held a good defence as amounting to what might constitute a rescission of the contract. *Eyre v. M'Dowell*, 7 Ir. Jur., N.S. 385.

Pleading in action by husband and wife.] A summons and plaint to recover money had and received for the use of husband and wife which does not disclose the wife's interest, will be bad on general demurrer, anything in the Common Law Procedure Act, 1853, to the contrary notwithstanding. *Ca-hill and Wife v. M'Dowell*, 7 Ir. Jur. N.S., 377.

Embarrassing defences.] Where, to a count for work and labour, the defendant pleaded that the work and labour were done in consequence of a contract with a third person, and not at the request of the defendant, and that at the time the work and labour were done the defendant was an infant, the court set the defence aside as embarrassing, but allowed the defendant to amend upon payment of the costs of the motion. *Johnstone v. Sloane*, 7 Ir. Jur. N.S., 28.

In an action for slander of title, a defence which contains a short abstract of title on the face of it, will not be set aside as embarrassing. *Cream v. Gamble*, 7 Ir. Jur. N.S., 31.

Action of covenant for 120*l.*, being six half year's rent, at 20*l.* per annum, reserved by lease, at rent of 40*l.* per annum, whereof only 20*l.* per annum had been paid. Defence on equitable grounds (there being other defences legal and equitable) that the 40*l.* was inserted in the lease by mistake; and that by deed subsequent to the lease but now lost, and founded on a prior agreement and made by and between the parties through whom plaintiff and defendant respectively claim as landlord and tenant, it was covenanted and agreed upon that the said rent should be 20*l.* and not 40*l.*, which latter sum was inserted by mistake. Liberty given to amend, reply, and demur. *Blake v. Hanly*, 7 Ir. Jur. N.S., 238.

A defence "That defendant did not promise to retire a certain bill, nor did he receive from plaintiff said bill for the purpose alleged," set aside as double and embarrassing. *Brett v. Sheridan*, 7 Ir. Jur. N.S., 387.

Plea to an action upon a promissory note by an indorsee against maker, "that the defendant was not at the time of the commencement of the suit the lawful holder of the note." Held, that this plea was embarrassing. The following amendment was ordered: "That after the indorsement mentioned in the plaint, and at the time when the action was commenced, the plaintiff had ceased to be, and was not then, the holder of the note." *Barber v. Doyle*, 12 Ir. C. L. Rep. 342.

See also *Lindsay v. Bagly*, 7 Ir. Jur. N.S., 259; *Pearson v. Smith*, 7 Ir. Jur. N.S., 275; *Brabazon v. Potts*, 7 Ir. Jur., N.S. 299.

Defence in ejectment.] To a summons and plaint in ejectment for non-payment of rent, naming six persons as defendants, and averring that the defendants held the lands as tenants from year to year of the plaintiff, at the yearly rent of 45*l.* sterling, one of the defendants pleaded "that he, together with the other defendants in this suit, does not hold the lands in plaint mentioned, in manner and form," &c. The

court refused to set aside this defence on motion. *Murphy v. Carey*, 12 Ir. C. L. Rep., app. ix.

Falses and sham defences.] The court set aside a defence which was shown by affidavit, and by the admissions of the defendant made after action brought, to be a sham, and which was irregular by reason of no notice or copy of the defence having been served on the plaintiff's attorney, as required by section 45 of the Common Law Procedure Act (Ireland) 1853. *Banks v. Jordan*, 7 Ir. Jur., N. S., 28.

Defence set aside as a sham. *O'Leary v. Hepper*, 7 Ir. Jur., N. S., 29.

Where the defence put in was a simple traverse of a material allegation in the summons and plaint, and did not introduce any new matter, and was regular in all respects, the court refused to set it aside as a sham defence. *O'Brien v. Taggart*, 7 Ir. Jur., N. S., 29.

Principles on which the court acts in setting aside or refusing to set aside defences as shams. *Id.*

To a writ of revivor a defence of payment which, it was sworn by the plaintiff, was false, and only filed to delay and embarrass the plaintiff, will not be set aside on motion, nor will the defendant be ordered to verify it. *Poster v. Murphy*, 7 Ir. Jur., N. S., 825.

Repeating same defence.] When one of the pleas in the defence is applicable to more than one of the counts in the summons and plaint, it is desirable that it should be inserted only once, and the counts to which it is an answer be specified, and not that the plea should be repeated severally as many times as there are counts to which it is an answer. *Montgomery v. Middleton*, 7 Ir. Jur., N. S., 80.

PLEADING (EQUITY).

In petitions for account for wilful default. In a cause petition against an agent praying an account as to wilful neglect and default, the petitioner must aver some specific instances of such neglect and default. *Bond v. M'Watty*, 7 Ir. Jur., N. S., 815.

Putting admissions in issue.] Statement of an admission in the petitioner's affidavit in reply, is not a compliance with the rules of equity pleading, requiring admissions to be put in issue. *Corry v. Lord Cremorne*, 12 Ir. Ch. Rep., 136.

Putting documents in issue.] Where an agreement is alleged in a petition for specific performance of that agreement, it is not necessary to put in issue the written documents relied on as evidence of that agreement. *Rice v. O'Connor*, 12 Ir. Ch. Rep. 424.

PLEADING (PROBATE COURT), *see* PROBATE (Court of).

POOR LAW.

By section 48 of 1 & 2 Vict., c. 56, it is enacted, "that the commissioners shall take order for the due performance of religious service in such workhouses, and for appointing fit persons to be chaplains for that purpose." Under this section the commissioners have no power to issue a sealed order commanding the guardians of the poor of a union to provide for the use of the Roman Catholic chaplain a suitable altar, vestments, and such other appendages of an altar as are necessary for the due performance of religious service in the workhouse of the union, according to the form of the Roman Catholic Church; and the court will not grant a mandamus to enforce such order. (*O'Brien, J., dissentiente*)

Per LAMONT, C. J.—An Act of Parliament, in order to confer upon commissioners a discretionary and unlimited power of directing the imposition of a tax, in the form of a rate, for objects of which they are to be the judges, must be clear and explicit beyond the possibility of a doubt. *The Queen v. The Guardians of the Poor of Newtownards Union*, 12 Ir. C. L. Rep. 45.

The court has not jurisdiction to interfere with or control the discretion vested in the Poor Law Commissioners by section 48 of the 1 & 2 Vict., c. 56, of fixing the salary of the chaplains of the union workhouses, where such discretion has been exercised *bona fide* by them. *The Queen v. The Poor Law Commissioners*, 12 Ir. C. L. Rep. 212.

Bed aliter if such discretion has been exercised in an illusory manner, or otherwise not *bona fide*. *Id.*

PORT AND HAVEN, *see* NEW TRIAL.

POWER OF APPOINTMENT.

A tenant for life, of freehold estate, having a power of appointment among his children, devised the estate to trustees to sell and divide the purchase money among the children in certain shares. Upon a petition for sale by the trustees of the will, the court granted an order for sale. *Blackley's Estate*, 7 Ir. Jur., N. S., 69.

What operates as an execution.] A testator having a power to appoint real estate, and a sum of 4,000*l.* to all or any, or one or more of the children, or more remote issue of the marriage, made his will before any child was born, but while the wife was *en ventre*, bequeathing all his property on trust, in the event of his leaving one child, that he or she should inherit all his landed and personal property; but in case of his leaving a son and daughter, he devised and bequeathed all his landed and personal property to his son, save and except 4,000*l.* to his daughter. He afterwards died, leaving no real estate except what was subject to the power, but considerable personal estate, and leaving two sons and two daughters. Held, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened. *Russell v. Russell*, 12 Ir. Ch. Rep. 377.

Held, also, that the will did not operate as an execution of the power over the 4,000*l.*, the Statute of Wills (1 Vict., c. 26, s. 27,) applying to general powers, and not to special powers in favour of particular objects. *Id.*

What amounts to.] A testator bequeathed all his estate, real and personal, to trustees, in trust, to pay the rents and dividends to his wife for her life, and, after her death, he directed all his real and personal estate, and all moneys which might have been got in, or might be still due and owing, should go to and be paid in such manner as he should by a codicil or codicils direct and appoint; and, in default of such direction, to his wife as his residuary devisee and legatee. By a codicil he left an annuity of 600*l.* to W. for his life; and if W. married, and had children, in that case the 600*l.* per year was to go to them in what manner W. might think proper; but, should he not leave any issue, then the 600*l.* per year to go to E. W. and his family, to be so divided as E. W. might think proper. Held, that W. had power to dispose of it among his children as a perpetual annuity, and that there was a trust for them in default of appointment. *Warren v. Wright*, 12 Ir. Ch. Rep. 401.

PRACTICE (LAW).

Particulars.] In an action for work and labour, to which the ordinary money counts are added in the summons and plaint, it is not necessary, when there is an endorsement of particulars, to specify to which of the counts the particulars refer. *M'Guinness v. Meekam*, 7 Ir. Jur., N. S., 13.

In an action to recover damages for breach of covenant by defendant in not completing his title to a house purchased from him by the plaintiff, the court refused to grant particulars of the costs of a Chancery suit, incurred by plaintiff, or of monies expended on the house by him, or the times of the expenditure. *Cornwall v. Hudson*, 7 Ir. Jur., N. S., 117.

Particulars of payment into court.] Action on the money counts claiming 400*l.* in respect of the items claimed in the plaintiff's bill of particulars. Defence as to 30*l.* portion, &c., payment of 30*l.* into court, and that that was sufficient to answer plaintiffs demand as to that sum, with traverses as to the rest. Held, that the court would not compel the defendant to give particulars specifying the items as to which the money was paid into court. *Ryan v. Horgan*, 7 Ir. Jur., N. S., 59.

Change of venue.] The court will change the venue on the application of the plaintiff when he accounts satisfactorily for having laid it in a place different from that to which he wishes it to be transferred, the defendant failing to exhibit such a preponderance of convenience as would have induced the court to change it, supposing it to have been originally laid where the plaintiff now seeks to have it. *Enright v. The Promoter Insurance Company*, 7 Ir. Jur., N. S., 153.

A motion by the defendant to change the venue, will be heard, where the defendant has lodged his pleas, and the assizes are close at hand, though the summons and plaint has not been filed, and the court will order it to be forthwith filed, unless the plaintiff undertakes not to give notice of trial for the next assize. *Egan v. Vesey*, 7 Ir. Jur., N. S., 23.

Amendment of plaint by striking out the name of a defendant] In an action of trespass, the plaintiff will be permitted to strike out the name of a defendant on whom the plaint had not been served, if the plaintiff would lose a trial at the next assizes by having to serve him. *Thompson v. Kelly*, 12 Ir. C. L. Rep., app. i.

Defences filed without leave.] Leave granted that defences filed without leave of the court should stand as if they had been filed by the permission of the court. *M'Loughlin v. Jeffers*, 12 Ir. C. L. Rep., app. l.

Notice for leave to file replication.] In the Court of Common Pleas, notice is now required of a motion for leave to file a replication. *Dunne v. Plunket*, 7 Ir. Jur., N. S., 323.

Replications to defence of set-off.] The leave of the court is necessary to entitle a plaintiff to file several replications to a defence of set-off. *Banahan v. Wallace*, 12 Ir. C. L. Rep., app. xiii.

Marking final judgment where no defence] Where no defence is filed to a plaint, the bill of particulars annexed to which contains even a single item which may be controverted, final judgment cannot, without the intervention of a jury, be marked under the Common Law Procedure Act, 1853, s. 96. *Conolly v. Teeling*, 12 Ir. C. L. Rep., app. xxix.

Postponement of trial.] Notwithstanding that the defendant on a motion for further time to plead, has undertaken to accept short notice of trial, the trial will be postponed on the ground of the absence of a material witness. *Lynch v. The Liverpool and New York Steam Ship Company*, 7 Ir. Jur., N. S., 336.

Notice of trial pending appeal.] Pending an appeal to the Court of Error by the defendants from an order of the full court, which had set aside a verdict had for the defendants, and directed a *venire de novo* the plaintiff cannot serve notice of trial for the ensuing assizes, and a judge sitting in Chamber has power to make an order to restrain him from proceeding to act upon it. *Whalley v. Lord Massareene*, 7 Ir. Jur., N. S., 323.

Proceedings in error.] The Court of Exchequer will not set aside "proceedings in error" where defendant did not make up the paper books within six days from filing of the suggestion. *Doolan v. Doolan*, 7 Ir. Jur., N. S., 34.

Proceedings where venire de novo directed by the House of Lords] Upon an application to set aside suggestions filed by the defendant, as having been entered without leave of the court, and as bearing no date, also to set aside the abstract of Nisi Prius and issues, the action having been commenced before the year 1853, and also the notice of trial, upon the ground that a year and a day had elapsed since any proceeding in the cause, it appeared that the action had been commenced in the year 1852, and the verdict having been for the plaintiff, and exceptions taken and overruled by the court below, that the defendant had carried the case into the Court of Error, and finally into the House of Lords, where judgment was given in July, 1858, affirming the judgment of the Court of Error, and granting a *venire de novo* to the defendant. That the record of the proceedings in the House of Lords was not finally made up until August, 1859; that upon the 15th of November, 1859, the defendant served a notice of trial, which was withdrawn a few days afterwards. The defendant, upon the 14th November, 1860, filed a suggestion of the death of a co-defendant, and, on the following day the defendant (no step having been taken by the plaintiff in the meantime), served the notice of trial, the subject of the present motion. Held, that the defendant was entitled, under the 156th section of the Common Law Procedure Act (1853), and notwithstanding the 156th General Order (1854), to enter the suggestions without the leave of the court. Held, that the record of Nisi Prius, and the issues, should not be set aside, although the action had been commenced before the passing of the Common Law Procedure Act. *M'Mahon v. Ellis*, 12 Ir. C. L. Rep. 437.

Held, also, (*dissentiente* Monahan, C. J.) that the judgment of the House of Lords having been pronounced in July, 1858, (though the record was not settled until August, 1859,) the defendant was entitled to serve notice of trial in November, 1859, without a rule for the purpose under the 178th General Order (1854). *Id.*

Held, (per Monahan, C. J.,) that notice of trial could not have been served by either party until the record of the proceedings in the House of Lords was returned into the court below, and, therefore, that the plaintiff not having been in default, the defendant should have obtained a rule to proceed

under the 178th General Order (1854), and consequently that the notice of trial of November, 1859, was invalid, and, for a similar reason, the notice of November, 1860. *Id.*

Liberty to proceed in fresh action, where rule to discontinue] Where a rule to discontinue had been entered, and the defendant's costs had been furnished, but not taxed, the court gave liberty to the plaintiff to proceed in another action for the same cause, lodging in court the amount of costs claimed by defendant. *Bredin v. Corcoran*, 12 Ir. C. L. Rep., app. ix.

Motion for liberty to proceed, notwithstanding lapse of time.] A case was referred by consent to arbitration. The arbitration was not proceeded with for upwards of five years, and then the defendant denied the authority of the arbitrators to proceed. The plaintiff moved the court for liberty to proceed with the action, notwithstanding the lapse of time. He accounted for the delay by his anxiety not to press the defendant, who was his brother. But, upon affidavit of the defendant that several witnesses, material and necessary for the defence, had left the country since the date of the consent, the court refused the motion. *O'Callaghan v. O'Callaghan*, 12 Ir. C. L. Rep., app. xlv.

Admission of documents.] A notice to admit documents served under section 118 of the Common Law Procedure Act, 1853, required the plaintiff to admit "that the documents specified in the second schedule thereto are true copies of the originals thereof respectively, and that said originals were presented, &c., as therein stated; and that said copies be admitted on the trial, instead of the originals, saving all just exceptions." The second schedule was headed, "documents admitted to be true copies of the originals." The plaintiff not having complied with this notice, a motion by the defendant to be paid the costs of proving at the trial the original documents (petitions to Parliament) was refused on the ground that the notice served sought only the admission of copies. *Rockfort v. Sedley*, 12 Ir. C. L. Rep., app. iv.

Seemle, though a party admit a copy, his adversary must still produce at the trial, or account for the non-production of the original. *Id.*

The jury disagreed at the trial; and the motion was made pending the action. *Id.*

Quære, whether the application was not premature? *Id.*

Inspection and production of documents.] To an action for rent brought by the heir at law and devisee of the lessor, the defendant in his defence referred to a deed of assignment made after the demise by the lessor of all her estate in the reversion—Held, that it should be produced for inspection though it destroyed, if genuine, the plaintiff's title. *Sargent v. Cleary*, 7 Ir. Jur., N. S., 323.

Order made directing defendant to state whether he had particular documents in his possession. *Poole v. Griffiths*, 7 Ir. Jur., N. S., 259.

Interrogatories.] Where the court has directed an interrogatory to be exhibited to the plaintiff in an action, and to be answered by him, and has afterwards disposed of the order by refusing to make any rule on a motion to attach him for non-compliance, and the defendant, subsequently, obtains from a judge in chamber an order, that a similar interrogatory be exhibited and answered, withholding all mention of the previous proceedings, the court will set aside the judge's order. *M'Mahon v. Ellis*, 7 Ir. Jur., N. S., 321.

Where in an action brought for the disturbance of the plaintiff in an office which he claims to hold, the court has previously ruled upon demurrer that it lies upon the plaintiff affirmatively to show he took the necessary oath of office, it will not permit the defendant to elicit from him by exhibiting an interrogatory, whether or not he ever took such oath, inasmuch as this is seeking to know what evidence the plaintiff means to give at the trial, or else an endeavour to procure evidence which may rebut his case. *Id.*

Garnishee order.] Where a garnishee order has been obtained upon a judgment entered on a bond, which is not an ordinary pecuniary bond, and its nature withheld from the judge at the time, the court will set aside the order. *Ryan v. Reynolds*, 7 Ir. Jur., N. S., 82.

PRACTICE (EQUITY).

Affidavit, when necessary to file.] Seemle, that when "the matter of defence" relied on by a respondent, is matter of law, and not of fact, the respondent may raise his objections at the hearing of the cause, without filing an answering affidavit,

pursuant to the 4th General Order, 1857. But if the petitioner charge, that he is taken by surprise by the defence raised, he will be directed to file an answering affidavit. *Irvine v. Frew*, 7 Ir. Jur., N. S., 72.

Enrolling decrees.] The Court of Chancery will not refuse permission to enrol decrees, or put the party seeking to enrol them under terms, when an appeal to the House of Lords has been lodged on a decree, against which the decrees sought to be enrolled would be evidence. *Spread v. News*, 7 Ir. Jur., N. S., 95, and 12 Ir. Ch. Rep., 335.

Petition of revivor and supplement.] Liberty to file a petition merely of revivor may be obtained on motion of course; but notice ought to be served where it is sought to file a petition of revivor and supplement. *Williamson v. Tuckey*, 7 Ir. Jur., N. S., 274.

Dismissing petition where order for security for costs not complied with.] Where an order has been obtained that a petitioner should give security for costs, which has not been complied with, the proper application for the respondent to make is, not to have the petition at once dismissed with costs, but for an order that the security be given within a limited time, and that, in default, the petition do stand dismissed with costs. *Martin v. Bunbury*, 7 Ir. Jur., N. S., 274.

Fee-farm grant where there is a receiver.] Where a tenant seeks a fee-farm grant, and there is a receiver over the owner's interest, the tenant must call upon the receiver to take the proper proceedings to have a fee-farm grant given before he proceeds himself, and, *semble*, that where the receiver is appointed in a cause, the tenant, in case of a refusal to act by the receiver, ought to proceed by motion in the cause, and not by petition under the Renewable Leasehold Conversion Act. *Ex parte Hanks*, 7 Ir. Jur., N. S., 199.

Letting lands where parties in possession.] Order made that the Master should let certain lands unless the parties in possession should shew good cause to the contrary; and that on shewing such cause those parties should state how they held the lands. *Peile v. Birmingham*, 7 Ir. Jur., N. S., 274.

Administration suit where proceedings to revoke administration.] District administration having been granted on the usual affidavit that the testator's assets did not amount to more than 200*l.*, the administrator attempted to obtain a sum of 1,000*l.*, to which the intestate was entitled. Proceedings to revoke the district administration were taken. Held, that a summary order of reference of a suit for administration and a receiver might be made without three weeks' demand of account required by the General Order. *Wales v. Grier*, 12 Ir. Ch. Rep. 88.

Jurisdiction of Master in administration suit to re-hear cause.] The Masters have jurisdiction to re-hear causes referred to them under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850; but they have only the same power and authority as the court, and are bound in the same manner as the court, in respect to the period within which causes may be re-heard; therefore—

After the time limited by the 80th section of the Act, the Masters have jurisdiction to give leave to re-hear a cause before them, only upon being satisfied that substantial grounds probably exist for such a re-hearing, and for the delay in bringing the same. *Nason v. Peard*, 12 Ir. Ch. Rep. 80.

A decree was made in July, 1855, in an administration suit. In July, 1858, the petitioner was informed of the necessity of rectifying it. In 1859, he obtained leave to file a supplemental petition in the nature of a bill of review, which was dismissed without prejudice in February, 1860. In May, 1860, he obtained leave to re-hear the original cause. Held, that the Master had no jurisdiction to make the order, having regard to the delay which had taken place, which was not accounted for. *Id.*

Observations on the practice in the Master's office in administration suits. *Id.*

Practice in partition suits.] The final decree in a partition suit directed that the several parties should bear their own costs incurred up to and including the first hearing; and that the costs incurred subsequently to the first decree, including copies of deeds, &c., should be borne rateably, and in the proportions and manner following, i.e., one-third by the petitioner A., one-third by the respondent B., and one-third by the respondents C., and that D. (who was the *cestus que trust* of C.), should be allowed his costs out of the third part of the lands and funds coming to C.; and it was ordered that it be referred to one of the taxing-masters to tax and ascertain the costs

of said several parties. Held, that the respondents C. were entitled under the decree to their cost; properly and necessarily incurred, subsequently to the first hearing, and up to and including the final hearing. *Leslie v. Dunganmon*, 12 Ir. Ch. Rep. 205.

In partition suits, the costs up to and including the costs of the first hearing, are borne by the parties to the suit respectively, and the costs of all parties properly and necessarily incurred after the first hearing, and up to and including the second hearing, should be taxed, and the total amount of such costs should be borne by the parties according to their respective interests. *Id.*

The practice as to costs in partition suits investigated and determined. *Id.*

Suits to perpetuate testimony.] A bill was filed to perpetuate testimony of the contents of a lost deed, by a party claiming a reversionary interest thereunder. Held, that under a commission issued according to the prayer of the above petition, the respondents named in the latter could not examine witnesses on their own behalf. *Talbot v. Kennedy*, 7 Ir. Jur., N. S., 50.

And that the defence of purchase for valuable consideration without notice, is no answer to a suit to perpetuate testimony. *Id.*

PRACTICE (COURT OF PROBATE), *see* PROBATE (COURT OF).

PRACTICE (LANDED ESTATES COURT), *see* LANDED ESTATES COURT.

PRESCRIPTION.

Right to water.] A lease made in 1775 by A. to T., comprised two closes Blackacre and Whiteacre. A mill was subsequently built on Blackacre, which was supplied by a stream through Whiteacre; and S., a tenant of the mill under P., and subsequent tenants enjoyed this right of water from 1818. In 1836, C., who was entitled to the reversion expectant on T.'s lease, appointed Whiteacre to K. for life, from the expiration of that lease, retaining Blackacre. The lease of 1775 expired on the 26th of April, 1840. K., in 1841, demised Whiteacre to the defendant, and, in 1843, C. demised Blackacre to the plaintiff with the right to water sufficient for the mill as enjoyed by S. In an action for the diversion of the water, commenced in June, 1860, there was evidence of uninterrupted enjoyment from 1818 to 1860. Held, that as, during the lease of 1775, there was a unity of possession in T., the enjoyment by Stuart, his tenant, pending that lease, was not an enjoyment "as of right" within the meaning of the Prescription Act. *Wilson v. Stanley*, 12 Ir. C. L. Rep. 345.

Held, also, that the user, for more than twenty years since the 20th April, 1840, conferred no title to the easement, under the 2nd section of the Prescription Act, the reversion of the servient tenement during that period being vested in K., the tenant for life. *Id.*

PRESUMPTION.

In 1708, lands were demised for a term of 500 years; the representatives of the lessee dealt with them from 1725 until 1840, as if they had been freehold. The devolution of title between 1726 and 1770 was not proved. Held, that as between persons claiming under a deed of 1770, the lands were to be treated as if a release of the reversion on the 500 years' term were to be presumed. *Lysaght v. Royce*, 12 Ir. Ch. Rep. 444.

An ancient watercourse, which had supplied D.'s mill had been, in 1824, and thence until 1828, obstructed by a new road, which was made across it; and the supply of water having been thus cut off, a new watercourse was constructed by D., to supply his mill through the lands of A. (through which the original watercourse had passed); and L., in 1853, obstructed the new watercourse. The lands of L. had been in the occupation of tenants from 1827 to 1853. The reversioner did not reside upon them; and the rents were received by a barrister living in Dublin, but who occasionally came to Cork (where the lands were situated), and lodged in the neighbourhood. An action having been brought by L. against D. for removing the obstruction to the watercourse, the latter

claiming a right to the flow of the water, and the judge at the trial having left to the jury the presumption of a grant to D., and having also told them that they should be satisfied that such grant had been actually executed in fact. Held (reversing the judgment of the Court of Common Pleas), per Pigot, C.B., O'Brien and Hayes, J.J., and Hughes, B. (*dubitante Lefroy, C.J.*) that there was sufficient evidence to leave to the jury a question of presumption of a grant to D. *Deeble v. Linehan*, 12 Ir. C. L. Rep. 1.

Held (per Fitzgerald, B.), that there was no evidence of acquiescence on the part of the reversioner sufficient to authorise such question of presumption being left to the jury. *Ib.*

Held, also, (per Lefroy, C.J., Pigot, C.B., O'Brien and Hayes, J.J., and Hughes, B.) that the jury should not have been required to find that as a matter of fact, a deed had been actually executed. *Ib.*

PRINCIPAL AND SURETY.

Evidence of forbearance.] Evidence of forbearance by the plaintiff to sue the principal debtor upon a bill of exchange is no evidence to go to a jury of such an agreement to forbear as will discharge the surety. *Bristow v. Brown*, 7 Ir. Jur. N. S., 378.

PROBATE AND LETTERS OF ADMINISTRATION.

Grant of probate generally.] The court will require the clearest evidence, to establish the will of a deaf and dumb testator, of his perfect capacity, due instructions for, and proper execution of his will. *Massey v. Pennefather*, 7 Ir. Jur. N. S., 268.

A will was signed by the testator in the absence of the two attesting witnesses, and the survivor of them in his evidence negatived an express acknowledgment then, but admitted that the will was on the table, signed, before the testator, and that it was handed over to them to sign. The drawer and the defendant, who were present, swore to an express acknowledgment. Held, on the evidence, that there was an express acknowledgment; but, besides, that there was enough to constitute a *virtual* one in law. *Todd v. Thompson*, 7 Ir. Jur. N. S., 890.

A testator executed a will in Grenada, West Indies, attested by three witnesses, in which he gave several legacies all in blank sums, and appointed J. K. his residuary legatee, and named four executors, and added a clause of revocation of all former wills. Held, that parol evidence could not be received to sustain a plea that such will was only deliberative and imperfect, and a demurrer to such plea was allowed; and the same rules apply to wills of real and of personal estate on this point. Also, that where a testator describes himself in his will as of L., in Ireland, at present at St. D., in Grenada, the court will assume that Ireland was his domicile though he died at St. D.; and the question of domicile should be pleaded as well as the law of Grenada, if different from that of Ireland, in order to raise the point. *Kennedy v. Kelly*, 7 Ir. Jur. N. S., 326.

A testator made a will of the 10th Sept., 1819, and by another of the 5th Nov., 1819, expressly revoked it; and by a codicil to it of the same day, after giving his property (subject to annuities) to his nephew, added, "trusting to his performance of my wishes contained in a will signed at, &c., on the 10th Sept. 1819, and which, if I live and perfect by legal advice, I intend to be my last will." Held, that the earlier will was thereby incorporated, and should form part of the probate, as together with the other will and codicils forming the last will of the testator. *Ball v. The Attorney-General*, 7 Ir. Jur. N. S. 208.

A testator had made a will in 1845, settling his estates first on A. and his issue, and then on B. and his issue. In 1854 he made another will, settling them first on B. and his issue, and then on A. and his issue. In 1858 he executed a codicil on the same paper as the will of 1845, mistaking it for the will of 1858, and beginning "This is a codicil to the above will." Held, that parol evidence was inadmissible to show the mistake; and that the will of 1845 was thereby revived, and together with the codicil formed the last will of the deceased. *In the Goods of Stowell*, 7 Ir. Jur. N. S. 325.

In cases of unattested wills, made before 1st Vic. c. 26, which are impeached, evidence of the handwriting of the deceased is not of itself sufficient; there must be additional evidence to connect the will in some way with the deceased. *Little v. Conyn*, 7 Ir. Jur. N. S., 418.

A will propounded and not impeached, save by a plea alleging a later one, cannot be decreed for unless some evidence of execution be given, an affidavit will suffice. *Whitney v. Whitney*, 7 Ir. Jur. N. S., 392.

Grant of letters of administration.] A next of kin, or a party entitled in distribution, seeking to establish his interest in the assets, either on the construction of the will, or by way of *donatio mortis causa*, to the exclusion of the other next of kin, must do so by affidavit clearly, and fairly to do so to the satisfaction of the court, the general rule will prevail that the person having the majority of interests is preferred, and the person having an interest adverse to the assets is passed over. *Semble*, in administration suits, brought by married women, their husbands should be parties. *Mahony v. Scully*, 7 Ir. Jur. N. S., 107.

The court will not dispense with the usual advertisements required in cases of applications for administration in cases of death on presumption, though more than seven years have elapsed since the deceased was last heard of. *In the goods of Armstrong*, 7 Ir. Jur. N. S., 402.

Administration de bonis non during lunacy of administrator.] Where an administrator becomes of unsound mind, (though not found a lunatic by inquisition), the court will grant administration *de bonis non*, limited during the lunacy of the administrator, directing the original letters of administration to be impounded, and their effect suspended till further order. *In the goods of Halliday*, 7 Ir. Jur. N. S., 206.

PROBATE (COURT OF).

I. PLEADING.

Reference to documents] In a plea which alleges that by a certain testamentary instrument, a former testamentary instrument was incorporated in it, it is not necessary, if the instruments are lodged in the registry, to set out in the plea the passage of the will or codicil relied on, which constitutes the incorporation, but the several instruments must be specially referred to in the plea, as then lodged in the registry, and thereby their contents will be considered as if fully set forth in the pleadings. *Ball v. The Attorney-General*, 7 Ir. Jur. N. S.

II. PRACTICE.

Limiting time to extract administration] Where a case is made out showing a pressing necessity for a personal representative to be forthwith raised, as to revive an abated suit in Chancery, which was pending for hearing on the Chancellor's list, the court will limit the time accordingly. *Phillips v. Haasard*, 7 Ir. Jur. N. S., 126.

Objections to interest] Objections to the interest of caveators should now be raised by petition, and not, as in the Prerogative Court, by peremptory exception. *Davidson v. Woods*, 7 Ir. Jur. N. S., 202.

Effect of non-appearance to citation.] Where a citation has been served by a next of kin on an executor to accept or refuse probate, and no appearance has been entered within the time specified, but the solicitor for the plaintiff was aware from communications which the executor's solicitor had with him, that the papers were being prepared for the purposes of probate by the executor, a rule entered by the plaintiff that the non-appearance of the defendant be taken as a renunciation was set aside. *Hosy v. Redmond*, 7 Ir. Jur. N. S., 126.

Where default in setting down cause.] Where the plaintiff, who propounded a will, obtained an order that either party should be at liberty to set down the cause for hearing, but did not pay the duty, and declined to act on that order, a motion on that ground by the defendant to dismiss the suit, and that the will should be condemned, is irregular; his proper course is to pay the duty himself, and take out a copy of the order, and set down the cause. *Goslin v. Goslin*, 7 Ir. Jur. N. S., 306.

Proving will where heir-at-law is a lunatic.] Where the heir-at-law of a testator is a lunatic, but not found so by inquisition, and is an inmate of an asylum, and the executor or other party desires to prove the will in solemn form, and service of a citation on the heir-at-law, had by order of the court been had on himself, and also his mother and the keeper of the asylum, the court will permit the case to go to trial, serving the order for trial, and all further orders, and all notices in the case in the same way as already directed as to the citation. *Massey v. Pennefather*, 7 Ir. Jur. N. S., 205.

When a defendant, the heir at-law, is of unsound mind, but not found so by inquisition, and no appearance has been had

for him, though the citation and notice of hearing had been served on his mother and the proprietor of the asylum in which he was living pursuant to order, the court will, on a hearing to prove the will, require the evidence to be taken down by a short-hand writer, and to be verified by him, and his copy of the evidence so verified to be lodged in the registry, together with all the documents given in evidence, to be preserved there and not given out. *Semble*, the court has power to bind the rights of insane persons, though not found so by inquisition. *Massey v. Pennefather*, 7 Ir Jur N.S., 268.

Effect of verdict by consent upon next of kin not cited, but cognizant of suit. A suit was instituted in this court by an executor in a will, against the widow of the deceased, a caveator, to have said will established. Certain persons were cited in that suit, who were alleged to be next of kin and heir-at-law of the deceased. The case, when at hearing, was compromised, and a verdict had, by consent, establishing the will. The defendants in this suit knew of the former trial, and were in court during part of it, but were not cited in it, and were no parties to, nor aware of, the compromise or consent until after the verdict. Before the probate issued they lodged a caveat as next of kin of the deceased. Held, that they were not bound by the verdict so had by consent. *Davidson v. Woods*, 7 Ir. Jur. N.S., 307.

Sending issues to the Assizes. Where it appears that persons really interested in the litigation are likely from their position and influence to occasion a disagreement in the jury at the Assizes, and have put forward a person without any interest to litigate as a defendant in the case, the court will not send the case for trial to the Assizes, though all the witnesses reside in the county, but will fix a day specially for the trial. *O'Connor v. Herbert*, 7 Ir. Jur. N.S., 126.

Where a will and codicil are propounded by different parties, and respectively impeached in the pleadings, it is not necessary to have separate issues as to the validity of each. The proper issue is, whether the will and codicil together are, or either and which is the last will, &c. *Id.*

New trial! A creditor of A. who was the heir-at-law and sole next of kin of the deceased, relied on a will of the deceased dated in Oct. 1853, which gave A. all the property of the deceased. B., the son of A., relied on a will of December, 1853, which gave B. all the property. The plaintiff (the creditor) replied that the will dated in Oct. 1853, was in fact executed after the will of Dec. 1854; and he also disputed the signature of the deceased to the will of December, 1854. The case was twice tried at Belfast. No verdict was had at the 1st trial; and at the 2nd both wills were condemned, and the judge certified that he was not dissatisfied with the verdict. On showing cause against a conditional order for a new trial, Held—that the verdict was not so satisfactory upon the evidence as that final judgment should be entered on it; and also, as the parties were by the verdict placed on unequal terms, viz., the plaintiff as a creditor of the heir-at-law and sole next of kin, being in as favorable a position as if his will had been established, while B.'s right, if any, would be forever concluded, that there ought to be a new trial, notwithstanding the certificate of the judge who tried the case that he was not dissatisfied with the verdict. The costs of the former trial reserved. *Hurst v. Campbell*, 7 Ir. Jur. N.S., 305.

Costs. Where by a final decree each party was ordered to bear their own costs of the cause, the short-hand writer, who by the direction of the judge had taken notes of the evidence, is entitled to an order for payment of one moiety of his fees by the plaintiff on his default to pay them. *Kelly v. Kelly*, 7 Ir. Jur., N.S., 129.

The Probate Act has not introduced any change in the old practice as to the costs of the heir-at-law; therefore, where there is both real and personal estate, and the heir-at-law having been cited, intestacy is pronounced, the costs are to be borne by the personal estate alone. *Newton v. Newton*, 7 Ir. Jur., N.S., 129.

If solicitors file pleadings in the Probate Court in cases within the jurisdiction of the Sessions, without having informed their clients of the jurisdiction, and without their express directions, notwithstanding, to proceed here, no costs will be allowed to them, either out of the estate or against their own clients. *Hennessey v. Hennessey*, 7 Ir. Jur., N.S., 390.

An heir-at-law, who fails in establishing the contents of an alleged lost will, will not be exempt from costs though he swears he propounded it, from representations which were made to him, and which he believed as to its validity. *Whitney v. Whitney*, 7 Ir. Jur., N.S., 392.

Security for costs in case of assignment of administration bonds. A next of kin of the deceased applying under an order of the Master in Chancery for an assignment of an administration bond to put it in suit against a surety, the administrator having made default, is not liable to the surety to give security for costs, on an allegation that he is a pauper. *In the goods of Collins*, 7 Ir. Jur., N.S., 267.

Administration bonds, assignment of. The court will not, without the sanction of the Master in Chancery, or the consent of the several parties interested in the fund, order an assignment of an administration bond to a person who is a petitioner in a petition matter in Chancery, and also entitled to a share of the assets of the deceased, the petition being for the administration of such assets, and the respondent being the administrator, and a final order having found a sum due by him which could not otherwise be made available. *In the goods of Fitzpatrick*, 7 Ir. Jur. N.S., 86.

The court will only give a conditional order for the assignment of an administration bond to be put in suit against sureties, unless notice of motion has been given. *In the goods of de Morin*, 7 Ir. Jur. N.S., 205.

The court will order an assignment of an administration bond in order to be put in suit against sureties when satisfied that a substantial breach of the condition has occurred, but will not require such evidence thereof as would be required to satisfy a jury. Laches on the part of applicant in not enforcing against the principal his rights will not disentitle him to an assignment. *Id.* 266.

Laches on the part of applicants will not prevent the assignment of the bond. *In the goods of Mary Collins*, 7 Ir. Jur. N.S., 267.

Solicitors. The rule of the Prerogative Court, that proctors should not in any proceeding refer to private conversations had between them, is still in force, and applies as well to solicitors. *Goslin v. Goslin*, 7 Ir. Jur. N.S., 306.

PROHIBITION.

Shewing cause against conditional order for In shewing cause against a motion to make absolute a conditional order for a writ of prohibition to restrain them from enforcing against the prosecutor a conviction for alleged offences against a several fishery, the justices who convicted him cannot, in order to disprove the existence in the mind of the prosecutor (at the time when he committed the alleged trespass) of a reasonable belief that he had a bona fide title to fish in the locus in quo, rely on affidavits made by witnesses who were not examined before them on the occasion of the conviction. *The Queen v. Justices of Fermanagh*, 12 Ir. C. L. Rep., app. xlviii.

PUBLIC COMPANY.

Substitution of service in case of dissolved company. The court will not direct a substitution of service of a writ of summons and plaint issued against a dissolved company, upon the secretary of that dissolved company. *Fayle v. Kingstown Waterworks Company*, 7 Ir. Jur., N. S., 397.

PURCHASER FOR VALUE WITHOUT NOTICE.

Protection by assignment of term. A purchaser for valuable consideration without notice is protected by an assignment of a term upon specific trusts, but is not protected by the assignment of a general term to attend the inheritance. *Corry v. Lord Cremorne*, 7 Ir. Jur. N. S., 21, and 12 Ir. Ch. Rep. 136.

A purchaser for valuable consideration, without notice, is protected against equitable, but not against legal estates. *Id.*

RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

Liability of railway company to keep high road in repair. A railway company carried their railway over a county presentment road, by means of a bridge, and in the course of the construction of their works, in order to give sufficient head-room under the bridge, sloped away the road on each side of the bridge; but on the completion of their works, placed the road in a state of permanent repair. Held, that the road was not an "immediate approach," or a "necessary work connected" with the bridge within the meaning of the Railways Clauses Consolidation Act, 1845, (8 Vict., c. 20, s. 46,) and consequently that the company having put the road into a state of permanent repair, was not bound to

keep it in repair (Hayes, J., *dissentiente*). *Waterford and Limerick Railway Company, and Limerick Railway Company v. Kearney*, 12 Ir. C. L. Rep. 224.

RECOGNIZANCE.

Putting newspaper recognizances in suit. Before newspaper recognizances are put in suit, under 1 Wm. 4, c. 78, the court requires notice to be served on the Attorney-General, as the Crown would be liable for costs if the proceedings failed. *Queen v. Watson*, 7 Ir. Jur., N. S., 401.

RECORDER.

Power of, to appoint officers for service of process under st. 14 & 15 Vict., c. 57. The recorders of boroughs, as well as the chairmen of counties, have authority to appoint officers for the service of civil bill process in their courts, and the officers so appointed are entitled to be paid by the collectors of Inland Revenue, the salary of £10, given by s. 17 of the Civil Bill Act, to the process officers appointed by the chairmen of counties. *Queen v. Ritson*, 7 Ir. Jur., N. S., 381.

SATISFACTION OF DEBT.

Satisfaction by discharge of debtor after arrest. Discharge of a debtor by creditor after arrest on a *ca. sa.* is a satisfaction of the debt, and he cannot be re-arrested for the same debt, even though it was so stipulated in a Master's order to which he was a party. *Seymour v. Clarke*, 7 Ir. Jur. N. S., 386.

"SETTLE"

Meaning of word. Action to enforce compliance with the terms of an agreement. The summons and plaint recited a letter from the defendant to the plaintiff (his mother), in which he agreed to settle £500 upon his sister as soon as he would be in a position to do so, in consideration of the plaintiff's yielding priority as to a portion of her jointure; that the plaintiff yielded priority as required, that the defendant was in a position to settle the £500 as agreed on; and that he had been applied to do so, but refused. Averment of conditions precedent. To this there was demurrer, on two grounds. First,—Because if an action can be sustained upon the agreement stated in the plaint, same should be brought by plaintiff's daughter, and not by the present plaintiff. Secondly,—Because the agreement stated in the plaint is too vague, indefinite and uncertain to be the subject of an action. Held, that there was no uncertainty in the word "settle," though the defendant might select the manner in which he would settle the money. *Byrne v. Byrne*, 7 Ir. Jur., N. S., 221.

Held, also, that the plaintiff was the proper person to bring the action. *Id.*

SETTLEMENT.

By a settlement executed on the marriage of B. in 1811, the S. estate was conveyed to trustees, to the use of A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail, subject to a term, the trusts of which were, in case there should be an eldest or only son, and one or more younger children of the marriage, to raise £2,000 for the portion or portions of all and every such younger child or children; if but one younger child, the whole to be paid to such only younger child, and if two or more, to be divided as B. should by deed or will appoint, &c., and, for default of appointment, to be equally divided. Provided that, in case any of the said younger children should die before his portion became payable, or that any younger son should become an eldest son before he attained the age of twenty-one years, the portion or portions of such of them so dying, or becoming an eldest or only son, should go and be divided equally among the survivors or survivor, or others or other of them. By the same settlement, a sum of £2,000 was charged on the X. estate (which was not otherwise the subject of that settlement), upon trust, after the decease of B., for the same intents and purposes as were thereinbefore expressed and declared of and concerning the £2,000 charged on the S. estate. There were six children of the marriage, the two eldest of whom were C. and D.; and in 1836, C. being of age, the S. estate was disentailed, and afterwards re-settled by a deed, under

which C. and D. took life estates, with remainder to their issue male. In 1836, on the marriage of D., B., by deed, appointed the 2,000l. charged on the S. estate, and 500l. of the 2,000 charged on the X. estate, upon certain trusts in favour of D. and his children; provided that if, under the limitations contained in the settlement of 1811 or 1836, or either of them, D. should succeed to an estate tail in possession in the S. estate, the appointment should not take effect, and the 2,500l. should belong to the remaining younger children of B., as he should appoint, and in default of appointment, equally. In 1841, the S. estate was re-settled, in pursuance of a power of revocation in the deed of 1836, to B. for life, remainder to C. for life, remainder to his first and other sons in tail, remainder to D. for life, remainder to his first and other sons in tail. In 1853, C. died without issue, whereupon D. became entitled to the estates under the last-mentioned deed. Held, that, supposing the appointment of 1839 to have been avoided by D. having become an eldest son, his share in the two sums of 2,000l., in default of appointment, had not been divested, as he had not become an eldest son before he attained the age of twenty-one. *In re Smyth's trusts*, 12 Ir. Ch. Rep. 187.

Held also, that the X. estate not being subject to the settlement of 1811, the appointment of 500l. of the 2,000l. charged on that estate was not divested by D., having, as eldest son, succeeded to the S. estate. *Id.*

Held also, that D. having, as eldest son, succeeded to an estate for life under the deed of 1841, and not to an estate tail, under the deeds of 1811 or 1836, the appointment of 1839 was not defeated. *Id.*

Settle, the court would not, on a petition under the Trustee Relief Acts to draw out the 2,000l. charged on the X. estate, and in the absence of minors claiming under the appointment of 1839, determine the right to the fund adversely to them. *Id.*

Settlement of future property. V. R., an idiot, was entitled absolutely to certain estates, held under leases for lives renewable. In 1794, R. R. his brother and heir presumptive married, and by the settlement executed previously to his marriage gave certain lands "together with all other the lands which he was then or should hereafter become entitled to," to trustees upon trust, besides other trusts, for the issue male of the marriage, or one or more of them as he R. R. should appoint, and in default of appointment subject to a trust term of 500 years, to the use of the first son of the marriage. In Michaelmas Term, 1819, R. R. became indebted to S. by judgment. On the 18th of November, 1819, R. R. appointed the lands comprised in the settlement to his eldest son, T. R. In 1839, V. R., the idiot died, and in 1842, the representative of the judgment creditor obtained a receiver over the lands upon a petition under the Sheriff's Act against R. R. R. R. died in 1859, and thereupon his eldest son T. R. went into receipt of the rents without having obtained the leave of the court so to do. Upon an application to revive the receiver matter, Held, that T. R. was entitled to hold the lands discharged of the receiver, and the application was refused, but no costs were given, as the conduct of T. R. in entering into receipt of the rents without the leave of the court was not proper in the present case. *Stack v. Royse*, 7 Ir. Jur., N. S., 114, and 12 Ir. Ch. Rep., 246.

R. conveyed the lands of A., of which he was seised in tail in remainder, together with all and singular of the lands and premises which he then was or thereafter might be entitled to in reversion, remainder, or otherwise howsoever to trustees to the use of himself for life, remainder as he should appoint among the issue male of the marriage, remainder over. He also covenanted to do any act or execute any conveyance if required of the lands of A., or any other lands and premises of which he should at any time thereafter be possessed of or entitled to, for the further and absolute carrying the settlement, and the true intent and meaning of the parties thereto into full legal and perfect execution. In 1819 a judgment was recovered against R.; and in 1839 he became entitled, as heir-at-law of his brother, to the lands of B., which were not mentioned in the deed of 1794. R. died in 1859. Held (affirming the decision of the court below) that the trusts of the deed of 1794, which were perfect and complete, attached upon the lands of B., when they descended upon R.; and that the eldest son of the latter was entitled to hold them discharged of the judgment. *Stack v. Royse*, 7 Ir. Jur., N. S., 249, Ch. App.

SHERIFF.

Sheriff's return.] Sheriffs to writ of *fi. fa.* set aside as evasive, ambiguous, and unsatisfactory. *Hogan v. Carey*, 7 Ir. Jur. N. S. 379.

SLANDER.

Imputation of Incontinence.] To impute incontinence to a female domestic servant whilst in the course of her employment, is actionable. *Connors v. Justice*, 7 Ir. Jur. N. S., 819.

Furnishing particulars.] The court has a general jurisdiction applicable to every species of action to order a plaintiff to furnish the defendant with further particulars, if the circumstances of the case and the course of justice require it. Therefore, where in an action for slander the defendant moved the court to order the plaintiff to furnish "the names, descriptions, and addresses of the persons in whose presence the slanderous words were spoken; and the time or times when, and the place or places where, the words were spoken." Held, (per O'Brien, Hayes, and Fitzgerald, JJ.; Lefroy, C.J., dissentiente) that the plaintiff should furnish a statement of the occasion or occasions on which the words were spoken, but not of the names, descriptions, and addresses of the persons present. *Early v. Smith*, 12 Ir. C. L. Rep. app. xxxv.

SOLICITOR AND CLIENT.

A., a solicitor, purchases four judgments affecting the estate of B., his client, for sums less than the amounts due on the judgments. Two of the judgments were assigned to A. by a deed in which B. joined. The third judgment was bought by A. a short time after the death of B., and the fourth during the time that A. had the carriage of the proceedings in a suit to administer the estate of B. The estate of B. was sold in the Landed Estates Court. Held, on the settlement of the final schedule, that A. could not stand upon the schedule as a creditor in respect of the judgments for sums larger than the amounts he actually paid, with interest thereon and costs of the assignments. *Johnstone's Estate*, 7 Ir. Jur. N.S., 36.

SPECIFIC PERFORMANCE.

A term of years was held upon trust for the separate use of E., a married woman, for her life, with remainder upon trust for T., her husband, for life, with remainder for the children of T. and E. There were several children, and by deed, reciting that E. in order to further the prospects in life of the children, had consented to assign her life interest for the benefit of the children; and that T., for the same purpose, agreed to assign his life interest in case he should survive his wife, E. assigned her life interest to trustees for the benefit of the children; and T. covenanted that if he should survive his wife he would, if called on by the trustees, assign his estate and interest upon the same trusts. E. and T. subsequently for a valuable consideration assigned to H. Held, that the children of E. and T. were entitled to enforce against H. a specific performance of T.'s covenant to assign his interest. *Joyce v. Hutton*, 12 Ir. Ch. R., 71.

SPIRIT LICENSE.

Responsibility of proprietor of licensed house.] The proprietor of a house licensed to retail spirits is responsible for the non-admission of the constabulary into his house in his absence. *Stewart app., Birney*, resp., 7 Ir. Jur. N. S., 108; Armagh Quarter Sessions.

STATUTE (CONSTRUCTION.)

Owner within st. l, Vict. c. 32.] C. F. being seised of certain freehold estate became an insolvent, and executed an assignment of all his property to the official assignee. The assignment was not registered, nor did the official assignee enter into possession of his freehold estate. The Commissioners of Public Works afterwards advanced several loans to C. F. to be laid out in the improvement of his estates. Held, that C. F. was an owner within the 1st Vict. c. 32, and that the loans were valid charges on the lands. *In re Fitzgerald's Estate*, 12 Ir. Ch. R., 81.

Construction of st. 3 Vict. c. 79.] When public works had been constructed under powers given by the 3 Vict. c. 79, to commissioners appointed for that purpose, and the inhabitants

of Belfast had acquiesced for twenty years in the manner in which they were executed and conducted. Held, that they were thereby precluded from suing the commissioners, and recovering the penalties imposed on them in that behalf. *Belfast Water Commissioners*, app.; *Girdwood*, resp. 7 Ir. Jur. N.S., 151.

Held, also, that a filtering basin which adjoins the town basin, though with a different level, was a portion of the town basin within the meaning of the 3 Vict. c. 79. *Ib.*

Held, also, that the Court of Queen's Bench had jurisdiction to hear the appeal under the 20 & 21 Vict. c. 43, notwithstanding the provisions of the 3 Vict. c. 79, s. 146.

Held, also, per Hayes, J., that the term "inhabitant" in the 3 Vict. c. 79, does not necessarily mean resident inhabitant. *Ib.*

Application of statutes to Ireland, and general rules of construction of.] The 8 & 9 Vict. c. 106, s. 6, which rendered contingent rights of entry assignable, does not apply to Ireland; and, *semble*, even if it did apply to Ireland, it was not meant to include the assignment of pretended titles. *Nelson v. Small*, 7 Ir. Jur. N.S., 379.

The Common Lodging-houses Acts, 1851, 1853, 14 & 15 Vict. c. 28, and 16 & 17 Vict. c. 41, did not, prior to the passing of the Common Lodging-houses Act (Ireland), 1860, 23 Vict. c. 26, apply to Ireland. *Wright v. Murphy*, 4 Ir. Law Rep. 358, distinguished. *The Queen v. Guardians of Malloon Union*, 12 Ir. C. L. R., 35.

Every Act of Parliament passed since the Union embraces Ireland, unless Ireland is excluded from its operation in express terms, or by necessary implication to be gathered from the construction of the statute. *Ib.*

It is the most natural and genuine exposition of a statute to construe one part by another; for that best expresseth the meaning of the makers, and this exposition is *ex visceribus actus*. Co. Lit. 381 a, followed and approved of. *Ib.*

If by a statute it is intended to impose a tax upon the subject, its construction must be clear beyond all reasonable doubt. (Per Lefroy, C.J.) *Ib.*

The common law rights of the subject, in respect of the enjoyment of his property, are not to be trenchoned upon by a statute, unless such intention is shown by clear words or necessary implication. (Per Lefroy, C.J.) *Ib.*

In cases of doubtful construction of a statute the title may be referred to. (Per Lefroy, C.J.) *Ib.*

SUCCESSION DUTY.

In the year 1844 Whiteacre and Blackacre stood limited to A. for life, remainder to his first and other sons in tail; remainder to B. for life, remainder to her first and other sons in tail. B. married and had issue C., an eldest son, and several younger children. In that year the entail was barred; and by another deed, dated the 9th April, 1844, to which A., B., her husband, and C., the tenant in tail, were parties, the estates of Whiteacre and Blackacre were conveyed, after the expiration of A.'s life estate, to the use, as to Whiteacre, of B. and her husband for the life of the survivor; and as to Blackacre, and also Whiteacre, after the death of the survivor of B. and her husband, to the use of trustees for a term of 400 years, with remainders, subject, as to both estates, to this term; and also, as to Whiteacre, to the life estates of B. and her husband, to C. for life, with remainders.

The trusts of the term were, after the death of A. to raise out of the rents of Blackacre interest on a sum of 4,000*l.*, at 8*l.* per cent., for the younger children of B. and her husband, until the death of the survivor of these two; and after the death of such survivor to raise the sum of 4,000*l.*, with interest thereon, from the death of the survivor, at 5*l.* per cent., for such younger children. A. died in 1852; and B. survived her husband, and died in 1854, after the passing of the Succession Duty Act, 1853. Held, that a succession to the 4,000*l.* within the meaning of the Succession Duty Act accrued to the younger children on the death of B. *Attorney-General v. Deane*, 12 Ir. C. L. Rep. 307.

Held, also, that B., and not C., was the "predecessor," and that succession duty was payable on the 4,000*l.* as on a succession from B. *Ib.*

TENANT FOR LIFE AND REMAINDERMAN.

Equities between.] A was seised in fee of estates called the family estates, and tenant for life of devised estates, with re-

mainder to B., his eldest son, in tail, subject to large incumbrances affecting each estate. A. and B. entered into an agreement that all the incumbrances should be paid by the sale of C., a portion of the devised estate which was of sufficient value for the purpose; and that the residue of the devised estate and the family estate should be settled on A. for life, remainder to B. for life, remainder over. And two deeds were executed, by one of which the entail of the devised estate was barred and it was conveyed to such uses as A. should appoint; and by the other deed A. conveyed the family estate, and conveyed and appointed the devised estate to such uses as A. and B. should jointly appoint, and in default of appointment to the use of trustees for 1000 years, to secure younger children's portions, and subject thereto to the use of A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder over. And A. covenanted with B. that he should sell C. a portion of the devised estate, and would, out of the rents received by him before sale, and the money which should arise from such sale, pay off all the charges and incumbrances affecting both estates. A. misapplied the rents, and suffered an arrear of interest of the incumbrances on the family estate to accrue, in consequence of which the produce of the sale of C. was insufficient to pay off the incumbrances and the interest on them, and a portion of the family estate was sold. Held, first, that B. had an equity against A. to be recouped out of the rents of the life estate, which he derived under the deed, to the extent of all interest on the incumbrances scheduled in the deed which accrued after the date of it, and which were levied by sale of any of the family estate in consequence of the misapplication of the rents by A. *Kilworth v. Mountcashell*, 12 Ir. Ch. Rep. 43.

Secondly, that although A. was not bound, before the execution, of the deed to pay the arrear of interest then due on the family estate, such arrear was, under the deed, to be paid out of the rents and produce of the sale of C. *Id.*

Thirdly, that the rents and produce of the sale of C. were also applicable to pay arrears due on the devised estate. *Id.*

Fourthly, that the equity of the petitioner to be recouped prevailed over the right of judgment creditors of A., whose judgments were obtained subsequently to the deed, and who had appointed a receiver over his life estate. *Id.*

TITHE RENT-CHARGE.

Practice of Landed Estates Court as to. The Landed Estates Court, even in the absence of an express condition of sale to that effect, does not guarantee the particulars of tithe rent-charge, the amount and apportionment of which are settled by Act of Parliament. Therefore, where the rental incorrectly stated the names of the parties liable to the payment of the tithe rent-charge—but the same amount was, in fact, paid by other parties—a motion by a purchaser to be discharged was refused, but compensation was given at the rate of the purchase for any substantial error of detail. *In re Moorhead's Estate*, 12 Ir. Ch. Rep. 371.

TRUST.

Circumstances under which the court will impose a trust on a devisee. The Court of Chancery will execute a trust which the devisee of a testator has verbally promised to perform, when it is satisfied that the intention of the testator was clearly explained to the devisee; that the devisee agreed to carry that intention into effect; and that, but for such undertaking by the devisee, the testator would not have given his property to the devisee. *Attorney-General v. Dillon*, 7 Ir. Jur., N.S., 251.

TRUSTEE AND CESTUI QUE TRUST.

Breach of trust. In Ireland a loan of trust funds on a second mortgage is not of itself, and in the absence of other circumstances, a breach of trust. *Smithwick v. Smithwick*, 12 Ir. Ch. Rep. 181.

A sum of money charged upon lands was, by a marriage settlement, assigned to trustees upon trust, to pay the interest to A., the husband, for his life, and after his death in trust to pay the wife, B., a jointure of 200*l.* a year, provided that it should be lawful for A., with the consent of the trustees in writing, to call in the trust fund, and lay out and dispose of the same in the purchase of an estate of inheritance or free-

hold for a term of at least three lives, or of a lease for a term of years whereof ninety-nine years shall be unexpired, or otherwise advantageously; which purchase or disposal when so made should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to said funds. A portion of the fund was paid to the surviving trustee, who lent it to A. on a release being executed by A., B., and C., their son, and acknowledged and enrolled under the Act for the abolition of Fines and Recoveries. Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Id.*

Money subject to be invested in lands, in the said Act, 3 & 4 Wm. 4; c. 92, s. 68, means money directed to be so invested. *Id.*

TRUSTEE RELIEF ACT.

Right of husband out of jurisdiction of executrix to execute an assignment vested in another person, under a 22 of the Trustee Relief Act, 1850. *Re Tisdall's Trusts*, 7 Ir. Jur., N.S., 139.

TURBARY.

As to confining right to cut turf to particular part of bog. Where a lease contained a covenant by the landlord that the tenant might at all times during the grant, raise, cut, and carry away from the bogs of A. and B. (the landlord's property) turf sufficient to be expended on the premises demised by the lease—Held, that the landlord was not at liberty to confine the exercise of his right to a particular portion of the bog allocated to him, though it was sufficient and convenient. *Hargrove v. Lord Congleton*, 12 Ir. C. L. Rep., 562.

Apportionment of the right of turbary. A. by indenture dated the 12th of August, 1785, demised certain lands to B. and C. for the term of 889 years, and by the lease A. covenanted that B. and C., "their executors, &c., and every of them, should and might, from time to time, and at all times during the grant, raise, cut, and carry away from off the bog of Coolmoney and Ballyna" (the absolute property of the lessor, and not included in the lease), "turf sufficient to be expended on the said premises." B. and C. covenanted to repair all houses, out-offices, &c., that then were, or thereafter might be, built upon the premises. In the year 1735, B. and C. partitioned the lands, and in 1856 the Commissioners of the Incumbered Estates Court granted B.'s moiety to the plaintiff, "with the appurtenances." Held, that the right of turbary was apportionable, and that the plaintiff was entitled to a proportional share. *Hargrove v. Lord Congleton*, 12 Ir. C. L. Rep. 868.

Held, also, that the plaintiff was entitled to turbary in respect of a messuage built since the purchase in the Incumbered Estates Court. *Id.*

VENDOR AND PURCHASER.

Objections to title. A purchaser who has agreed to take an assignment of premises held under a lease for a term of years, cannot object to the title upon the grounds of the discovery that such lease is an underlease, as the sub-tenant is now placed in privity with the head landlord by 23 & 24 Vict. c. 154, s. 21, (The Landlord and Tenant Law Amendment Act, Ireland, 1860). *Balfour v. M'Neill*, 7 Ir. Jur., N.S., 8.

Waiver of condition of sale. M. agreed to sell his interest in a lease of the lands of F. to A., under the following conditions of sale (amongst others). "As the property in question is of small value, and the vendor is unwilling to incur any unnecessary expense or costs, the purchaser is to accept the title, which the present vendor accepted upon the occasion of the purchase of the premises in February last; and such purchaser shall not be entitled to object, on any grounds whatsoever, to the title anterior to the conveyance to the present vendor, dated the 1st of February, 1861, or to make any requisition in respect to such prior title, but the abstract of title under which the vendor was satisfied, upon the purchase of these premises, and all deeds, documents, and papers, handed over to him or his solicitor upon that occasion, shall be handed to the present purchaser." Pending the negotiation between the solicitors of the parties, M. frequently assured A., by letter, that the title was perfectly good. Held—That the letters written by M. amounted to a waiver of the above condition of sale. *Matthews v. Archer*, 7 Ir. Jur., N.S., 255.

WARRANT TO DISTRAIN.

Where a warrant to distrain, made by justices acting under the 9 and 10 Vict., c. 292, s. 45, and 14 and 15 Vict., c. 93, s. 32, had been anticipated by an execution creditor of a defaulting officer of the Waterford Harbour Commissioners, and an application was made to the summary jurisdiction of the court to set aside the execution, and direct the sheriff to pay over the proceeds to the secretary of the Harbour Commissioners, on the ground that the justices' warrant amounted to a writ of *levari facias*, and, therefore, at common law bound the goods of the defendant from the time of its delivery to the constable, and also on the ground of fraud and collusion by the defendant, in permitting his goods to be seized by the execution creditor after the warrant had been issued by the justices. The court refused the application. *Whitstone v. Smith*, 7 Ir. Jur., N.S., 31.

WAY.

A carriage-way includes a horse-way, and a horse-way a foot-way. *Tottenham v. Byrne*, 7 Ir. Jur., N.S., 14.

WEIGHMASTER.

Disturbance of office. Where D. was appointed to the office of weighmaster, of the town of T., under the 52nd Geo. 3, c. 134, in October, 1859, but did not take the oath prescribed by the statute till April, 1860, and C. opened a weigh-house in the same town, enticed away D.'s customers, and took the fees allowed by the statute—Held, that there was a disturbance of D.'s office; that the word "wherein," in the 6th section of the Act, referred to the words "city, town corporate, and county," in the preceding sentence; that the oath required by the statute might be taken at the sessions subsequent to the date of the appointment; and that exemplary damages beyond the mere pecuniary loss of D. might be given. *Dexter v. Cust*, 7 Ir. Jur., N.S., 156.

And held, by Pigot, C. B., and Hughes, B., that the appointment was not invalid, because, instead of the words "I shall continue," in the Act prescribed, the words of the oath taken were, "I shall hold." *Ib.*

Fitzgerald and Deasy, BB., dissenting. *Ib.*

WILL (CONSTRUCTION).

Generally. A testator bequeathed to his daughters A. and C. 100*l.* each, to be left at interest by his executors and trustees, and the interest regularly paid to them; and should they marry, it must be with the consent of their brother; and, even in that case, their husbands were to have no control over principal or interest; and the receipt of his said daughters was to be a sufficient discharge of the interest. Should either of his daughters die, or both of them, without issue, they might, by their last will and testament, dispose of 500*l.* each of said 2,000*l.* to any of their brothers or sisters, or nephews or nieces, but to no other person; the remaining 1,000*l.* to be divided amongst his surviving children, share and share alike; and should his daughters, or either of them, wish to purchase an annuity with their share of the 2,000*l.* for their life or lives, with the consent, or under the direction and advice of their guardians, they were to be at liberty to do so. C. died intestate, and without issue. Held, first, that the daughters took life interests only in the 2,000*l.*; secondly, that as to 500*l.* of C.'s share, a trust was created for the brothers and sisters, and nephews and nieces, living at her death, and that they were entitled equally to the 500*l.* in default of appointment, thirdly, that the brothers of C. who survived her were entitled to the remaining 500*l.*, her sisters having died before her. *O'Neill v. Montgomery*, 12 Ir. Ch. Rep. 163.

What passes by will. Where, after a lease of a house which gave the lessee the option of purchasing the lessor's interest, the testator made a will, which contained a bequest of the purchase-money in case the tenant should exercise his option. Held, that the house passed by the will. *Taylor v. Burns*, 7 Ir. Jur. N.S., 26.

The will contained a bequest of "all cash" which might be after paying testator's legacies and debts. Held, that this bequest included the surplus rents of the house which would accrue after testator's death, after payment of head rent and an annuity created by the will, and that those surplus rents should be held on the trusts of the will. *Ib.*

Meaning of "next elder brother." A testator died leaving seven sons surviving him. By both his will and the first codicil thereto he directed that certain sums should be divided equally amongst his five younger sons, exclusive of his two eldest sons, who were otherwise provided for. By a second codicil, the testator directed his executors to lodge the amount of certain debts due to him, "to the use of my five younger sons, beginning at E, my third son, and down to H, my youngest son, in such proportions as I have appointed by my will and former codicil; but they are only to receive the interest of said legacies during their natural lives; and in case those who die do not leave any wife or children at their death, then the said proportions they were entitled to during their life to go to their next elder brother, and so on to the youngest." The fifth son died unmarried. Held, that the share of the deceased passed to the sixth son as his next elder brother. *Fitzgerald v. Fitzgerald*, 7 Ir. Jur., N.S., 9.

Admissibility of parol evidence to explain. Where a person perfectly answers the description given in a will of the intended legatee, parol evidence of the testator's intentions and declarations is not admissible for the purpose of showing that another person imperfectly answering such description, was the object of the testator's bounty. *Hagerty v. Hagerty*, 7 Ir. Jur., N.S., 166, per Lendrick, Chairman of Quarter Sessions, Co. Wicklow.

Exoneration of personal estate from legacies. Legacies held to be charged upon real estate to the exoneration of the personality. *Dawnt v. Dawnt*, 7 Ir. Jur. N.S., 815.

Legacies not raiseable out of real estate. A testator bequeathed to his four dear daughters a legacy of £500, to be paid to them respectively on the days of their respective marriages, with the consent of his wife and executors, with power to each of them to dispose thereof by will or deed as they might think proper; such four legacies to be charged on his personal estate, and the deficiency to be raised out of his real estate, which he empowered his trustees to do by demise, sale, or mortgage; and he directed his executors to pay not less £30 or more than £40 a year for his daughters' maintenance until their respective marriages, out of his personal estate, and on a deficiency out of his real estate. By a codicil to his will he devised four additional legacies of £500 to be paid to each of them at the time and in the manner in his will mentioned. One of the daughters died unmarried, having bequeathed her legacies to the survivors. Held, firstly, that the legacies of the daughter who died could not be raised out of the testator's real estate; secondly, that the legacies to the surviving daughters were not raiseable out of the real estate, before their marriage with consent. *Bolton v. Bolton*, 12 Ir. Ch. Rep. 233.

Creation of estate in quasi tail. A testator seized of lands, under a lease for lives renewable for ever, devised the same by will dated 1826 to his son T. He also devised other property by the same will to his son P., and directed that "in case any or either of my sons shall die without issue, their shares and proportions shall be left to the survivor; and if it should happen that both should die without issue, that their shares or proportions shall be left to my grandson J. G., or his heirs." Held, that under this devise the sons of the testator took an estate in quasi tail. *Moriarty v. Grey*, 12 Ir. C. L. Rep. 129.

Cross-remainders. A testator devised all his estate and interest in the lands of D. to A. and B., one moiety to each for life, and from and after their decease to the sons of A. and B. and the heirs of their bodies, and in default of such issue, he devised the said lands to C. Held, that the terms of this devise implied cross-remainders. *Fitzgerald v. Fitzgerald*, 7 Ir. Jur., N.S., 104; and 12 Ir. C. L. Rep. 551.

Held also, per Monahan, C.J., (Christian, J., dissentiente), that there is nothing to prevent the implication of successive cross-remainders between estates for life and estates tail in the same subject matter, where the phraseology of the will warrants the inference that the testator so intended. *Ib.*

Testator being seized of large real estates, devised the same to his nephew D. F., for life, with remainder to his sons in tail male; and in default of issue male in the said D. F., he devised the said estates to his three nieces, J. R., and B., "and the survivor of them for the term of their natural lives as tenants in common and not as joint tenants without impeachment of waste; and from and after their decease," to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their respective bodies successively, in equal proportions, the elder of such

sons of each of my said nieces and the heirs male of their bodies being always preferred and to take before the younger, and the heirs male of their bodies, and for default of such issue male, then to the daughters of the said J., R., and B., and for default of such issue, male or female, to the use of testator's own right heirs for ever. At the date of the will and of the testator's death, one of the nieces, J., was married and had a daughter, C., who is mentioned by the testator in a former part of his will, and is the respondent. The two other nieces were at the time of the testator's death unmarried, but they afterwards married, and had issue each a son; J. never had any issue male. The nieces J. and R. died, leaving B. then surviving. Held, 1st, that under the words "and the survivor of them," B., as the survivor, became entitled to the whole estate for her life. 2ndly, that cross remainders were to be implied between the issue male of the nieces; and that C., the daughter of J., could not take anything until there was a failure of issue male of all the nieces. *Taaffe v. Conmee*, 7 Ir. Jur., N. S., 229, H. of L., reversing *Conmee v. Taaffe*, 12 Ir. Ch. Rep. 338.

Legacy free from legacy duty.] A testator, after reciting that a sum of £50,000 was charged on certain estates, which bore interest at 4 per cent., and was payable, subject to a power of appointment, to the male issue of his marriage, and, in certain events, reverted to him, bequeathed the said sum, upon trust to pay out of the interest an annuity to his wife, and the residue of the interest to his granddaughter, for life; and he directed that, with the exception of the said sum so charged, all his debts, legacies, and legacy duties, &c., should be paid and payable out of such portions of his estate as were not specifically bequeathed; and he directed that all his legacies should be paid within twelve months after his decease, without any deduction for legacy or stamp duty; and that all his legacies should bear interest at the rate of 5 per cent.

from the time of his death; and he further directed that his executors should pay the legacy duties payable on the said legacies; and that all legacies thereby bequeathed should be payable without any deduction whatever. Held, that the £50,000 was payable free from legacy duty. *Ferguson v. Ogilby*, 12 Ir. Ch. Rep. 411.

WILL (REVOCATION AND REVIVAL OF).

Revival of will by codicil.] A testator duly made a will, dated the 4th of Feb. 1858, containing a clause of revocation, and destroyed it. On the 11th January, 1859, he made a second will, and added a codicil to it on the 7th February, 1859. On the 16th of February, 1859, he made a codicil to his will of 1858, and confirmed all the provisions of that will, adding, however, that in case the devisee therein married a certain person, the estates devised to him were to go to another. Both the will of 1858 and the codicil of the 16th February, 1859, were destroyed by the testator before his death. Held, that a non-existing will cannot be revived by a codicil by reference *Newton v. Newton*, 7 Ir. Jur., N. S., 129; and 12 Ir. Ch. Rep. 118.

That parol evidence is not admissible to explain a testator's intention, which must be collected from the instruments themselves. *Id.*

Held, that as the codicil referred to the original will of 1858, the draft of the will could not be incorporated by reference. *Id.*

That (reversing the decision below) as the codicil of the 16th of February, 1859, referred to the will of 1858 alone, there was no evidence of an intention not to revoke the will of 1859 in case the testator failed to revive that of 1858. *Id.*

Effect of reference to a destroyed will in a codicil upon an existing will, made after the destroyed will and before the codicil—*Costa. Rogers v. Andrews*, 7 Ir. Jur., N. S., 135.

Addenda.

The following cases and references were accidentally omitted from the body of the Digest.

APPEAL.

Principles on which court acts in reversing decree below.] The Court of Appeal will be slow to reverse a decision below, arrived at after deliberation, unless clearly satisfied that that decision was erroneous. Lord Wensleydale's judgment in *Vernon v. Wright*, 7 H. of L. 66, approved of. *Upington v. Tarant*, 7 Ir. Jur. N. S., 199, Ch. App.

ASSIGNMENT.

Consideration.] A covenant by the assignee of a term of years to pay the rent reserved in the original lease, and to indemnify the assignor against its other covenants, does not amount to a consideration in law which will support the assignment against creditors, and exclude the operation of the statute against fraudulent conveyances (10 Chas. 1, sess. 2, c. 3). *Gardiner v. Gardiner*, 7 Ir. Jur. N. S., 81, and 12 Ir. C. L. Rep. 565.

ATTORNEY.

Liability on undertaking of his clerk.] Attorney held bound by the undertaking of his clerk, though he on the same day in another place refused to give the same undertaking to the agent of the person to whom his clerk gave the promise. *Young v. Power*, 7 Ir. Jur. N. S., 388.

BANKRUPTCY AND INSOLVENCY.

Trader residing and trading in England.] The Court of Bankruptcy in Ireland has jurisdiction only over traders who reside in, and trade in, Ireland, or who trade with England and reside in Ireland. Therefore, a person who, while residing in, and trading in, England, contracted trade debts there, cannot be adjudicated a bankrupt in Ireland in respect of those debts, although he may have resided for some years, and may have contracted debts, in Ireland. *In re Day*, 7 Ir. Jur. N. S., 309.

A trader who had resided and carried on business in England for several years, took premises in Ireland in November, 1860, closed his place of business in England, removed his family to Ireland, and, pursuant to advertisements in the Irish newspapers, carried on his trade thenceforward in Ireland only. Five tenths of the amount of his debts were contracted in England. In April, 1861, he was adjudged a bankrupt in England, and in May following the Irish Court of Bankruptcy and Insolvency made a similar adjudication. On appeal by the bankrupt from the latter, Held, that the bankrupt was residing and trading exclusively in Ireland, under the 31st section of the Irish Bankruptcy and Insolvency Act. *Re Sanderson, a bankrupt*, 7 Ir. Jur. N. S., 48.

Jurisdiction of court over compositions.] The Courts of Bankruptcy and Insolvency in Ireland have no jurisdiction over compositions between bankrupts and their creditors, save to see that the amount of composition offered corresponds with that advertised, and to annul (with or without costs) the adjudication of bankruptcy. *Semble*—The offer must be of a composition by a money payment, and not by bills of exchange. *Re Fahy*, 7 Ir. Jur. N. S., 47.

Appeal against certificate.] No appeal lies against the granting of a certificate to a bankrupt unless the appellant's objection be made in writing at the final examination. *Re Woodroffe*, 7 Ir. Jur. N. S., 49.

BANKS (LIABILITY OF.)

Forged cheques.] There is no obligation on a banking company to ascertain the genuineness of a payee's indorsement upon a cheque or draft payable to order, before paying same when presented. *Hare v. Copeland*, 7 Ir. Jur. N. S., 242.

A summons and plaint which complains that a banking company had paid away money of the plaintiff upon a cheque drawn by the plaintiff and payable to order, but the indorsement upon which is a forgery, and charges that the same happened through their gross negligence and that of their servants and agents, but does not allege any act of wilful misfeasance on the part of the defendants or their servants and agents will be bad on general demurrer (Christian, J., *dissentiente*). *Id.*

EVIDENCE.

An agreement to finish a vault in a church made between a stone-mason and an ancestor of the party claiming under him, signed by the stone-mason only, and produced from the proper quarter, is evidence to prove that the vault in question was finished, on the same ground that counterparts of leases are admissible, but is not evidence of any of the facts recited in the agreement; nor is it admissible as an ancient document to prove possession of the church in the ancestor. *Johnston v. Bloomfield*, 7 Ir. Jur. N. S., 61.

A codicil to a will, by which the testator charges his property with the endowment of a church, is evidence to prove the bequest; but is not evidence of the facts recited in it, that an ancestor of the testator had commenced, and that the testator had himself completed, the said church, either as an ancient document relating to ancient possession, or on the ground that it amounted to a declaration against interest, or as evidence of reputation. *Id.*

FRAUD.

Effect of, on a release and reconveyance.] A. conveyed to B. certain lands on which C. had a mortgage. B. had notice of the mortgage before the completion of the sale to B.; and A. undertakes with B. to obtain a reconveyance of the estate to B. A. by fraud obtained a release and a reconveyance of the lands to himself from C., of which fraud B. had no notice. A. died seized of the estate and interest so conveyed to him by C. B. as owner, after the death of A., proceeded to sell in the Landed Estates Court the estates conveyed to him. C. filed an objection, alleging that the deed of reconveyance obtained from him by A. was fraudulent and void, and claiming to be reinstated in his original position as an incumbrancer. Held, reversing the order of the Court of Appeal, approving of Judge Longfield's declaring that the deed of reconveyance was void, not only as against it, but also against B.; and that C. was entitled to be restored to his rights under his mortgage deed. *Eyre v. Burmester*, 7 Ir. Jur. N. S., 329.

LANDED ESTATES COURT (PRACTICE).

Rehearings and appeals.] A motion to rehear or review a decision must be made within three months from the date of the order or decision, and liberty must first be obtained before a notice to rehear is served; but the application for liberty to rehear may be made *ex parte*. *Johnstone's Estate*, 7 Ir. Jur. N. S., 36.

Application to extend the time to appeal must be made before the expiration of the three months, the time within which, by the 41st section, the appeal must be brought. *Id.*

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APPENDIX TO THE IRISH JURIST,

CONTAINING

The Public General Statutes,

PASSED IN THE SESSION, 1862, AND 25 & 26 VICTORIA.

N.B.—The Statutes relating to Ireland only are printed in full.

CAP. I.

An Act to apply the Sum of Nine hundred and seventy-three thousand seven hundred and forty-seven Pounds out of the Consolidated Fund to the Service of the year ending the Thirty-first Day of March One thousand eight hundred and sixty-two. [10th March 1862.]

CAP. II.

An Act to apply the Sum of Eighteen Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and sixty-two. [24th March 1862.]

CAP. III.

An Act to amend an Act, intituled *An Act to amend the Law relating to Supply Exchequer Bills, and to charge the same on the Consolidated Fund*; and to repeal all Provisions by which Authority is given to the Commissioners of Her Majesty's Treasury to fund Exchequer Bills. [24th March, 1862.]

CAP. IV.

An Act to enable Her Majesty to issue Commissions to the Officers of Her Majesty's Land Forces and Royal Marines, and to Adjutants and Quarter-masters of Her Militia and Volunteer Forces, without affixing Her Royal Sign Manual thereto. [11th April, 1862.]

CAP. V.

An Act for punishing Mutiny and Desertion, and for the better payment of the Army and their Quarters. [11th April, 1862.]

CAP. VI.

An Act for the Regulation of Her Majesty's Royal Marine Forces while on shore. [11th April, 1862.]

CAP. VII.

An Act to provide for the Registration and Transfer of India Stocks at the Bank of Ireland, and for the mutual Transfer of such Stocks from and to the Banks of England and Ireland respectively. [11th April, 1862.]

Sec. 1. *Interpretation of expression "India Stock."*

2. *Power to transfer India Stock from the books of*

the Bank of England to the books of the Bank of Ireland.

3. *Assignments or transfers of stock so transferred may be made at the Bank of Ireland.*

4. *Power to transfer India Stock from the books of the Bank of Ireland to the books of the bank of England.*

5. *No transfer shall be made within a certain period before the closing day.*

6. *Application to be made at the Bank of England and of Ireland for permission to transfer from the one to the other, and upon such transfers being made certificates to be granted.*

7. *Notices of transfers to be sent to the Bank into which the stock is to be transferred.*

8. *Books to be provided for entering transfers under this act at the Bank of England and Ireland respectively.*

9. *On production of certificate from the bank where the transfer is made, the bank to which the transfer is made shall write the amount of stock into their books.*

10. *Banks of England and Ireland to certify to the Secretary of State in Council of India the amount of stock written in their books prior to dividend, and the interest to be paid to them by such secretary of state.*

11. *Remuneration for services under this Act to be paid to the Bank of Ireland.*

12. *Duplicates may be granted of certificates lost or destroyed.*

13. *Power to Bank of Ireland to close books for transfer.*

14. *Persons forging, &c., certificates guilty of felony.*

15. *No fee, &c., to be taken for receiving certificates, or paying dividends, &c., on penalty of £20, with costs of suit.*

‘WHEREAS by an Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter one hundred and two, the Secretary of State in Council of India was authorized from time to time to make such arrangements with the Governor and Company of the Bank of England as should be deemed expedient for the payment of debts and obligations of the Government of India, and of the interest thereon, and for

the creation and registration and for the transfer of and the payment of interest on any stock into which any such obligations might be convertible: and whereas certain arrangements have been made under the authority of the said Act, and in pursuance of such arrangements the stocks in certain loans secured by and chargeable on the revenues of *India*, and the transfers thereof, are registered at the Bank of *England*, and the dividends thereon are paid at such bank: and whereas it is expedient that provision should be made so as to enable the transfer of stock raised in the United Kingdom on the credit of the revenues of *India* to the Bank of *Ireland*, and for the registration and transfer of and the payment of dividends on such stock so transferred at such last-mentioned bank: and whereas it is expedient to make provision for the mutual transfer of such stock from and to the Bank of *England* and the Bank of *Ireland* respectively: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act the expression "*India Stock*" means stock created or to be created for the raising of money in the United Kingdom on the credit of the revenues of *India*, but does not include the stock commonly known by the name of *East India stock*.

2. From and after the passing of this Act it shall and may be lawful for any person or persons holding any *India stock* transferable at the Bank of *England*, upon making application in the manner herein-after provided, to transfer or cause to be transferred such stock, for the purpose of having the same amount of stock of the same denomination written into the books of the governor and Company of the Bank of *Ireland*, and to be transferable at such bank, and the dividends on the stock so transferred shall be payable half-yearly at the Bank of *Ireland* on the same days on which such dividends would have been payable at the Bank of *England* if the said stock had never been so transferred.

3. The several stocks so transferred, or any share or interest therein, and the proportional dividend attached thereto respectively, shall be assignable and transferable at the Bank of *Ireland*, as directed by this Act, and not otherwise; and there shall be kept at the Bank of *Ireland* within the city of *Dublin* a book or books wherein all assignments or transfers of any part of the several stocks and the proportional dividends attached thereto respectively shall be entered and registered, which entries shall be conceived in proper words for that purpose, and shall be signed by the parties making such assignments or transfers, or if any such party or parties be absent by his, her, or their attorney or attorneys, thereunto lawfully authorized by writing under his, her, or their hands and seals, to be attested by two or more credible witnesses, and the person or persons to whom any such assignment or transfer shall be made, or, in case of absence, his, her, or their attorney or attorneys thereunto lawfully authorized as aforesaid, shall respectively underwrite his, her, or their acceptance thereof; and no other method of assigning or transferring any such stock and the dividend attached thereto, or any interest therein, at the Bank of *Ireland*, shall be good and available in law, and no stamp duties whatsoever shall be charged upon the said assignments or transfers or any of them.

4. It shall and may be lawful for any person or persons holding any *India stock* transferable at the Bank of *Ireland*, upon making application in the manner herein-after provided, to transfer or cause to be transferred such stock, for the purpose of having the same amount of stock of the same denomination written into the books of the Governor and Company of the bank of *England*, and to be transferable at such bank.

5. Notwithstanding anything herein-before contained to the contrary, it shall not be lawful for any person to make any transfer of any stock from the Bank of *England* to the Bank of *Ireland*, or from the Bank of *Ireland* to the Bank of *England*, under the provisions of this Act, at any

time within three clear days before the day on which the books shall be closed for the purpose of striking the balances of the several accounts for the purpose of calculating the half-yearly dividend, or within such other period as the governor and Company of the Bank of *England*, in concurrence with the governor and Company of the Bank of *Ireland*, may from time to time prescribe.

6. Any person or persons holding *India stock* transferable at the Bank of *England* or at the Bank of *Ireland* respectively and desiring to transfer the same so as to make such stock transferable at the Bank of *Ireland* or at the Bank of *England* respectively, shall apply in writing, or cause application in writing to be made by some person on his, her, or their behalf, to the governor and Company of the Bank of *England* or Bank of *Ireland* respectively at which such stock shall be transferable, for permission to transfer or cause to be transferred such stock for the purpose of having the same amount of stock of the same denomination written into the books of the governor and Company of the Bank of *Ireland* or into the books of the governor and Company of the Bank of *England* respectively, as the case may require, and such application shall be according to such form as shall be established by the governor and Company of the Bank of *England* in concurrence with the governor and Company of the Bank of *Ireland*, and shall be the same in all cases, and upon such application having been made, and upon such person or persons transferring the stock or causing the same to be transferred into the name of the Accountant General of the Bank of *England* or Bank of *Ireland* respectively, at which it shall be desired that such stock shall be transferred, it shall and may be lawful for the Governor or Deputy Governor of the Bank of *England* or for the Governor or Deputy Governor of the Bank of *Ireland*, as the case may require, or for the Accountant General or Deputy Accountant General of such governor and company, or for the secretary or assistant secretary of such governor and company for the time being, and they are hereby respectively authorized and required to grant a certificate to the person or persons making such transfer, or on whose behalf such transfer shall have been made, directed to the Governor and Company of the Bank of *Ireland* or the Governor and Company of the Bank of *England* to which it shall be desired that such stock shall be transferred, and such certificate shall be according to such form as shall be established by the Governor and Company of the Bank of *England* in concurrence with the Governor and Company of the Bank of *Ireland*, and shall be the same in all cases; and such certificate shall state that the person or persons therein mentioned has or have transferred or caused to be transferred at the Bank of *England* or the Bank of *Ireland*, as the case may be, the stock therein described, to the Accountant General of the Bank of *England* or the Bank of *Ireland*, as the case may be, for the purpose of having the amount of such stock written in the name or names of such person or persons into the books of the Governor and Company of the Bank of *Ireland* or of the Governor and Company of the Bank of *England*, as the case may be, and shall describe such stock, and specify the amount thereof, and thereupon the amount of the stock comprised in such certificate shall be written off the account of the Accountant General of the Bank of *England*, or the account of the Accountant General of the Bank of *Ireland*, by an entry made in conformity with such certificate.

7. In every case where any transfer for the purposes of this Act shall be made at the Bank of *England* the governor and company of the said bank shall cause notice thereof to be transmitted to the Governor and Company of the Bank of *Ireland* on the same day on which such transfer shall be made; and in like manner in every case where any transfer for the purposes of this Act shall be made at the Bank of *Ireland* the Governor and Company of the Bank of *Ireland* shall cause notice thereof to be transmitted to the Governor and Company of the Bank of *England* on the same day on which such transfer shall be made.

8. A book or books shall be provided and kept by the Governor and Company of the Bank of *England* and the Governor and Company of the Bank of *Ireland* at the Bank of *England* and Bank of *Ireland* respectively, in which shall be fairly entered the names of all persons making any transfer of any stocks to the Accountant General of the said banks respectively, under the provisions of this Act, to which book or books it shall and may be lawful for all persons making any such transfer, their respective executors, administrators, and assigns, from time to time and at all reasonable times to resort, and to inspect the same, without any fee or charge.

9. Whenever any transfer shall be made of any stock for the purposes of this Act at the Bank of *England* or at the Bank of *Ireland* respectively, then and in every such case, upon the production of a certificate of the Governor or Deputy Governor of the Bank of *England* or of the Governor and Company of the Bank of *Ireland* at which any such transfer shall have been made, or of the accountant general or deputy accountant general, or of the secretary or assistant secretary of such governor and company respectively, granted according to the directions of this Act, the Governor and Company of the Bank of *Ireland* or the Governor and Company of the Bank of *England* respectively are hereby authorized and required to write or cause to be written into the books of such Bank of *Ireland* or banks of *England* respectively, as the case may require, relating to stock of the same denomination, the amount of stock specified in such certificate; and such amount of stock shall be written accordingly, transferable under the provisions of this Act at the Bank of *Ireland* or Bank of *England* respectively, as the case shall require, and shall be payable and transferable at such Bank of *England* or Bank of *Ireland* respectively; and every such amount of stock so written into the books of the Bank of *Ireland* or of the Bank of *England* respectively shall be entitled to interest or dividend payable at the bank to which such transfer shall have been made, except as to stock which shall have been transferred after the closing and before the dividend shall become payable, in which case the party making the transfer shall receive the current dividend at the bank from which such transfer shall have been made.

10. The Governor and Company of the Bank of *England* and the Governor and Company of the Bank of *Ireland*, upon making up their books preparatory to the payment of each and every half-yearly interest or dividend upon any stocks transferable under this Act, shall certify to the secretary of state in council of *India*, or to such officer or officers as the secretary of state in council of *India* shall direct, the amounts of such stocks which shall then be written in the books of the Governor and Company of the Bank of *England* or of the Governor and Company of the Bank of *Ireland*, and shall be transferable at such banks respectively under the provisions of this Act; and upon the receipt of such certificates the secretary of state in council of *India* is hereby authorized and required to pay to the Governor and Company of the Bank of *England* and to the Governor and Company of the Bank of *Ireland*, or into the Bank of *England* to the account of the Governor and Company of the Bank of *Ireland* respectively, the amount of all interest or dividends then being or becoming payable upon such amounts of stocks as are specified in such certificates respectively.

11. In addition to the amount of interest or dividend which shall from time to time be paid to the Governor and Company of the Bank of *Ireland* under the last provision, the secretary of state in council of *India* shall at the same time pay to the Governor and Company of the Bank of *Ireland*, or to the account of such Governor and Company at the Bank of *England*, as a remuneration for their services in the execution of this Act, such sum as shall from time to time be fixed as the amount of such remuneration under any arrangement or agreement to be made between the secretary of state in council of *India* and the Governor and Company of the Bank of *Ireland*.

12. In case of the loss or destruction of any certificate

of the governor or deputy governor, accountant general, or deputy accountant general, Secretary or Assistant Secretary of the Bank of *England* or of the Bank of *Ireland* respectively, granted for the purposes of this Act, it shall and may be lawful for any such governor or deputy governor, accountant general or deputy accountant general, secretary or assistant secretary, and they are hereby respectively authorized and empowered, upon proof of such loss or destruction to their satisfaction, to grant a duplicate of such certificate, and such duplicate shall be full and sufficient authority for the purposes of this Act, and shall stand in the place and stead of the original certificate, if such original certificate shall not have been previously found and acted upon: provided always, that upon any loss or destruction or alleged loss or destruction of any such original certificate, and on the production of any such duplicate certificate, it shall and may be lawful for the Governor and Company of the Bank of *England* or the Governor and Company of the Bank of *Ireland* respectively, and they are hereby authorized and required to demand and take from the party or parties tendering any such duplicate full and sufficient security to her Majesty, her heirs and successors, to indemnify such governor and company against the production of or any claim which shall be made under or by virtue of any such original certificate so lost or destroyed, or alleged to have been lost or destroyed: and if at any time after the time when a duplicate certificate shall have been produced and acted upon under this Act the original of such certificate shall be tendered to the Governor and Company of the Bank of *England* or the Governor and Company of the Bank of *Ireland*, it shall and may be lawful for such governor and Company and they are hereby authorized and required to detain such original certificate, and to cancel the same, and to transmit the same so cancelled to the Governor and Company of the Bank of *England* or the Governor and Company of the Bank of *Ireland*, as the case may be, by or on whose behalf such certificate shall have been given, and to deliver up such security as shall have been entered into touching the said original certificate to the party or parties entering into such security, or such of them as shall require the same.

13. The Governor and Company of the Bank of *Ireland* shall be at liberty to close their books for transfer of *India* stock on any day in the month prior to the days for payment of the half-yearly dividends on such stock, such day to be fixed or agreed on between the Bank of *England* and the Bank of *Ireland*; provided, however, that the period for which the same shall be closed shall not exceed fifteen days, and the person or persons who on the day of such closing shall appear in the said books to be the proprietor or proprietors thereof shall be entitled to the current dividend thereon.

14. If any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or duplicate certificate required by this Act, or shall alter any number, figure, or word therein, or shall utter or publish as true any such false, forged, counterfeited, or altered certificate with intent to defraud the Governor and Company of the Bank of *England* or the Governor and Company of the Bank of *Ireland*, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being convicted thereof in due form of law, shall be adjudged guilty of felony.

15. No fee, reward, or gratuity whatsoever shall be demanded or taken of any of her Majesty's subjects for receiving any such certificate or duplicate certificate, or for paying interest or dividend, or for any transfer of any sum to be made in pursuance of this Act, upon pain that any officer or person offending by taking or demanding any such fee or reward or gratuity shall for every such offence forfeit the sum of twenty pounds to the party aggrieved, with full costs of suit, to be recovered by action of debt, bill

plaint, or information in any of her Majesty's Courts of Record at *Westminster* or *Dublin* respectively.

CAP. VIII.

Sec. 1. *Women and children not to be employed during the night.*

2. *Application of powers, &c., of 7 & 8 Vict., c. 15 to this Act.*

An Act to prevent the Employment of Women and Children during the Night in certain Operations connected with Bleaching by the open-air Process.

[11th April, 1862.]

'WHEREAS it is the practice of a few occupiers of bleach fields or works in which the operation of bleaching by the open-air process is the only operation of bleaching carried on, and which consequently are not regulated by the provisions of the Act of the twenty-third and twenty-fourth years of *Victoria*, chapter seventy-eight, to employ females unnecessarily during the night in processes in which mechanical power is used: and whereas the exemption accorded to such works in virtue of the first and seventh clauses of the said recited Act was not intended to give sanction to a practice (so injurious to the health and morals of the persons so employed):' be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. That from and after the first day of *January* one thousand eight hundred and sixty-three, in any building, buildings, or premises in one or more of which any process previous to packing is carried on in the occupation of bleaching, dyeing, or finishing of any yarn or cloth of cotton, silk, wool, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, including the occupation of bleaching by the open-air process as defined in the Act of the twenty-third and twenty-fourth years of *Victoria*, chapter seventy-eight, and in one or more of which processes steam or water or other mechanical power is used or employed, it shall not be lawful to employ females, young persons, and children, or any of them, during the night, that is to say, from eight of the clock in the evening to six of the clock in the morning, excepting to recover lost time in the manner provided by "The Bleaching and Dyeing Works Act," twenty-third and twenty-fourth *Victoria*, chapter seventy-eight.

2. For the due enforcement of this Act, there shall be applicable all the powers, provisions, and penalties of the Act of the seventh and eighth years of *Victoria*, chapter fifteen, intituled *an Act to amend the laws relating to labour in factories*

CAP. IX.

An Act to enable the Trustees of Sir John Soane's Museum to send Works of Art to the International Exhibition, 1862.

[11th April, 1862.]

CAP. X.

An Act for continuing for a further limited Time, and for extending the Operation of Orders made under, "the Industrial Schools Act, 1861," and "The Industrial Schools (*Scotland*) Act, 1861."

[11th April, 1862.]

CAP. XI.

An Act to explain an Act, intituled *An Act for the better Government of Her Majesty's Australian Colonies*

[11th April, 1862.]

CAP. XII.

An Act for the Protection of Inventions and Designs exhibited at the International Exhibition of Industry and Art for the year One thousand eight hundred and sixty-two.

29th April, 1862.

CAP. XIII.

An Act for raising the Sum of One million Pounds by Exchequer Bonds for the Service of the Year One thousand eight hundred and sixty-two. [16th May, 1862.]

CAP. XIV.

An Act to extend to the *Isle of Man* the Provisions of the Act Eighteenth and Nineteenth *Victoria*, Chapter Ninety, as to the payment of Costs to and by the Crown. [16th May, 1862.]

CAP. XV.

40 G. 3, c. 84 (*I.*)

Sec. 1. *Commencement of Act.*

2. *From commencement of act part of 40 G. 3, c. 84, s. 42 (I) repealed*

3. *Defining powers of college with respect to admissions to its fellowships.*

An Act to define the Powers of the President and Fellows of the King and Queen's College of Physicians in *Ireland* with respect to the Election of its Fellows.

[16th May, 1862.]

'WHEREAS by an act passed in the Parliament of *Ireland* in the fortieth year of the reign of his late Majesty King George the Third, chapter eighty-four, it is amongst other things enacted, in the forty-second section thereof, that no person shall be capable of being elected a fellow of the College of Physicians (incorporated by the name of the president and fellows of the King and Queen's College of Physicians in *Ireland*) who shall not have taken the degree of bachelor or master in arts or doctor in physic in one of the universities in *Dublin*, *Oxford*, or *Cambridge*, unless the number of fellows shall at any time be reduced to six, in which case only, whenever it may happen, such qualification of the degree of bachelor or master in arts or doctor of physic may be dispensed with respectively: and whereas under the charter which had been granted to the said College of Physicians in the fourth year of the reign of King William and Queen Mary, the said college was empowered to elect to the fellowship thereof without restriction such of its licentiates as it deemed deserving of such distinction: and whereas the said restriction imposed by the said recited act is unjust to universities and colleges other than those of *Dublin*, *Oxford*, or *Cambridge*, and it is expedient that the same should be repealed, and that the said president and fellows of the said college should be enabled to elect to the fellowship thereof such of its licentiates as are graduates in arts of any university of the United Kingdom of *Great Britain* and *Ireland*, and also such of its licentiates as may appear to them to merit such distinction by reason of their personal and professional attainments: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act shall commence and take effect from and after the first day of *September* one thousand eight hundred and sixty-two.

2. From and after the commencement of this act, so much of the said recited act as provides that no person shall be capable of being elected a fellow of the said College of Physicians in *Ireland* who shall not have taken the degree of bachelor or master in arts or doctor in physic in one of the universities of *Dublin*, *Oxford*, or *Cambridge*, unless the number of fellows shall at any time be reduced to six, in which case only, whenever it may happen, such qualification of the degree of bachelor or master in arts or doctor in physic may be dispensed with respectively, shall be repealed.

3. From and after the commencement of this act it shall be lawful for the president and fellows of the King and Queen's College of Physicians in *Ireland* to elect to the fellowship of the said college such of its licentiates as are graduates in arts or doctors in physic of any university of the United Kingdom of *Great Britain* and *Ireland*. or of

any foreign university, and also such of its licentiates, not being such graduates in arts or doctors in physic, as under such limitations as to them may seem fit, may appear to the said president and fellows to merit such distinction.

CAP. XVI.

An Act for extinguishing certain Rights of Way through the *Netley Hospital Estate in the Parish of Hound in the County of Southampton.* [16th May, 1862.]

CAP. XVII.

An Act to extend the Time for making Enrolments under the Act passed in the last Session of Parliament, intituled *An Act to amend the Law relating to the Conveyance of Land for Charitable Uses*, and to explain and amend the said Act. [16th May, 1862.]

CAP. XVIII.

An Act to amend the Law as to the whipping of Juvenile and other Offenders. [16th May, 1862.]

CAP. XIX.

An Act to amend The General Pier and Harbour Act, 1861. [16th May, 1862.]

Sec. 1. *Construction of Act. Short title.*

2. *Repeal of parts of principal Act described in schedule (A)*

3. *Notice by advertisement as in schedule (B.), part 1.*

4. *Deposit of documents in schedule (B.) part 2.*

5. *Subsequent deposit of documents in schedule (B.) part 3.*

6. *Extent of part 2 of act.*

7. *Approval of works by admiralty.*

8. *Abandonment, disuse, &c., of works.*

9. *Power to admiralty to cause local survey to be made.*

10. *Recovery of expenses from undertakers.*

11. *Lights to be exhibited at night during construction of works.*

12. *Limitation of time for completion of works.*

13. *Pier, &c., open to public on payment of rates.*

14. *Power to Board of trade to revise rates.*

15. *Company to send copy of annual account in abstract as to rates, vessels, &c., to board of trade*

16. *As to audit of accounts on complaint to board of trade.*

17. *Rates to be equally levied.*

18. *Mode of recovery of rates.*

19. *10 & 11 Vict., c. 27, incorporated.*

20. *Water pipes.*

21. *Application of Merchant Shipping Act, &c.*

22. *Costs of the order.*

23. *Proceedings under section 9 of principal act for fixing schedule of rates. Power to board of trade to authorize schedule as published, though differing from schedule referred to in principal act.*

24. *Provisions of principal act as in schedule (C.) to this Act repealed.*

25. *Order not to be made affecting powers under local acts without consent.*

26. *Power to board of trade to impose terms, &c.*

27. *Application of 7 W. 4, and 1 Vict., c. 83, to act.*

'WHEREAS it is expedient to amend the General Pier and Harbour Act, 1861, herein-after called the Principal Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows.

Preliminary.

1. This act shall be read (as far as may be) together with the Principal Act as one act, and may be cited as the General Pier and Harbour Act, 1861, Amendment Act.

I.—FUTURE APPLICATIONS FOR PROVISIONAL ORDERS.

2. The provisions of the principal act described in Schedule (A) to this act shall be repealed with respect to any application to be made to the Board of Trade for a provisional order after the passing of this act.

3. Any persons intending to make application to the Board of Trade for a provisional order relative to a pier or harbour, which persons are herein-after called the promoters, shall in the months of *October* and *November*, or either of them, immediately preceding the application for the provisional order, publish notice of their intention by advertisement according to the regulations contained in Schedule (B.) Part I. to this act.

4. On or before the thirtieth day of *November* immediately preceding the application for the provisional order, the promoters shall deposit the documents described in Schedule (B) Part II. to this act, according to the regulations therein contained.

5. On or before the twenty-third day of *December* in the same year, the promoters shall deposit the documents mentioned in Schedule (B) Part III. to this act, according to the regulations therein contained.

II.—FUTURE OR PENDING APPLICATIONS FOR PROVISIONAL ORDERS.

6. The provisions of this part of this act shall apply to every provisional order of the Board of Trade on any application already made or to be hereafter made.

Works.

7. Before commencing the construction of any part of the works authorized by a provisional order, the undertakers shall deposit at the Admiralty Office working drawings of the whole works for the approval of the Lords of the Admiralty. The works shall not be constructed otherwise than in accordance with such approval. After the same are commenced or constructed the undertakers shall not alter or extend the same without first obtaining the like approval. If any work be commenced, constructed, altered, or extended contrary to this provision, the Lords of the Admiralty may, at the expense of the undertakers, abate and remove it, or any part of it, and restore the site thereof to its former condition.

8. If any work authorized by any provisional order be abandoned or suffered to fall into disuse or decay, the Lords of the Admiralty may, if and as they think fit, at the expense of the undertakers, either repair and restore such work or any part of it, or abate and remove it or any part of it, and restore the site thereof to its former condition.

9. The Lords of the Admiralty may at any time, at the expense of the undertakers, cause to be made a local survey and examination of the works authorized by any provisional order, or of the site thereof.

10. Whenever the Lords of the Admiralty, under the authority of this act, do any act or thing in relation to any works authorized by any provisional order, which they are by this act authorized to do at the expense of the undertakers, the amount of such expense shall be a debt due to the Crown from the undertakers, and shall be recoverable as such, with costs, or the same may be recovered with costs as a penalty is or may be recoverable from the undertakers.

11. During the construction of the works the undertakers shall, at their own expense, exhibit and keep burning every night from sunset to sunrise such lights for the guidance of vessels as the Lords of the Admiralty shall from time to time require or approve of: If the undertakers refuse or neglect to comply with this provision, they shall for each offence be liable to a penalty not exceeding ten pounds.

12. The works authorized by any provisional order shall be completed within five years after the passing of an act confirming the provisional order, or within such other time as the provisional order may direct; and on the expiration of that period the powers by the order given to the undertakers for executing the same, or otherwise in relation

thereto, shall cease to be exercised, except as to so much thereof as is then completed.

Rates.

13. On payment of the rates payable under a provisional order, and subject to the provisions of the principal act and this act and the provisional order, the pier or harbour to which the provisional order relates and its approaches shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers, and such persons and passengers shall have unobstructed ingress, passage, and egress into, along, through, and out of the same.

14. Where the undertakers are a company incorporated by the provisional order for the purposes of the undertaking, then if at any time it appear to the Board of Trade that the clear annual profits divisible on the subscribed and paid-up capital of the company, on the average of the then three last preceding years, amount to or exceed the rate of ten *per centum per annum* on the nominal value of the shares, the Board of Trade may, if in their discretion they think fit, require the company to reduce the rates received by them to such extent as may to the Board of Trade seem fit: if the company refuse or neglect to comply with any such requirement, they shall be liable to a penalty not exceeding fifty pounds for every day during which such refusal or neglect shall continue: provided that if at any subsequent time the profits fall below the said rate of ten *per centum per annum* the company may, with the sanction of the Board of Trade, again raise the said rates to an amount not exceeding the amount authorized by the provisional order.

15. Where the undertakers are a company as aforesaid, the company, within one month after sending to the clerk of the peace for the county the copy of their annual account in abstract, shall send a copy of the same to the Board of Trade, who shall forward a copy to any persons who may require the same: if the company refuse or neglect to comply with this provision, they shall for every such refusal or neglect be liable to a penalty not exceeding twenty pounds.

16. If, on complaint in writing by any person interested, it appear to the Board of Trade that there is reasonable ground for believing that such last-mentioned account has not been duly kept, or that any rates have been improperly or unfairly levied by the company, or have not been applied in accordance with the order, then the following provisions shall take effect:

- (1) The Board of Trade may appoint an auditor to audit and examine such account, and inquire into the matters complained of, and report to the Board of Trade on such accounts and matters:
- (2) The company shall on demand produce to such auditor all or any of their accounts, books, deeds, papers, writings, and documents, and afford to him all reasonable facilities for examining and comparing the same:
- (3) In case any such complaint be found to be true, the reasonable expenses of the auditor shall be paid to the Board of Trade by the company:
- (4) In case any such complaint be not found to be true, the reasonable expenses of the auditor shall be paid to the Board of Trade by the complainant:
- (5) In either case, such expenses shall be a debt due to the Crown from the company or from the complainant (as the case may be), and shall be recoverable as such, with costs, or the same may be recovered with costs as a penalty is recoverable from the company, or from any person liable to a penalty under the provisional order (as the case may be).

17. All rates levied under any provisional order shall be charged equally to all persons with respect to the same description of vessels and the same description of goods.

18. Without prejudice to any other remedy, the undertakers may recover any rates due in respect of a vessel from the owner or master of such vessel, and any rates due in respect of goods from the owner or consignee of

such goods, by proceedings in any court of competent jurisdiction.

General Provisions.

19. Subject to the provisions of the principal act and this act and any provisional order, The Harbours, Docks, and Piers Clauses Act, 1847, shall be deemed to be incorporated with every provisional order.

20. The undertakers may grant or allow to any persons the right of laying down or constructing and maintaining pipes or channels for the conveyance of water to, on, and within the pier or harbour, and may demand and receive such sums in consideration of such grant or allowance as they may think reasonable.

21. The undertaking authorized by any provisional order shall be subject to the provisions of the Merchant Shipping Act, 1854, and of every general act relating to harbours or dues on shipping or on goods carried in ships, now in force or hereafter to be passed, and to any future revision or alteration under the authority of Parliament of the rates authorized by the order.

22. The costs of and connected with the preparation and making of each provisional order shall be paid by the promoters.

III.—PENDING APPLICATIONS FOR PROVISIONAL ORDERS.

23. 'And whereas it was by the Principal Act (section nine) enacted, that in case the promoters, or any persons being the owners or proprietors of any works, or any persons having the management of or powers to construct any such works under any Local Act of Parliament, or any town council of any seaport town not having any constituted harbour trust, should be desirous of levying any rates for the maintenance of such works, or of altering the schedule of rates then leviable thereat, they should prepare a schedule of such rates which they might think reasonable and proper to be levied at such works, and should publish such schedule in a newspaper as therein specified, and should also deposit a printed copy of such schedule at such office as therein specified, and also transmit a copy of such schedule to the board of trade with such other documents as therein specified, and that after such proceedings and the lapse of such time as therein specified the board of trade should finally adjust and fix a schedule of rates, not exceeding the rates specified in the schedule to the Burgh Harbours (*Scotland*) Act, 1853, and that thereupon the board of trade might by provisional order empower any of the persons in the section now in recital mentioned to levy rates according to such schedule:

'And whereas under the said recited provision, persons within the description therein contained have prepared schedules of rates which they thought reasonable and proper to be levied, and have published, deposited, and transmitted the same in manner by the said recited provision required, but the board of trade on proceeding to finally adjust and fix schedules of rates have, in certain cases, found that the schedules so prepared, published, deposited, and transmitted comprise rates in some instances exceeding the rates specified in the schedule to the Burgh Harbours (*Scotland*) Act, 1853, and in other instances leviable in respect of subjects not specified in the last-mentioned schedule:

'And whereas in the several cases aforesaid it is represented to the board of trade by the promoters, and the board of trade have no reason to doubt, that it is essential to the success of the several undertakings that an opportunity should be given to the promoters of obtaining the sanction of Parliament to the several schedules of rates so prepared, published, deposited, and transmitted as aforesaid, without reference to the conformity of such schedules with the schedule to the Burgh Harbours (*Scotland*) Act, 1853: 'Be it therefore enacted as follows:

Where any schedule of rates has been prepared, published, deposited, and transmitted as aforesaid, and it appears to the board of trade to be expedient that the same, or the same as modified on any objection taken under the Principal Act, should be authorized by a provisional order, it shall be lawful for the board of trade to finally adjust

and fix a schedule of rates, not exceeding the rates specified in the schedule so prepared, published, deposited, and transmitted, or so modified, and thereupon by provisional order to authorize the levying and recovery of rates according to the schedule so finally adjusted and fixed, notwithstanding that the same may in any respect differ from the schedule to the Burgh Harbours (*Scotland*) Act, 1853: Provided, that it shall be lawful for the board of trade, if in any case they think fit, before finally adjusting and fixing any such schedule, to require the promoters to publish any further or other notice relative to the proposed schedule as the board of trade may direct.

24. The provisions of the Principal Act described in schedule (C.) to this act shall be repealed with respect to any application already made to the board of trade for a provisional order.

IV.—GENERAL PROVISIONS.

25. The board of trade shall not make any provisional order taking away or abridging any right, privilege, power, jurisdiction, or authority given or reserved to any person or corporation by any local or special Act of Parliament, without the consent in writing of such person or corporation; but, subject to this restriction, and to the provisions of the Principal Act, and of this act, every provisional order when duly confirmed by Parliament shall be of full force and effect, any local or special act to the contrary notwithstanding.

26. Every provisional order of the board of trade on any application already made or to be hereafter made shall take effect subject and according to such restrictions and provisions and on such terms and conditions as may be therein specified, not being inconsistent with the provisions of the Principal Act or this act.

27. The provisions of the act of the session of the seventh year of King William the Fourth and the first year of her Majesty, chapter eighty-three, "to compel clerks of the peace for counties and other persons to take the custody of such documents as shall be directed to be deposited with them under the standing orders of either House of Parliament," shall (as far as may be) apply to all cases of deposit of documents made or to be made with any person under the Principal Act or this act.

SCHEDULES.

SCHEDULE (A.)

Parts of General Pier and Harbour Act, 1861, repealed as to future Applications to the Board of Trade for Provisional Orders.

- (1.) Sections five, nine.
- (2.) In section six, so much as requires any deposit to be made at the admiralty office.
- (3.) In section sixteen, so much as relates to the London, Edinburgh, or Dublin Gazette.

SCHEDULE (B.)

PART I.—Advertisement in October or November of intended Application.

- (1.) Every advertisement is to state—

1. The objects of the intended application, specifying any of the following objects, when comprised among the objects of the application:

- (a.) Extension of time for the completion of any works already authorized:
- (b.) Power for a company to amalgamate with another.
- (c.) Power to sell, purchase, lease, or take on lease an undertaking.
- (d.) Amendment or repeal of any local or special act of Parliament, or of any former provisional order:
- (e.) Power to levy any tolls, rates, or duties, or to alter any existing tolls, rates, or duties:
- (f.) The conferring, varying, or extinguishing of any exemption from tolls, rates, or duties; or of any other right or privilege:
- (g.) Constitution or alteration of constitution of any harbour authority:

2. A general description of the nature of the proposed new works, if any.

3. The names of the parishes, townlands, townships, and extra-parochial places in which the proposed new works, if any, will be made.

4. The times and places at which the deposit under Part II. of the schedule will be made.

5. An office, either in London, or at the place to which the intended application relates, at which printed copies of the draft provisional order, when deposited, will be purchasable as herein-after provided.

- (2.) The whole notice is to be included in one advertisement, which is to be headed with a short title descriptive of the undertaking or application.

- (3.) The advertisement is to be inserted once at least in each of two successive weeks in some one and the same newspaper published in the city, town, or place where the proposed works will be made, or where the pier or harbour to which the intended application relates is situate; or if there be no such newspaper, then in some one and the same newspaper published in the county in which such city, town, or place, or some part thereof, is situate; or if there be none, then in some one and the same newspaper published in some adjoining or neighbouring county.

- (4.) The advertisement is also in every case to be inserted once at least in the London Gazette if the place to which the intended application relates is situate in England or Wales, in the Edinburgh Gazette if such place is situate in Scotland, or in the Dublin Gazette if such place is situate in Ireland.

PART II.—Deposit on or before 30th November.

- (1.) The promoters are to deposit—

1. A copy of the advertisement published by them.
2. A proper plan and section of the proposed new works, if any; such plan and section to be prepared according to such regulations as may from time to time be made by the board of trade in that behalf.
- (2.) The documents aforesaid are to be deposited for public inspection—

1. In England or Ireland, in the office of the clerk of the peace for every county, riding, or division; in Scotland, in the office of the principal sheriff clerk for every county, district, or division,—in which any proposed new work will be made, or in which the pier or harbour to which the intended application relates, or any part thereof, is situate.
2. At the Custom House, if any, of the port, sub-port, or creek to which the intended application relates.
- (3.) The documents aforesaid are also to be deposited in the offices of the admiralty and of the board of trade.

PART III.—Deposit on or before 23rd December.

- (1.) The promoters are to deposit at the office of the board of trade—

1. A memorial of the promoters, signed by them or one of them, headed with a short title descriptive of the undertaking or application (corresponding with that at the head of the advertisement), addressed to the board of trade, and praying for a provisional order.
2. A printed draft of the provisional order as proposed by the promoters.
3. An estimate of the expenso of the proposed new works, if any, signed by the person making the same.

- (2.) They are also to deposit printed copies of the draft provisional order for public inspection at the custom house (if any) of the port, sub-port, or creek to which the application relates.

- (3.) They are also to deposit a sufficient number of such printed copies at the office named in that behalf in the advertisement; such copies to be there furnished to all persons applying for them at the price of not more than one shilling each.

SCHEDULE (C.)

Parts of General Pier and Harbour Act, 1861, repealed

as to Applications already made to the Board of Trade for Provisional Orders.

In section sixteen, so much as relates to the London, Edinburgh, or Dublin Gazette; and also so much as restricts the time for the introduction of a bill into Parliament for the confirmation of a provisional order.

CAP. XX.

An Act respecting the Issue of Writs of Habeas Corpus out of England into Her Majesty's Possessions Abroad. [16th May, 1862.]

CAP. XXI.

An Act to amend the Law relating to the Transfer of Stocks and Annuities transferable at the Bank of Ireland. [16th May, 1862.]

24 & 25 Vict. c. 35.

Sec. 1. *Sect. 1 of 24 & 25 Vict. c. 35 repealed, and other provision as to the time of closing the books for the transfer of stocks, &c., at the Bank of Ireland prior to the payment of dividends made.*

'Whereas by the act of the twenty-fourth and twenty-fifth Victoria, chapter thirty-five, intituled *An Act to increase the Facilities for the Transfer of Stocks and Annuities transferable at the Bank of Ireland, and to make further Provisions respecting the mutual Transfer of Capital in certain Public Stocks or Funds transferable at the Banks of England and Ireland respectively*, it was enacted, that it should be lawful for the governor and company of the Bank of Ireland to close the books for the transfer of government stocks, funds, and annuities on any day not exceeding fifteen days prior to that on which the dividends thereon respectively should by law be payable: and whereas it is expedient to amend the said act as regards the time for closing said books prior to the days for payment of the dividends thereon, and to make further provision in respect thereof: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. That the first section of the said act be and the same is hereby repealed; and in lieu and stead thereof it shall be lawful for the said governor and company of the Bank of Ireland to close the books for the transfer of the several government stocks, funds, and annuities now by law transferable at the Bank of Ireland on any day in the month preceding that in which the dividends thereon respectively shall by law be payable; and the person or persons who on the day of the closing of such books was or were inscribed as the proprietor or proprietors of any share or shares of and in such stocks, funds, and annuities respectively shall, as between him, her, or them and the transferee or transferees thereof, be the person or persons entitled to the then current half-year's dividend thereon, and the person or persons to whom any transfer shall be made after the day of the closing of such books, shall not be entitled to the then current half-year's dividend on such stocks, funds, and annuities, but shall take and accept the same exclusive of the right to the said half year's dividend; provided that the period for which such books of transfer shall be closed shall not exceed fifteen days.

CAP. XXII.

An Act to continue certain Duties of Customs and Inland Revenue for the Service of Her Majesty, and to grant, alter and repeal certain other Duties.

[3rd June, 1862.]

Sec. 1. *Grant of duties specified in schedules annexed.*
2. *Provisions of former acts to apply to this act.*
3. *Licences to brewers to expire on 10th October in every year.*
4. *Brewer of beer for sale, before obtaining licence to make declaration under provisions of 5 & 6 W. 4. c. 62. of the quantity of malt and sugar brewed during the previous year.*

5. *When licence of brewer of beer for sale exceeds £10 it may be paid in moieties.*
6. *On the death of a brewer, or on the business being discontinued before expiration of licence, a proportionate part of the duty may be returned.*
7. *When the quantity of beer brewed in any year shall be less than the quantity for which the licence was granted, the difference shall be repaid to the brewer; if the quantity be greater he shall be surcharged.*
8. *Surcharge upon a brewer's first licence to become payable immediately upon death or bankruptcy of the brewer.*
9. *Brewers of black beer to continue to pay the duties imposed by 6 G. 4. c. 81.*
10. *Brewers of beer for sale omitting to take out licence to be liable to the duty.*
11. *Persons brewing beer for others to be deemed brewers for sale.*
12. *As to sale of beer at fairs, &c.*
13. *Occasional licence may be granted to victuallers to sell beer, spirits, &c., at such time and place as the commissioners of inland revenue shall approve.*
14. *Charging of excise duty on sugar used in brewing deferred until 1st July, 1863.*
15. *Licences granted under 23 Vict. c. 27 and 23 & 24 Vict. c. 107 may be transferred as other excise licences in case of the removal of the licensed person.*
16. *For removal of doubts as to the privilege of the free vintners of the City of London to sell wine without licence.*
17. *Excise duties, &c., on hops cured after the passing of this act repealed.*
18. *Repeal of customs duty on hops on 16th Sept. 1862.*
19. *When drawbacks on exportation of hops to cease.*
20. *Excise penalties imposed upon the use of substitutes for hops repealed.*
21. *British hops re-imported chargeable with duty for six months after 16th September, 1862.*
22. *Prohibition on extract of hops repealed.*
23. *Allowance of 7s. per cwt. on British hops in stock on 15th September, 1862.*
24. *Made of claiming the allowance on hops in stock.*
25. *Officers of excise to attend to examine claims and stocks and grant certificates.*
26. *Declaration to be made of the truth of the certificate, and collector to pay the amount of the allowance.*
27. *9 G. 4. c. 18, granting duties on cards and dice repealed.*
28. *Interpretation of terms.*
29. *The duty to be denoted on the wrapper. Cards to be sold in separate packs enclosed in wrappers.*
30. *Licences to sell cards to be granted.*
31. *Selling cards without licence, penalty £20. Hawkers of cards may be apprehended and taken before a justice.*
32. *Penalty on selling cards without stamped wrappers. Unstamped cards to be forfeited.*
33. *Name of maker, &c., to be printed on the wrapper.*
34. *The seller of cards to cancel the stamp on the wrapper.*
35. *Frauds relating to wrappers, &c., Penalty £20.*
36. *What cards may be sold without wrappers. Second-hand cards.*
37. *Unstamped cards may be exported.*
38. *Penalty for making unstamped bonds.*
39. *For probate duty. bond debts to be assets, as if they were simple contract debts.*
40. *Licences to hawkers with one horse reduced. All licences to hawkers may be half-yearly.*
41. *Recovery of penalties.*
42. *The sums assessed under Schedules (A.) and (B.) for year 1861 to be taken as assessed for 1862.*

43. *Persons intrusted with the payment of dividends, &c., since 5th April, 1862, and before the passing of this Act, to make returns thereof. Dividends, &c., due since 5th April, 1862, to be assessed by special commissioners.*
44. *Assessors not to be appointed for duties under Schedule (A.) and (B.)*
45. *Power to appoint more than two collectors of income tax and assessed taxes for each parish. Duties now charged on tea, sugar, &c., continued until 1st July, 1863.*

Most Gracious Sovereign,

We your Majesty's most dutiful and loyal subjects, the commons of the United Kingdom of *Great Britain and Ireland* in Parliament assembled, towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto your Majesty the several rates and duties herein-after mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. There shall be charged, collected, and paid for the use of her Majesty, her heirs and successors, the several rates and duties of customs, excise, stamps, and income tax respectively specified and contained in the several schedules marked respectively (A.), (B.), (C.), and (D.) to this act annexed, and there shall be allowed the several drawbacks specified and contained in the said schedules (A.) and (B.); and the said rates, duties, and drawbacks shall respectively take effect at or from the respective times, and shall continue to be charged, collected, paid, and allowed for and during the periods respectively specified or mentioned in that behalf in this act or in the said schedules; and where no time is so specified for the commencement thereof, the same shall commence and take effect from and after the passing of this act; and where no period is so specified or limited for the duration thereof, the same shall continue to be charged, collected, paid, and allowed respectively until Parliament shall otherwise order; and the said several schedules shall be deemed to be part of this Act.

2. All the powers, provisions, clauses, regulations, allowances, and exemptions, forfeitures, pains, and penalties, contained in or imposed by any act or acts or any schedule thereto, relating to any duties or drawbacks of the same kind or description as the several rates or duties or drawbacks granted and allowed by this act respectively, and in force at the time of the passing of this act and not hereby expressly repealed, or as regards the income tax in force on the fifth day of *April*, one thousand eight hundred and sixty-two, shall respectively be in full force and effect with respect to the said rates, duties, and drawbacks by this act granted respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned rates and duties and the allowance and payment of the said drawbacks respectively, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted. *mutatis mutandis*, with reference to the rates, duties, and drawbacks by this act granted respectively.

3. All licences to brewers of beer to be granted under this act shall expire on the tenth day of *October* in every year, and shall be renewed yearly on payment of the duties chargeable for or in respect of such licences respectively, according to the provisions of this act.

4. Before any licence shall be granted to any brewer of beer for sale (other than a first licence), such brewer or his principal servant under whose direction or inspection

the malt or sugar herein-after mentioned shall have been brewed, shall make before a justice of the peace, or before the proper collector of excise, or any other officer of excise empowered to grant licences (who are hereby respectively authorized to receive the same), a declaration in writing under the provisions of the Act passed in the fifth and sixth years of the reign of his late Majesty King *William the Fourth*, chapter sixty-two, setting forth a true and just account of the number of bushels of malt and of the number of pounds weight avoirdupois of sugar respectively used by such brewer in the brewing of beer within the previous year ending on the tenth day of *October* immediately preceding the application for such licence; and if such declaration shall be false or untrue in any particular, the person making the same shall be subject to the pains and punishment prescribed by the said last-mentioned act: provided always, that in no case shall a licence be granted to any such brewer of beer upon payment of any less amount of duty than shall appear to be due according to the entries made in the book or paper delivered to such brewer by the officer of excise for that purpose.

5. Where the amount of duty chargeable upon any licence to brew beer for sale shall exceed the sum of ten pounds, such licence may, if required, be granted upon payment only of a moiety of the duty so chargeable, and in such case the other moiety of such duty shall be paid on the first day of *March* next after the commencement of the year for which such licence shall have been granted, or in default thereof the licence shall thereupon cease and determine, and be no longer in force.

6. If any brewer of beer for sale shall die or become bankrupt, or shall discontinue the trade and business of a brewer of beer for sale at any time before the expiration of his current licence, it shall be lawful for the commissioners of inland revenue to ascertain by such means as they shall think fit, the quantity of malt and sugar which such brewer shall have used in the brewing of beer in the portion of the year during which he shall have carried on business under such licence, and the amount of duty which would be payable for a licence in respect of the number of barrels of beer brewed from such malt and sugar, according to the provisions of this act; and if the amount of duty so ascertained shall be less than the sum paid by such brewer for his current licence, the commissioners shall cause the difference to be repaid to such brewer, or to the executors or assignees of any brewer who shall die or become bankrupt.

7. If upon the termination of any licence granted to a brewer of beer for sale it shall appear that the number of barrels of beer brewed by such brewer during the existence of such licence, computed according to the provisions in the seventh section of the act passed in the first year of the reign of King *William the Fourth*, chapter fifty-one, is less than the number of barrels in respect of which the duty upon such licence was charged, the difference between the amount of duty that would have been payable for a licence for the lesser number of barrels of beer brewed and the amount actually paid for the licence shall be repaid to the brewer, his executors or administrators; and if it shall appear that the number of barrels of beer, computed as aforesaid, brewed during such period, shall be greater than the number in respect of which the licence was granted, the brewer, or his executors or administrators, shall be surcharged with such additional amount of duty as, with the sum actually paid for such licence, shall amount to the sum payable according to the rates of duty imposed by this act upon the number of barrels of beer brewed as aforesaid by such brewer; and such additional amount of duty shall be paid by such brewer, his executors or administrators, within seven days after he or they shall have had notice to pay the same.

8. If any person who shall have taken out a licence as a brewer of beer for sale for the first time shall die, or become bankrupt, or discontinue the business of a brewer of beer at any time before the expiration of such licence, the further additional sum which shall be chargeable under this act in respect of such licence shall become due and

payable immediately thereupon, and shall be a debt due to her Majesty, her heirs and successors, and be recoverable accordingly; and in the case of any such brewer who shall discontinue business as aforesaid, payment of such additional sum may be demanded either verbally of such brewer, or by writing left at the brewery, by the supervisor of excise of the district in which the brewery shall be situated; and if the same shall not be paid within three days next after such demand shall have been made, the brewer shall forfeit a penalty of double the amount thereof; and in all the foregoing cases the stock of beer, malt, and hops, and the utensils and machinery upon the brewery premises at the time of such death, bankruptcy, or discontinuance of business, shall be and remain liable for the payment of the said sum of money or penalty, and are hereby made chargeable therewith, notwithstanding any title or conveyance by which they may be claimed.

9. Provided always, that brewers of beer known as spruce or black beer, for sale, shall continue to pay for their licences only the same rates of duty as are imposed by the act passed in the sixth year of King George the Fourth, chapter eighty-one, on brewers of beer other than table beer only, for sale; provided that any such brewer shall not brew on the same premises beer of any other description than spruce or black beer, nor use in the brewing of the same, or add thereto, any hops or other bitter, or any yeast or other matter to produce fermentation, and shall not brew, or sell or send out, any of such beer of a less specific gravity than one thousand one hundred and eighty degrees.

10. If any brewer of beer for sale shall omit to take out a proper licence in that behalf under this act, he shall nevertheless be chargeable with the full amount of the duty payable or which would become payable under this act for or in respect for the licence which he ought to have taken out, and such duty shall be a debt to her Majesty, her heirs and successors, and shall be recoverable accordingly.

11. If any person shall brew any beer for the use of any other person at any place other than the premises of the person for whose use the beer shall be brewed, the person brewing such beer shall be deemed to be a brewer of beer for sale, and shall be liable to take out a licence accordingly.

12. So much of any Act as permits the sale of beer, spirits, or wine at fairs or races without an excise licence shall be and the same is hereby repealed.

13. It shall be lawful for the commissioners of inland revenue, whenever they shall consider it conducive to public convenience, comfort, and order, and with the consent in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorize any officer of excise to grant to any person who shall be duly authorized to keep a common inn, alehouse, or victualling house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this act empowering him to sell the like articles for which he shall have taken out such licences as aforesaid at any such other place, and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein; provided that no such occasional licence shall authorize the sale of any beer, spirits, or wine, except during the hours after sunrise and before sunset; and provided that the said licence shall not protect any such person in the sale of any of the articles herein mentioned, unless he shall at the time of such sale produce such licence when requested to do so by any officer of excise, or by any constable or police officer; nor shall any such licence be granted for the sale of any of the articles herein mentioned on any *Sunday, Christmas Day,*

or *Good Friday*, or on any day appointed for a public fast or thanksgiving: provided also, that the provisions of this clause shall not extend to *Scotland*.

14. 'And whereas by an act passed in the nineteenth and twentieth years of her Majesty's reign, chapter thirty-four, a duty of excise was imposed on sugar used in the brewing or making of beer, and by an act passed in the twenty-fourth, and twenty-fifth years of her Majesty's reign, chapter ninety-one, the charging of the said duty was deferred until the first day of *July* one thousand eight hundred and sixty-two, and it is expedient further to defer the same: Be it enacted, that the charging of the said duty of excise on sugar used as aforesaid shall be further deferred until the first day of *July* one thousand eight hundred and sixty-three.

15. The provisions contained in the twenty-first section of the act passed in the sixth year of the reign of King George the Fourth, chapter eighty-one, relating to the transfer of excise licences in the case of the removal of any person from the house or premises at which he shall be licensed under that act, shall be and the same are hereby extended to licences granted under the act passed in the twenty-third year of the reign of her present Majesty, chapter twenty-seven, and the act passed in the twenty-third and twenty-fourth years of her said Majesty's reign, chapter one hundred and seven respectively: Provided that no licence granted under either of the two last-mentioned acts for the sale of foreign wine by retail to be consumed upon the premises where the same shall be sold shall be transferred by the officers of excise, unless the assignee of such licence shall be duly licensed to keep a refreshment house, nor unless he shall produce to such officers a certificate from a justice of the peace acting for the city, borough, town, or place in which the house and premises are situated, that such justice does not object to such transfer being made, and provided that no such licence so transferred shall authorize the assignee to carry on the business mentioned therein for a longer period than five weeks from the date of such transfer, unless he shall in the meantime have qualified himself to become the holder of a licence of the like kind according to the provisions of the said respective acts.

16. 'Whereas doubts have arisen as to the extent of the privilege of the master, warden, freemen, and commonalty of the vintners of the City of *London* to sell wine without taking out an excise licence for that purpose: Be it enacted, that no freeman of the said company shall be entitled to sell wine in more than one separate and distinct house or premises at the same time without taking out the proper excise licence in that behalf, nor shall any freeman be entitled to exercise the said privilege unless he shall have previously made an entry of the house or premises in which he intends to sell wine with the proper officer of excise, in the manner directed in the fifth section of an act passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, chapter fifty-one.

17. The duties of excise now chargeable on hops growing or to grow in the United Kingdom, which shall be cured and made fit for use after the passing of this act, shall cease, and are hereby repealed; and all allowances and drawbacks of the duties of excise on the exportation of such hops shall also cease, and be no longer payable.

18. On and after the sixteenth day of *September* one thousand eight hundred and sixty-two the duty of customs now payable on the importation of hops into *Great Britain* and *Ireland* shall cease and determine.

19. All allowances and drawbacks of excise on the exportation of hops grown in the United Kingdom, and cured and made fit for sale before the passing of this act, shall cease and be repealed as to all or any of such hops which shall be exported on or after the sixteenth day of *September* one thousand eight hundred and sixty-two.

20. On and after the sixteenth day of *September* one thousand eight hundred and sixty-two so much of an act passed in the fifty-sixth year of the reign of King George the Third, chapter fifty-eight, and of an act passed in the seventh and eighth years of the reign of King George the

Fourth, chapter fifty-two, and of any other act relating to the revenue of excise, as imposes any excise penalty upon any brewer of, or dealer in, or retailer of beer, for receiving into, or having in his possession, or using or mixing with any worts or beer any article for or as a substitute for hops, or as prohibits the sale of any such article to the said persons, shall be and is hereby repealed: Provided always, that nothing herein contained shall be construed to extend to repeal any such penalty or prohibition so far as regards any article which may be used as a substitute for malt, notwithstanding that it may be also a substitute for hops.

21. *British* hops re-imported or brought back into *Great Britain or Ireland* on or at any time within six months after the sixteenth day of *September* one thousand eight hundred and sixty-two shall be charged with the duty now payable on the importation of hops; and no *British* hops which shall have been re-imported or brought back into *Great Britain or Ireland*, and warehoused for security of duties of customs previously to the said sixteenth day of *September*, shall be delivered on or within six months after that day without payment of the duty of customs now chargeable on the importation of hops.

22. The prohibition of the importation of extracts and essences of hops and other concentrations thereof, contained in the third section of the Customs Duties Consolidation Act, 1860, shall, on and after the sixteenth day of *September*, one thousand eight hundred and sixty-two, cease.

23. Provided always, that any person who shall have in his stock or possession on the fifteenth day of *September* one thousand eight hundred and sixty-two not less than half a ton weight of *British* hops of a marketable quality, on which the duties of excise have been fully charged and paid, and shall produce the same to the proper officer of excise authorized by the commissioners of inland revenue to take an account thereof in the original bags or pockets (whole and unopened) in which the same were charged with duty, such person being the *bond fide* owner of such hops, or a known hop factor, shall be entitled to claim and be paid an allowance at the rate of seven shillings for every hundredweight thereof subject to a deduction of ten per centum for the tare of the bags or pockets in which the hops are contained.

24. Every person intending to claim any such allowance shall, seven days previously to the fifteenth day of *September* one thousand eight hundred and sixty-two, give notice to the proper officer of excise of the division in which the hops upon which he intends to claim such allowance are stored, specifying his name and place of abode, and the particular warehouse or building in which such hops are stored, and the number of bags or pockets of such hops, with the weight and marks upon each bag or pocket, and the total weight of such hops, and also the amount of the allowance claimed; and every person claiming such allowance shall provide requisite scales and weights to enable the officer of excise conveniently to take an account of such hops, and shall also, with his servants and workmen, whenever thereto required, aid and assist the said officer in taking such account; and in default thereof the claimant shall not be entitled to any allowance in respect of any hops in his stock or possession.

25. The proper officer of excise authorized in that behalf shall on the said fifteenth day of *September*, or within three days thereafter, attend at the place mentioned in such notice as aforesaid as the place where any such hops are deposited, and examine, weigh, and take an account of the same, and shall mark each bag or pocket with such marks and figures as he shall think fit to denote such examination; and such officer shall ascertain and compute the amount of the allowance to which the claimant may be entitled in respect of such hops, and shall give to him a certificate expressing the true quantity and net weight of the hops in respect of which such claimant shall be entitled to the allowance, and specifying the amount of the allowance, and the name and place of abode of the person entitled thereto.

26. On the production of such certificate by the claimant or his agent to the collector of excise of the collection in which the same was granted, and on a solemn declaration being made by such claimant before a justice of the peace, or such collector, that the whole quantity of the hops mentioned in such certificate was, at the time therein specified, the sole property of such claimant, or of him and his copartner in trade (as the case may be), or that he is a hop factor, and that the same, or any part thereof, hath not been taken account of for the purpose of obtaining the said allowance more than once, and that the said certificate is true to the best of his knowledge and belief, and that no false statement, art, or contrivance was used to deceive the officer taking an account of the said hops, or any part thereof, or to render the account or amount thereof expressed in such certificate untrue, the said collector being satisfied of the truth of such declaration shall, out of the money in his hands on account of any of the duties of excise, pay to the said claimant or his agent the sum of money specified in such certificate at the next sitting day which shall be held for the collection or receipt of excise duties next after the expiration of one week from the production of such certificate and the making of such declaration as aforesaid.

27. From and after the first day of *September* one thousand eight hundred and sixty-two the act passed in the ninth year of the reign of King *George* the Fourth, chapter eighteen, for repealing the stamp duties on cards and dice made in the United Kingdom, and granting other duties in lieu thereof, and amending and consolidating the acts relating to cards and dice and the exportation thereof shall be and the same is hereby repealed, save and except as to any duties granted by the said act and which shall be then unpaid and any penalty which may have been incurred, which duties and penalties shall be recoverable as if this act had not been made, and also save and except so far as relates to any bond given in pursuance of the said act, which bond shall, notwithstanding this act, continue in force until the condition thereof shall have been performed and fulfilled; and from and after the said first day of *September* one thousand eight hundred and sixty-two the duty by this act charged for and in respect of playing cards, and all the clauses and provisions relating thereto, shall commence and take effect.

28. The term "cards," wherever the same shall be used in this act, shall mean playing cards by this act charged with stamp duty; the term "wrapper" shall mean a paper wrapper, label, or enclosure provided by the said commissioners of inland revenue for containing, enclosing, or covering a pack of cards and denoting the duty in respect thereof; and the term "pack of cards" shall mean any quantity or number of cards not exceeding fifty-two.

29. The said duty of threepence by this act chargeable on a pack of cards shall be denoted on the wrapper of every pack, which wrapper the commissioners of inland revenue shall provide with such stamp or device or devices thereon for denoting the said duty as they shall think fit; and the said commissioners shall supply to any person who shall be a maker of cards, and shall as such have a licence in force for selling cards, with any quantities of such wrappers on payment of the duties for the same, or at their discretion shall stamp to denote the said duty, the wrappers of licensed makers of cards, which when so stamped shall be deemed to be wrappers provided by the said commissioners in pursuance of this act; and no cards shall be sold otherwise than in separate packs, each pack being enclosed in a wrapper, the stamp on which shall be at all times uncovered and open to view, and which shall be securely fastened round or over the same by means of wheat flour paste, or some other firmly adhesive substance to be approved by the said commissioners, and so in such manner that the wrapper cannot be opened, or the cards taken out without the wrapper being destroyed; and if the wrapper used by any maker of cards for enclosing any cards sold by him shall not be fastened with proper and sufficient adhesive substance as aforesaid, or *bond fide* in a secure manner, and with the stamp thereon open to

view, according to the true intent and meaning of this act, such cards shall be deemed to be not enclosed in a wrapper provided by the said commissioners under this act; and such maker, and also any other person selling such cards, shall be subject and liable to the penalties imposed by this act for selling cards not enclosed in wrappers.

30. The commissioners of inland revenue, or any of their officers authorized by them, shall grant to any person who shall apply for it a licence to sell cards at any house to be specified therein, on payment of the duty for the same; every such licence shall continue in force from the day on which the same shall be granted until and upon the first day of September then next following, and no longer.

31. If any person shall sell or offer for sale any cards without having a licence in force for the same granted under this act he shall forfeit twenty pounds; and any person who shall sell cards at any house or place not specified in a licence granted to him shall be deemed to be a person selling cards without having a licence; and any person who shall be found hawking or carrying about for sale any cards, whether enclosed in a stamped wrapper or not, and who shall sell the same or offer the same for sale at any place for which he shall have no licence, may be apprehended by any constable or officer of inland revenue, and taken before any justice of the peace, who shall hear and determine the matter, and if upon conviction of such offence the offender shall not immediately pay the penalty in which he shall be convicted, he shall be committed to prison for any period not exceeding three months nor less than one month, unless the penalty shall be sooner paid; and all cards which he shall be found trading with or carrying about shall be forfeited, and delivered up to the commissioners to be dealt with as cards forfeited under this act.

32. If any maker of cards shall remove or send or deliver out any cards from his house or premises, or the house or place in which they were made or completed (except for exportation as allowed by this act), the same not being in packs enclosed in wrappers in manner aforesaid, or if any person, whether a maker of cards or not, and whether licensed or not, shall sell any cards, not being a pack of cards enclosed in a wrapper as by this act is required, he shall forfeit, if he be a maker of cards, the sum of one hundred pounds, and if he be not a maker of cards, the sum of twenty pounds; and moreover, for every pack of cards which any such person shall sell or send or deliver out not enclosed in a wrapper as aforesaid, he shall forfeit the further sum of five pounds; and all cards found in any house or place whatever (except on the premises of a licensed maker specified in his licence) which shall be kept or intended for sale, or which shall be found on the premises or in the possession of any person who shall sell cards, and which shall not be in separate packs enclosed in wrappers as aforesaid, shall be forfeited; and the same, and also all wrappers found in any house or place whatsoever which shall have been used for enclosing cards, and removed or got off therefrom, may be taken and carried away by any officer of inland revenue, and be destroyed or otherwise disposed of as the commissioners shall direct; and for the purposes of such seizure it shall be lawful for any such officer, under the authority of a warrant for that purpose specially granted by any two of the commissioners or any justice of the peace, to enter in the day-time any house or place in which there shall be reason to suspect that any cards not enclosed in stamped wrappers, or any wrappers that have been used as aforesaid, are deposited or kept, and to search for the same; and if necessary, such officer may break open the door of any room or closet, or any box, trunk, or case in which any such cards or wrappers are suspected to be contained; and all cards so found shall be deemed to be kept and intended for sale, unless the contrary shall be proved.

33. Upon the wrapper of every pack of cards sold or sent or delivered out by any maker of cards there shall be printed his name and the place at which he shall be licensed to sell cards in manner to be approved by the said commissioners, but, except as is provided by the next succeed-

ing section, no cards shall be sold or sent or delivered out by any maker the stamp upon the wrapper of which shall be cancelled or defaced, or in any way damaged or injured; and for every pack of cards sold or sent or delivered out by any maker of cards, on the wrapper of which shall not be printed as hereby required such name and place, or, except as aforesaid, the stamp on which wrapper shall be cancelled or in any way defaced, damaged, or injured, he shall forfeit the sum of five pounds; and cards enclosed in a wrapper having the name of a maker thereon, or otherwise purporting to be made by him, shall be deemed to have been made by him, unless the contrary shall appear.

34. Every person who shall sell cards, other than a maker of or dealer in cards selling by wholesale to persons who buy to sell again, shall, before he shall deliver or send out a pack of cards on the sale thereof, cancel the stamp on the wrapper denoting the duty by this act charged on a pack of cards by writing or impressing in ink his name upon such stamp, or in default thereof he shall forfeit the sum of five pounds.

35. If any person shall remove or get off or aid or assist in removing or getting off from any pack of cards any wrapper which shall have been used for enclosing the same, with intent that such wrapper shall be again used for enclosing any other cards; or shall use any wrapper so removed or got off for enclosing any such other cards; or shall sell or utter any such last-mentioned wrapper, or any cards enclosed therein, knowing the said wrapper to have been so removed or got off as aforesaid; or shall knowingly have in his possession or on his premises any wrapper which shall have been so removed or got off, with intent that the same might be used for enclosing other cards; or shall be guilty of any fraudulent act, contrivance, or device whatever relating to the duty by this act chargeable in respect of cards, he shall forfeit the sum of twenty pounds; and it shall be lawful for the said commissioners to refuse to grant licence to sell cards to any person who shall have been convicted of any such offence.

36. Provided, that cards in packs, each pack containing an ace of spades duly stamped under the said act of the ninth year of King George the Fourth, and also cards duly imported, enclosed in wrappers according to the act of the sixteenth and seventeenth years of her present Majesty, chapter one hundred and seven, may lawfully be sold as if this act had not been made; and provided that it shall be lawful for any person possessed of cards previously sold and opened, used and played with, to sell the same to any licensed maker of cards without having a licence for selling cards, and without such cards being enclosed in a wrapper provided under this act; and if any such cards shall be afterwards sold or sent or delivered out by the said maker, they shall be subject to all the provisions of this act, and for the purposes of this act such maker shall be deemed to be the maker of such cards; and provided that this act shall not extend to charge with stamp duty *bona fide* toy cards not exceeding in length one inch and three quarters, or in width one inch and a quarter.

37. Provided also, that any licensed maker of cards who shall have given security as herein-after required may export cards, made by him on the premises specified in his licence, to the *Isle of Man* or to foreign parts without being enclosed in wrappers provided under this act, under the conditions and provisions herein after mentioned; that is to say before any cards intended for exportation shall be removed from the premises of the licensed maker, notice of the intention to export them shall be given by the maker to the said commissioners, or to some officer of inland revenue authorized to receive the same, at the chief office in *London*, or at the place at which the maker shall be licensed, specifying the quantity of packs and the description of the cards to be exported, the ports or places from and to which respectively, and the name of the ship or vessel in which the cards are to be exported; and the said commissioners or officer shall issue to the maker a certificate, in such form as the commissioners shall approve, authorizing the removal and exportation of the cards in conformity with the notice, and thereupon the

cards may be removed from the premises of the maker, and shall be deposited on board the said ship or vessel within a certain period to be specified in the certificate, not exceeding in any case seven days from the date thereof; and if the said cards or any of them shall be found at any place whatever within the United Kingdom after the expiration of such period, or at any place other than the port or place of exportation, or in transit thereto, before the expiration thereof, or at any place and at any time not accompanied by such certificate, the same shall be forfeited, and may be seized by any officer of inland revenue, and disposed of as by this act is provided as to cards forfeited: Provided, that before any maker of cards shall be permitted to export cards not enclosed in wrappers under this act, he shall give bond to her Majesty in the penalty of five hundred pounds, with one or more sureties to the satisfaction of the commissioners, conditioned for the due exportation, in conformity with the provisions of this act, of all cards which he shall be authorized to export, which bond, and the condition thereof, shall be in such form and terms as the commissioners shall require.

38. If any person shall make, issue, deliver, assign, transfer, or negotiate in the United Kingdom, any bond, debenture, or other security by this act chargeable with stamp duty, or shall pay any interest or dividend accrued due in respect of any such instrument, before the same shall be duly stamped for denoting the said duty, he shall forfeit the sum of twenty pounds.

39. For the purposes of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death on obligation or other specialty, shall be estate and effects of the deceased, within the jurisdiction of her Majesty's Court of Probate in *England* or *Ireland*, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

40. The stamp duty of eight pounds now payable for a yearly licence to be taken out by a hawker, pedlar, and petty chapman in *Great Britain*, to travel and trade with one horse only, exceeding in height thirteen hands, shall be and the same is hereby reduced to the sum of four pounds; and any licence to be hereafter taken out by a hawker, pedlar, and petty chapman in *Great Britain* may be granted for a period not exceeding six months on payment only of one-half the amount payable for a yearly licence for the same purpose: Provided that any such licence shall continue in force until and upon the thirty-first day of *January* or the thirty-first day of *July*, as the case may be, next following the date thereof, and no longer.

41. All penalties imposed by this act relating to stamp duty may be proceeded for and recovered for the use of her Majesty in the same manner, and in the case of summary proceedings with the like power of appeal, as any penalty may be proceeded for and recovered under any act relating to the excise revenue.

42. The sum charged as the annual value or amount of any property, profits, or gains in the several and respective assessments made in pursuance of the act passed in the twenty-fourth year of her Majesty's reign, chapter twenty, under Schedules (A.) and (B.) respectively of the act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, and the duty charged in respect of such annual value or amount by the said assessments for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, shall (except as to *ilways* and otherwise as provided by the acts relating to *come tax*) be taken as the annual value or amount of such property, profits, or gains, and as the duty payable in respect thereof respectively for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the respective assessments made under the said schedules respectively for the said year ended on the fifth day of *April* one thousand eight hundred and sixty-

two, except as aforesaid, shall, for the purposes of this act, be deemed and taken to be assessments made for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the commissioners executing the Income Tax Acts shall, for each place within their several and respective districts, cause duplicates of the said assessments so made payable for the said last-mentioned year to be made out and delivered, together with warrants for collecting the same, and in *England* the said commissioners shall appoint such persons, being inhabitants of the place to which the duplicate shall relate, as they the said commissioners shall think fit, to be collectors of the duties thereby charged, in like manner as if such persons had been presented to them by assessors under the acts now in force; and such duties shall be collected, levied, and paid for the said year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, subject nevertheless to be increased in like manner as the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, and subject also to be abated or discharged at the end of the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, for any cause allowed by the said acts: Provided, that whenever it shall appear that any property, profits, or gains chargeable under this act have not been charged by the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, such property, profits, and gains shall be assessed to the duties granted by this act under the provisions of the said several acts applicable thereto.

43. 'And whereas, since the fifth day of *April* now last past, and before the passing of this act, divers dividends, annuities, and shares of annuities, and interest on loans and on bonds, debentures, and other securities directed by the acts relating to the income tax in force on the said last-mentioned day to be assessed under Schedules (C.) and (D.) respectively of the said acts, have become due and payable, and by reason of the expiration of the said acts before the passing of this act have not been assessed and charged with the said tax; and it is expedient to provide for the assessment thereof with the rates and duties of income tax granted by this act, and for the collection of the sums assessed from the persons respectively to whom such dividends, annuities, shares, and interest have been paid, or who are entitled thereto, or otherwise, as hereinafter mentioned: Be it enacted, that all persons respectively intrusted with the payment of any such dividends, annuities, shares, or interest as aforesaid, or who have paid the same, either as agent or otherwise, shall, within one calendar month next after the passing of this act, deliver or cause to be delivered to the commissioners for special purposes, at the head office of inland revenue at *Somerset House* in the City of *Westminster*, an account in writing, duly authenticated and signed by such persons respectively, containing a description of all such dividends, annuities, shares, and interest intrusted to them for payment, which have become due or payable since the fifth day of *April* last, and also a true and perfect account of the names and residences of the several persons to whom the same have become due or payable, and the several sums which have been so paid to them, or to which they have become entitled respectively, specifying in such account the sums (if any) deducted or retained by the persons intrusted with such payment as aforesaid in respect of income tax, to become chargeable thereon by the authority of Parliament in this present session, and the said commissioners for special purposes shall make assessments thereon respectively, under Schedules (C.) and (D.) respectively of the acts relating to the income tax, of the rates and duties of income tax granted by this act; that is to say, they shall make assessments in respect of so much of such dividends, annuities, shares, or interest as may not have been actually paid to the persons entitled thereto, and also in respect of so much thereof as shall have been paid to such persons, but in respect whereof the duty chargeable by this act shall have been retained as aforesaid, in like manner as if

view, according to the true intent and meaning of this act, such cards shall be deemed to be not enclosed in a wrapper provided by the said commissioners under this act; and such maker, and also any other person selling such cards, shall be subject and liable to the penalties imposed by this act for selling cards not enclosed in wrappers.

30. The commissioners of inland revenue, or any of their officers authorized by them, shall grant to any person who shall apply for it a licence to sell cards at any house to be specified therein, on payment of the duty for the same; every such licence shall continue in force from the day on which the same shall be granted until and upon the first day of *September* then next following, and no longer.

31. If any person shall sell or offer for sale any cards without having a licence in force for the same granted under this act he shall forfeit twenty pounds; and any person who shall sell cards at any house or place not specified in a licence granted to him shall be deemed to be a person selling cards without having a licence; and any person who shall be found hawking or carrying about for sale any cards, whether enclosed in a stamped wrapper or not, and who shall sell the same or offer the same for sale at any place for which he shall have no licence, may be apprehended by any constable or officer of inland revenue, and taken before any justice of the peace, who shall hear and determine the matter, and if upon conviction of such offence the offender shall not immediately pay the penalty in which he shall be convicted, he shall be committed to prison for any period not exceeding three months nor less than one month, unless the penalty shall be sooner paid; and all cards which he shall be found trading with or carrying about shall be forfeited, and delivered up to the commissioners to be dealt with as cards forfeited under this act.

32. If any maker of cards shall remove or send or deliver out any cards from his house or premises, or the house or place in which they were made or completed (except for exportation as allowed by this act), the same not being in packs enclosed in wrappers in manner aforesaid, or if any person, whether a maker of cards or not, and whether licensed or not, shall sell any cards, not being a pack of cards enclosed in a wrapper as by this act is required, he shall forfeit, if he be a maker of cards, the sum of one hundred pounds, and if he be not a maker of cards, the sum of twenty pounds; and moreover, for every pack of cards which any such person shall sell or send or deliver out not enclosed in a wrapper as aforesaid, he shall forfeit the further sum of five pounds; and all cards found in any house or place whatever (except on the premises of a licensed maker specified in his licence) which shall be kept or intended for sale, or which shall be found on the premises or in the possession of any person who shall sell cards, and which shall not be in separate packs enclosed in wrappers as aforesaid, shall be forfeited; and the same, and also all wrappers found in any house or place whatsoever which shall have been used for enclosing cards, and removed or got off therefrom, may be taken and carried away by any officer of inland revenue, and be destroyed or otherwise disposed of as the commissioners shall direct; and for the purposes of such seizure it shall be lawful for any such officer, under the authority of a warrant for that purpose specially granted by any two of the commissioners or any justice of the peace, to enter in the day-time any house or place in which there shall be reason to suspect that any cards not enclosed in stamped wrappers, or any wrappers that have been used as aforesaid, are deposited or kept, and to search for the same; and if necessary, such officer may break open the door of any room or closet, or any box, trunk, or case in which any such cards or wrappers are suspected to be contained; and all cards so found shall be deemed to be kept and intended for sale, unless the contrary shall be proved.

33. Upon the wrapper of every pack of cards sold or sent or delivered out by any maker of cards there shall be printed his name and the place at which he shall be licensed to sell cards in manner to be approved by the said commissioners, but, except as is provided by the next succeed-

ing section, no cards shall be sold or sent or delivered out by any maker the stamp upon the wrapper of which shall be cancelled or defaced, or in any way damaged or injured; and for every pack of cards sold or sent or delivered out by any maker of cards, on the wrapper of which shall not be printed as hereby required such name and place, or, except as aforesaid, the stamp on which wrapper shall be cancelled or in any way defaced, damaged, or injured, he shall forfeit the sum of five pounds; and cards enclosed in a wrapper having the name of a maker thereon, or otherwise purporting to be made by him, shall be deemed to have been made by him, unless the contrary shall appear.

34. Every person who shall sell cards, other than a maker of or dealer in cards selling by wholesale to persons who buy to sell again, shall, before he shall deliver or send out a pack of cards on the sale thereof, cancel the stamp on the wrapper denoting the duty by this act charged on a pack of cards by writing or impressing in ink his name upon such stamp, or in default thereof he shall forfeit the sum of five pounds.

35. If any person shall remove or get off or aid or assist in removing or getting off from any pack of cards any wrapper which shall have been used for enclosing the same, with intent that such wrapper shall be again used for enclosing any other cards; or shall use any wrapper so removed or got off for enclosing any such other cards; or shall sell or utter any such last-mentioned wrapper, or any cards enclosed therein, knowing the said wrapper to have been so removed or got off as aforesaid; or shall knowingly have in his possession or on his premises any wrapper which shall have been so removed or got off, with intent that the same might be used for enclosing other cards; or shall be guilty of any fraudulent act, contrivance, or device whatever relating to the duty by this act chargeable in respect of cards, he shall forfeit the sum of twenty pounds; and it shall be lawful for the said commissioners to refuse to grant licence to sell cards to any person who shall have been convicted of any such offence.

36. Provided, that cards in packs, each pack containing an ace of spades duly stamped under the said act of the ninth year of King *George* the Fourth, and also cards duly imported, enclosed in wrappers according to the act of the sixteenth and seventeenth years of her present Majesty, chapter one hundred and seven, may lawfully be sold as if this act had not been made; and provided that it shall be lawful for any person possessed of cards previously sold and opened, used and played with, to sell the same to any licensed maker of cards without having a licence for selling cards, and without such cards being enclosed in a wrapper provided under this act; and if any such cards shall be afterwards sold or sent or delivered out by the said maker, they shall be subject to all the provisions of this act, and for the purposes of this act such maker shall be deemed to be the maker of such cards; and provided that this act shall not extend to charge with stamp duty *bande* toy cards not exceeding in length one inch and three quarters, or in width one inch and a quarter.

37. Provided also, that any licensed maker of cards who shall have given security as herein-after required may export cards, made by him on the premises specified in his licence, to the *Isle of Man* or to foreign parts without being enclosed in wrappers provided under this act, under the conditions and provisions herein after mentioned; that is to say before any cards intended for exportation shall be removed from the premises of the licensed maker, notice of the intention to export them shall be given by the maker to the said commissioners, or to some officer of inland revenue authorized to receive the same, at the chief office in *London*, or at the place at which the maker shall be licensed, specifying the quantity of packs and the description of the cards to be exported, the ports or places from and to which respectively, and the name of the ship or vessel in which the cards are to be exported; and the said commissioners or officer shall issue to the maker a certificate, in such form as the commissioners shall approve, authorizing the removal and exportation of the cards in conformity with the notice, and thereupon the

cards may be removed from the premises of the maker and shall be deposited on board the said ship or vessel within a certain period to be specified in the certificate, not exceeding in any case seven days from the date thereof; and if the said cards or any of them shall be found at any place whatever within the United Kingdom after the expiration of such period, or at any place other than the port or place of exportation, or in transit thereto, before the expiration thereof, or at any place and at any time not accompanied by such certificate, the same shall be forfeited, and may be seized by any officer of inland revenue, and disposed of as by this act is provided as to cards forfeited: Provided, that before any maker of cards shall be permitted to export cards not enclosed in wrappers under this act, he shall give bond to her Majesty in the penalty of five hundred pounds, with one or more sureties to the satisfaction of the commissioners, conditioned for the due exportation, in conformity with the provisions of this act, of all cards which he shall be authorised to export, which bond, and the condition thereof, shall be in such form and terms as the commissioners shall require.

38. If any person shall make, issue, deliver, assign, transfer, or negotiate in the United Kingdom, any bond, debenture, or other security by this act chargeable with stamp duty, or shall pay any interest or dividend accrued due in respect of any such instrument, before the same shall be duly stamped for denoting the said duty, he shall forfeit the sum of twenty pounds.

39. For the purposes of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death on obligation or other specialty, shall be estate and effects of the deceased, within the jurisdiction of her Majesty's Court of Probate in *England* or *Ireland*, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

40. The stamp duty of eight pounds now payable for a yearly licence to be taken out by a hawker, pedlar, and petty chapman in *Great Britain*, to travel and trade with one horse only, exceeding in height thirteen hands, shall be and the same is hereby reduced to the sum of four pounds; and any licence to be hereafter taken out by a hawker, pedlar, and petty chapman in *Great Britain* may be granted for a period not exceeding six months on payment only of one-half the amount payable for a yearly licence for the same purpose: Provided that any such licence shall continue in force until and upon the thirty-first day of *January* or the thirty-first day of *July*, as the case may be, next following the date thereof, and no longer.

41. All penalties imposed by this act relating to stamp duty may be proceeded for and recovered for the use of her Majesty in the same manner, and in the case of summary proceedings with the like power of appeal, as any penalty may be proceeded for and recovered under any act relating to the excise revenue.

42. The sum charged as the annual value or amount of any property, profits, or gains in the several and respective assessments made in pursuance of the act passed in the twenty-fourth year of her Majesty's reign, chapter twenty, under Schedules (A.) and (B.) respectively of the act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, and the duty charged in respect of such annual value or amount by the said assessments for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, shall (except as to railways and otherwise as provided by the acts relating to income tax) be taken as the annual value or amount of such property, profits, or gains, and as the duty payable in respect thereof respectively for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the respective assessments made under the said schedules respectively for the said year ended on the fifth day of *April* one thousand eight hundred and sixty-

two, except as aforesaid, shall, for the purposes of this act, be deemed and taken to be assessments made for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the commissioners executing the Income Tax Acts shall, for each place within their several and respective districts, cause duplicates of the said assessments so made payable for the said last-mentioned year to be made out and delivered, together with warrants for collecting the same, and in *England* the said commissioners shall appoint such persons, being inhabitants of the place to which the duplicate shall relate, as they the said commissioners shall think fit, to be collectors of the duties thereby charged, in like manner as if such persons had been presented to them by assessors under the acts now in force; and such duties shall be collected, levied, and paid for the said year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, subject nevertheless to be increased in like manner as the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, and subject also to be abated or discharged at the end of the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, for any cause allowed by the said acts: Provided, that whenever it shall appear that any property, profits, or gains chargeable under this act have not been charged by the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, such property, profits, and gains shall be assessed to the duties granted by this act under the provisions of the said several acts applicable thereto.

43. 'And whereas, since the fifth day of *April* now last past, and before the passing of this act, divers dividends, annuities, and shares of annuities, and interest on loans and on bonds, debentures, and other securities directed by the acts relating to the income tax in force on the said last-mentioned day to be assessed under Schedules (C.) and (D.) respectively of the said acts, have become due and payable, and by reason of the expiration of the said acts before the passing of this act have not been assessed and charged with the said tax; and it is expedient to provide for the assessment thereof with the rates and duties of income tax granted by this act, and for the collection of the sums assessed from the persons respectively to whom such dividends, annuities, shares, and interest have been paid, or who are entitled thereto, or otherwise, as herein-after mentioned: Be it enacted, that all persons respectively intrusted with the payment of any such dividends, annuities, shares, or interest as aforesaid, or who have paid the same, either as agent or otherwise, shall, within one calendar month next after the passing of this act, deliver or cause to be delivered to the commissioners for special purposes, at the head office of inland revenue at *Somerset House* in the City of *Westminster*, an account in writing, duly authenticated and signed by such persons respectively, containing a description of all such dividends, annuities, shares, and interest intrusted to them for payment, which have become due or payable since the fifth day of *April* last, and also a true and perfect account of the names and residences of the several persons to whom the same have become due or payable, and the several sums which have been so paid to them, or to which they have become entitled respectively, specifying in such account the sums (if any) deducted or retained by the persons intrusted with such payment as aforesaid in respect of income tax, to become chargeable thereon by the authority of Parliament in this present session, and the said commissioners for special purposes shall make assessments thereon respectively, under Schedules (C.) and (D.) respectively of the acts relating to the income tax, of the rates and duties of income tax granted by this act; that is to say, they shall make assessments in respect of so much of such dividends, annuities, shares, or interest as may not have been actually paid to the persons entitled thereto, and also in respect of so much thereof as shall have been paid to such persons, but in respect whereof the duty chargeable by this act shall have been retained as aforesaid, in like manner as if

view, according to the true intent and meaning of this act, such cards shall be deemed to be not enclosed in a wrapper provided by the said commissioners under this act; and such maker, and also any other person selling such cards, shall be subject and liable to the penalties imposed by this act for selling cards not enclosed in wrappers.

30. The commissioners of inland revenue, or any of their officers authorized by them, shall grant to any person who shall apply for it a licence to sell cards at any house to be specified therein, on payment of the duty for the same; every such licence shall continue in force from the day on which the same shall be granted until and upon the first day of *September* then next following, and no longer.

31. If any person shall sell or offer for sale any cards without having a licence in force for the same granted under this act he shall forfeit twenty pounds; and any person who shall sell cards at any house or place not specified in a licence granted to him shall be deemed to be a person selling cards without having a licence; and any person who shall be found hawking or carrying about for sale any cards, whether enclosed in a stamped wrapper or not, and who shall sell the same or offer the same for sale at any place for which he shall have no licence, may be apprehended by any constable or officer of inland revenue, and taken before any justice of the peace, who shall hear and determine the matter, and if upon conviction of such offence the offender shall not immediately pay the penalty in which he shall be convicted, he shall be committed to prison for any period not exceeding three months nor less than one month, unless the penalty shall be sooner paid; and all cards which he shall be found trading with or carrying about shall be forfeited, and delivered up to the commissioners to be dealt with as cards forfeited under this act.

32. If any maker of cards shall remove or send or deliver out any cards from his house or premises, or the house or place in which they were made or completed (except for exportation as allowed by this act), the same not being in packs enclosed in wrappers in manner aforesaid, or if any person, whether a maker of cards or not, and whether licensed or not, shall sell any cards, not being a pack of cards enclosed in a wrapper as by this act is required, he shall forfeit, if he be a maker of cards, the sum of one hundred pounds, and if he be not a maker of cards, the sum of twenty pounds; and moreover, for every pack of cards which any such person shall sell or send or deliver out not enclosed in a wrapper as aforesaid, he shall forfeit the further sum of five pounds; and all cards found in any house or place whatever (except on the premises of a licensed maker specified in his licence) which shall be kept or intended for sale, or which shall be found on the premises or in the possession of any person who shall sell cards, and which shall not be in separate packs enclosed in wrappers as aforesaid, shall be forfeited; and the same, and also all wrappers found in any house or place whatsoever which shall have been used for enclosing cards, and removed or got off therefrom, may be taken and carried away by any officer of inland revenue, and be destroyed or otherwise disposed of as the commissioners shall direct; and for the purposes of such seizure it shall be lawful for any such officer, under the authority of a warrant for that purpose specially granted by any two of the commissioners or any justice of the peace, to enter in the day-time any house or place in which there shall be reason to suspect that any cards not enclosed in stamped wrappers, or any wrappers that have been used as aforesaid, are deposited or kept, and to search for the same; and if necessary, such officer may break open the door of any room or closet, or any box, trunk, or case in which any such cards or wrappers are suspected to be contained; and all cards so found shall be deemed to be kept and intended for sale, unless the contrary shall be proved.

33. Upon the wrapper of every pack of cards sold or sent or delivered out by any maker of cards there shall be printed his name and the place at which he shall be licensed to sell cards in manner to be approved by the said commissioners, but, except as is provided by the next succeed-

ing section, no cards shall be sold or sent or delivered out by any maker the stamp upon the wrapper of which shall be cancelled or defaced, or in any way damaged or injured; and for every pack of cards sold or sent or delivered out by any maker of cards, on the wrapper of which shall not be printed as hereby required such name and place, or, except as aforesaid, the stamp on which wrapper shall be cancelled or in any way defaced, damaged, or injured, he shall forfeit the sum of five pounds; and cards enclosed in a wrapper having the name of a maker thereon, or otherwise purporting to be made by him, shall be deemed to have been made by him, unless the contrary shall appear.

34. Every person who shall sell cards, other than a maker of or dealer in cards selling by wholesale to persons who buy to sell again, shall, before he shall deliver or send out a pack of cards on the sale thereof, cancel the stamp on the wrapper denoting the duty by this act charged on a pack of cards by writing or impressing in ink his name upon such stamp, or in default thereof he shall forfeit the sum of five pounds.

35. If any person shall remove or get off or aid or assist in removing or getting off from any pack of cards any wrapper which shall have been used for enclosing the same, with intent that such wrapper shall be again used for enclosing any other cards; or shall use any wrapper so removed or got off for enclosing any such other cards; or shall sell or utter any such last-mentioned wrapper, or any cards enclosed therein, knowing the said wrapper to have been so removed or got off as aforesaid; or shall knowingly have in his possession or on his premises any wrapper which shall have been so removed or got off, with intent that the same might be used for enclosing other cards; or shall be guilty of any fraudulent act, contrivance, or device whatever relating to the duty by this act chargeable in respect of cards, he shall forfeit the sum of twenty pounds; and it shall be lawful for the said commissioners to refuse to grant licence to sell cards to any person who shall have been convicted of any such offence.

36. Provided, that cards in packs, each pack containing an ace of spades duly stamped under the said act of the ninth year of King *George the Fourth*, and also cards duly imported, enclosed in wrappers according to the act of the sixteenth and seventeenth years of her present Majesty, chapter one hundred and seven, may lawfully be sold as if this act had not been made; and provided that it shall be lawful for any person possessed of cards previously sold and opened, used and played with, to sell the same to any licensed maker of cards without having a licence for selling cards, and without such cards being enclosed in a wrapper provided under this act; and if any such cards shall be afterwards sold or sent or delivered out by the said maker, they shall be subject to all the provisions of this act, and for the purposes of this act such maker shall be deemed to be the maker of such cards; and provided that this act shall not extend to charge with stamp duty *bona fide* toy cards not exceeding in length one inch and three quarters, or in width one inch and a quarter.

37. Provided also, that any licensed maker of cards who shall have given security as herein-after required may export cards, made by him on the premises specified in his licence, to the *Isle of Man* or to foreign parts without being enclosed in wrappers provided under this act, under the conditions and provisions herein after mentioned; that is to say before any cards intended for exportation shall be removed from the premises of the licensed maker, notice of the intention to export them shall be given by the maker to the said commissioners, or to some officer of inland revenue authorized to receive the same, at the chief office in *London*, or at the place at which the maker shall be licensed, specifying the quantity of packs and the description of the cards to be exported, the ports or places from and to which respectively, and the name of the ship or vessel in which the cards are to be exported; and the said commissioners or officer shall issue to the maker a certificate, in such form as the commissioners shall approve, authorizing the removal and exportation of the cards in conformity with the notice, and thereupon the

cards may be removed from the premises of the maker and shall be deposited on board the said ship or vessel within a certain period to be specified in the certificate, not exceeding in any case seven days from the date thereof; and if the said cards or any of them shall be found at any place whatever within the United Kingdom after the expiration of such period, or at any place other than the port or place of exportation, or in transit thereto, before the expiration thereof, or at any place and at any time not accompanied by such certificate, the same shall be forfeited, and may be seized by any officer of inland revenue, and disposed of as by this act is provided as to cards forfeited: Provided, that before any maker of cards shall be permitted to export cards not enclosed in wrappers under this act, he shall give bond to her Majesty in the penalty of five hundred pounds, with one or more sureties to the satisfaction of the commissioners, conditioned for the due exportation, in conformity with the provisions of this act, of all cards which he shall be authorized to export, which bond, and the condition thereof, shall be in such form and terms as the commissioners shall require.

38. If any person shall make, issue, deliver, assign, transfer, or negotiate in the United Kingdom, any bond, debenture, or other security by this act chargeable with stamp duty, or shall pay any interest or dividend accrued due in respect of any such instrument, before the same shall be duly stamped for denoting the said duty, he shall forfeit the sum of twenty pounds.

39. For the purposes of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death on obligation or other specialty, shall be estate and effects of the deceased, within the jurisdiction of her Majesty's Court of Probate in *England or Ireland*, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

40. The stamp duty of eight pounds now payable for a yearly licence to be taken out by a hawker, pedlar, and petty chapman in *Great Britain*, to travel and trade with one horse only, exceeding in height thirteen hands, shall be and the same is hereby reduced to the sum of four pounds; and any licence to be hereafter taken out by a hawker, pedlar, and petty chapman in *Great Britain* may be granted for a period not exceeding six months on payment only of one-half the amount payable for a yearly licence for the same purpose: Provided that any such licence shall continue in force until and upon the thirty-first day of *January* or the thirty-first day of *July*, as the case may be, next following the date thereof, and no longer.

41. All penalties imposed by this act relating to stamp duty may be proceeded for and recovered for the use of her Majesty in the same manner, and in the case of summary proceedings with the like power of appeal, as any penalty may be proceeded for and recovered under any act relating to the excise revenue.

42. The sum charged as the annual value or amount of any property, profits, or gains in the several and respective assessments made in pursuance of the act passed in the twenty-fourth year of her Majesty's reign, chapter twenty, under Schedules (A.) and (B.) respectively of the act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, and the duty charged in respect of such annual value or amount by the said assessments for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, shall (except as to railways and otherwise as provided by the acts relating to income tax) be taken as the annual value or amount of such property, profits, or gains, and as the duty payable in respect thereof respectively for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the respective assessments made under the said schedules respectively for the said year ended on the fifth day of *April* one thousand eight hundred and sixty-

two, except as aforesaid, shall, for the purposes of this act, be deemed and taken to be assessments made for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two; and the commissioners executing the Income Tax Acts shall, for each place within their several and respective districts, cause duplicates of the said assessments so made payable for the said last-mentioned year to be made out and delivered, together with warrants for collecting the same, and in *England* the said commissioners shall appoint such persons, being inhabitants of the place to which the duplicate shall relate, as they the said commissioners shall think fit, to be collectors of the duties thereby charged, in like manner as if such persons had been presented to them by assessors under the acts now in force; and such duties shall be collected, levied, and paid for the said year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, subject nevertheless to be increased in like manner as the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, and subject also to be abated or discharged at the end of the year commencing on the sixth day of *April* one thousand eight hundred and sixty-two, for any cause allowed by the said acts: Provided, that whenever it shall appear that any property, profits, or gains chargeable under this act have not been charged by the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-two, such property, profits, and gains shall be assessed to the duties granted by this act under the provisions of the said several acts applicable thereto.

43. 'And whereas, since the fifth day of *April* now last past, and before the passing of this act, divers dividends, annuities, and shares of annuities, and interest on loans and on bonds, debentures, and other securities directed by the acts relating to the income tax in force on the said last-mentioned day to be assessed under Schedules (C.) and (D.) respectively of the said acts, have become due and payable, and by reason of the expiration of the said acts before the passing of this act have not been assessed and charged with the said tax; and it is expedient to provide for the assessment thereof with the rates and duties of income tax granted by this act, and for the collection of the sums assessed from the persons respectively to whom such dividends, annuities, shares, and interest have been paid, or who are entitled thereto, or otherwise, as herein-after mentioned: Be it enacted, that all persons respectively intrusted with the payment of any such dividends, annuities, shares, or interest as aforesaid, or who have paid the same, either as agent or otherwise, shall, within one calendar month next after the passing of this act, deliver or cause to be delivered to the commissioners for special purposes, at the head office of inland revenue at *Somerset House* in the City of *Westminster*, an account in writing, duly authenticated and signed by such persons respectively, containing a description of all such dividends, annuities, shares, and interest intrusted to them for payment, which have become due or payable since the fifth day of *April* last, and also a true and perfect account of the names and residences of the several persons to whom the same have become due or payable, and the several sums which have been so paid to them, or to which they have become entitled respectively, specifying in such account the sums (if any) deducted or retained by the persons intrusted with such payment as aforesaid in respect of income tax, to become chargeable thereon by the authority of Parliament in this present session, and the said commissioners for special purposes shall make assessments thereon respectively, under Schedules (C.) and (D.) respectively of the acts relating to the income tax, of the rates and duties of income tax granted by this act; that is to say, they shall make assessments in respect of so much of such dividends, annuities, shares, or interest as may not have been actually paid to the persons entitled thereto, and also in respect of so much thereof as shall have been paid to such persons, but in respect whereof the duty chargeable by this act shall have been retained as aforesaid, in like manner as if

this act had been in force on the sixth day of *April* one thousand eight hundred and sixty-two, and the duty so assessed shall be paid into the Bank of *England* in manner directed by the said acts in such cases; and in respect of so much of the said dividends, annuities, shares, or interest as shall have been paid to the persons entitled thereto, the duty whereon shall not have been deducted, they shall make assessments on such persons, and the duty so assessed as last aforesaid shall be paid to the receiver-general of inland revenue by the several persons who shall have received or are entitled to such dividends, annuities, shares, and interest respectively; and in default of such payment the sums so assessed shall be recoverable from the said last-mentioned persons, and shall be collected and levied in like manner as any other assessments made by the said commissioners are or may be by law directed or authorized to be recovered, collected, or levied: Provided always, that if any sum so assessed shall not be so paid, recovered, or collected by or from any person chargeable therewith, and such person shall at any time hereafter become entitled to any further payment of the like dividends, annuities, shares, or interest, the person intrusted with the payment thereof as aforesaid shall, on notice and requisition from the said commissioners in that behalf, deduct and retain from and out of such further payment any such sum assessed and remaining unpaid as aforesaid, as well as any further assessment chargeable in respect of such further payment of the said dividends, shares, annuities, or interest; and the person deducting and retaining any such sum of money assessed as aforesaid shall pay the same into the Bank of *England* to the account of the said receiver general in like manner as he is by any act relating to the income tax required or directed to pay over any other sums of money deducted or retained by him for income tax; and if any person intrusted with the payment of, or who hath paid any such dividends, annuities, shares, or interest as aforesaid, either as agent or otherwise, shall neglect or refuse to do any act hereby required or directed to be done or performed by him, he shall forfeit the sum of one hundred pounds.

44. No assessors shall be appointed for the duties payable under the Schedules (A.) and (B.) of the said act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four: Provided that the inspectors or surveyors of taxes shall act as assessors in respect of such duties whenever it shall be necessary; and as regards the duties which shall be collected under the said Schedules (A.) and (B.) in lieu of the poundage granted by the one hundred and eighty-third section of the act of the fifth and sixth years of her Majesty, chapter thirty-five, to be divided between the assessors and collectors, there shall be paid a poundage of three halfpence to the collectors.

45. 'And whereas, owing to the increase of population and in the value of property in divers parishes and places in *England*, it is necessary for the due and proper collection of the income tax and assessed taxes respectively that more than two collectors of the said respective taxes should be appointed for each of such parishes or places: Be it enacted, that it shall be lawful for the commissioners executing the acts relating to the said respective taxes in their respective districts, and they are hereby authorized and required, to appoint such number of persons to be collectors of the several and respective taxes or any of them in each such parish or place as the said commissioners may deem necessary for the due and proper collection of the said taxes respectively, and all such collectors shall have the same powers and authorities, and shall be subject to the like rules, regulations, and penalties, as any collectors appointed under the provisions of the acts now in force.

SCHEDULES.

SCHEDULE (A.)

Containing the RATES and DUTIES of CUSTOMS granted, and the DRAWBACKS allowed on the following ARTICLES, by this Act.

The duties of customs now charged on the articles next

mentioned shall continue to be levied and charged, on and after the first day of July one thousand eight hundred and sixty-two until the first day of July one thousand eight hundred and sixty-three, on importation into Great Britain and Ireland; that is to say,

	£	s.	d.
Tea (without any allowance for draft) the lb.	0	1	5
SUGAR, and articles composed thereof, or sweetened therewith; viz. :—			
Candy, brown or white, refined sugar, or sugar rendered by any process equal in quality thereto . . . the cwt.	0	18	4
White clayed sugar, or sugar rendered by any process equal in quality to white clayed, not being refined or equal in quality to refined . . . the cwt.	0	16	0
Yellow muscovado and brown clayed sugar, or sugar rendered by any process equal in quality to yellow muscovado or brown clayed, and not equal to white clayed . . . the cwt.	0	13	10
Brown muscovado or any other sugar, not being equal in quality to yellow muscovado or brown clayed sugar . . . the cwt.	0	12	8
Cane juice . . . the cwt.	0	10	4
Molasses . . . the cwt.	0	5	0
Almonds, paste of . . . }			
Cherries, dried . . . }			
Comfits, dry . . . }			
Confectionery . . . }			
Ginger, preserved . . . each }			
Marmalade . . . the lb. }	0	0	2
Plums, preserved in sugar . . . }			
Succades, including all fruits and vegetables preserved in sugar. not otherwise enumerated . . . }			

The following drawbacks on the several descriptions of refined sugar herein-after mentioned shall continue to be allowed on and after the first day of July one thousand eight hundred and sixty-two until the first day of July one thousand eight hundred and sixty-three, on exportation from Great Britain and Ireland to foreign parts, or on removal to the Isle of Man for consumption therein, or on deposit thereof in any approved warehouse, upon such terms and subject to such regulations as the commissioners of customs may direct, for delivery from such warehouse, as ship's stores only, or for the purpose of sweetening British spirits in bond; that is to say,

Upon refined sugar, in loaf, complete or whole, or lumps duly refined, having been perfectly clarified and thoroughly dried in the stove, and being of an uniform whiteness throughout, or sugar candy, or sugar refined by the centrifugal machine, or by any other process, and not in any way inferior to the export standard No. 3 approved by the lords of the treasury for every cwt. 0 17 2

Upon such refined sugar already described, if pounded, crushed, or broken in a warehouse approved by the commissioners of customs, such sugar having been there first inspected by the officers of customs in lumps or leaves as if for immediate shipment, and then packed for exportation in the presence of such officers, and at the expense of the exporters

for every cwt. 0 17 2
Upon refined sugar unstoved, pounded, crushed, or broken, and not in any way inferior to the export standard sample No. 1 approved by the lords of the treasury, and which shall not contain more than 5 per centum moisture over and above what the same would contain, if thoroughly dried in the stove for every cwt. 0 16 4

Upon bastard or refined sugar, unstoved, broken in pieces, or being ground, powdered, or crushed, not in any way inferior to the export standard sample No. 2, approved by the lords of the treasury

for every cwt. 0 15 1

Upon bastard or refined sugar being inferior in quality to the said export standard sample No. 2 . . . for every cwt. 0 12 8

In lieu of the duties of customs now charged on the articles under-mentioned, the following duties of customs shall be charged thereon, on importation into Great Britain and Ireland on and after the fourth day of April one thousand eight hundred and sixty-two:

	Containing less than the following Rates of Proof Spirit, in 50 tins, verified by Sykes' Hydrometer, viz.:			If imported from 49 Degrees, and containing less than 49 Degrees.		
	25 Degrees.	48 Degrees.	49 Degrees.	25 Degrees.	48 Degrees.	49 Degrees.
Wine, Red—the Gallon	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Ditto, White "	1 0	2 6	2 6	2 6	2 6	2 6
Lees of such Wine,,	1 0	2 6	2 6	2 6	2 6	2 6
	1 0	2 6	2 6	2 6	2 6	2 6

And for every degree of strength beyond the highest above specified, an additional duty of threepence per gallon.

No more than ten per cent. of proof spirit shall be used in the fortifying of any wine in bond; nor shall any wine be fortified in bond to a greater degree of strength than forty per cent. of such proof spirit.

In lieu of the duties of customs now charged on the articles under-mentioned, the following duties of customs shall be charged thereon on importation into Great Britain and Ireland, from and after the first day of September one thousand eight hundred and sixty-two, viz. :—

Cards, viz. : £ s. d.
Playing cards, the dozen packs . 0 3 6

SCHEDULE B.

Containing the DUTIES and DRAWBACK of EXCISE granted and allowed respectively by this Act.

Duties on licences to brewers of beer for sale, to be taken out on and after the eleventh day of October one thousand eight hundred and sixty-two.

For and upon every licence to be taken out yearly by any brewer of beer for sale— £ s. d.

If the quantity of beer brewed by such brewer within the year ending the tenth day of October next preceding the taking out of such licence, shall not exceed twenty barrels, the duty of 0 12 6

And if the same shall exceed twenty barrels and not exceed fifty barrels, the duty of 1 7 6

And if the same shall exceed fifty barrels 2 0 0

And if the same shall exceed one hundred barrels and shall not exceed one thousand barrels then for every fifty barrels, and for any fractional part or number of an entire quantity of fifty barrels, over and above the first one hundred barrels, the additional duty of 0 15 0

And if the same shall exceed one thousand barrels, and shall not exceed fifty thousand barrels, then in addition to the duty chargeable in respect of one thousand barrels, there shall be charged for every fifty barrels, and for any fractional part or number of an entire quantity of fifty barrels, over and above one thousand barrels, the further duty of 0 14 0

And if the same shall exceed fifty thousand barrels, then in addition to the duty chargeable in respect of fifty thousand barrels, there shall be charged for every fifty barrels, and for any

fractional part or number of an entire quantity of fifty barrels over and above fifty thousand barrels, the further duty of 0 12 6

And for and upon every licence to be taken out by any person who shall first become a brewer of beer for sale, the duty of 0 12 6

And there shall be charged upon and payable by the said last-mentioned person in respect of such licence such further additional sum as, with the said duty of twelve shillings and sixpence, shall amount to the duty chargeable on a licence in respect of the like number of barrels of beer brewed by him during the existence of the licence granted to him; and the said additional charge shall be paid within ten days next after the expiration of the said licence.

The duties aforesaid to be in lieu of the duties now chargeable on licences to be taken out by brewers of beer for sale.

On a victualler's occasional licence; that is to say,

For and upon every occasional licence to be granted to any person who shall be duly authorized to keep a common inn, alehouse, or victualling house, and licensed to sell therein beer, spirits, wine, or tobacco, to sell the like articles for which he shall be so licensed at any such other place, and for and during such space or period of time not exceeding three days as shall be specified in such occasional licence, the sum of 0 5 0

Drawback on beer exported; that is to say,

For and in respect of every barrel of thirty-six gallons, and so in proportion for any greater quantity of beer brewed or made by any entered or licensed brewer of beer for sale in the United Kingdom, which, on or after the eleventh day of October one thousand eight hundred and sixty-two shall be exported to foreign parts as merchandise, the sum of threepence, in addition to any drawback now payable by law on beer exported.

SCHEDULE (C.)

Containing the STAMP DUTIES imposed by this Act.

For and in respect of every pack of playing cards made fit for sale or use in the United Kingdom, the duty of 0 0 3

For and upon every licence to be taken out annually by any person who shall sell playing cards in the United Kingdom,

If he be a maker of playing cards, the duty of 1 0 0

If he be not a maker of playing cards, the duty of 0 2 6

Upon and in respect of any bond, debenture, or other security for money, by whatever name it shall be called, made in the United Kingdom or elsewhere, by or on behalf of any foreign or colonial government, state, or company, and bearing date or signed after the passing of this Act (not being a bill of exchange or promissory note chargeable as such with stamp duty, nor being an instrument already chargeable with the same duty as a bond, or for which a composition in lieu thereof is payable) which shall be issued, delivered, assigned, transferred, or negotiated within the United Kingdom.

The same stamp duty as is chargeable on a bond made in the United Kingdom, for securing the payment of the like amount of money.

Provided that this shall not extend to charge with stamp duty any instrument bona fide made and issued at any place out of the United Kingdom as a security for the repayment of money raised or procured on loan in foreign parts, and not lent or advanced by any person resident in the United Kingdom, and the interest whereon shall not be paid within the United Kingdom.

SCHEDULE (D.)

Containing the RATES and DUTIES of INCOME TAX granted by this Act.

For one year commencing on the sixth day of April one thousand eight hundred and sixty-two, for and in respect of all property, profits, and gains mentioned or described as chargeable in the act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, for granting to her Majesty duties on profits arising from property, professions, trades, and offices, the following rates and duties; that is to say,

For every twenty shillings of the annual value or amount of all such property, profits, and gains (except those chargeable under Schedule (B.) of the said Act), the rate or duty of ninepence:

And for and in respect of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule (B.) of the said act, for every twenty shillings of the annual value thereof—

In England, the rate or duty of fourpence halfpenny:

And in Scotland and Ireland respectively, the rate or duty of threepence:

Subject to the provision contained in the said act, sixteenth and seventeenth Victoria, chapter thirty-four, section twenty-eight, for the relief of persons whose incomes are under one hundred and fifty pounds a year respectively, from so much of the said duties as shall exceed the rate of sixpence for every twenty shillings of their respective profits and gains, computed as in the said enactment is mentioned, and subject also to the provision therein contained for the exemption of persons whose incomes from every source shall be less than one hundred pounds a year respectively.

CAP. XXIII.

An Act to amend "The Summary Procedure on Bills of Exchange (Ireland) Act (1861)." [3rd June, 1862.]

24 & 25 Vic. c. 43.

Sec. 1. In actions upon bills of exchange, &c., the days for appearing and filing a defence to run in vacation.

2. The days from 1st August to 30th October to be reckoned days within which summons, &c., should be filed.

3. This and recited Act to be as one.

4. Short title.

'Whereas it is, amongst other things, enacted by the sixth section of "The Summary Procedure on Bills of Exchange (Ireland) Act, 1861," that the provisions of "The Common Law Procedure Amendment (Ireland) Act, 1853," shall, as far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under the said "Summary Procedure on Bills of Exchange (Ireland) Act, 1861," and it is expedient to amend the said sixth section as herein-after provided: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In all actions upon bills of exchange or promissory notes commenced pursuant to the provisions of "the Summary Procedure on Bills of Exchange (Ireland) Act, 1861," the days for appearing and filing a defence to the writ of summons and plaint shall run in vacation as well as in term time, without excepting the days from the first day

of August to the twentieth day of October inclusive, notwithstanding the provisions of "The Common Law Procedure (Ireland) Act, 1853."

2. In all such actions the days from and including the first day of August to the twentieth day of October inclusive in each year shall be reckoned days within which the summons and plaint and defence should be filed, and on such days such summons and plaint, or defence, shall be filed and received, notwithstanding the provisions of "the Common Law Procedure (Ireland) Act, 1853."

3. This act and the Summary Procedure on Bills of Exchange (Ireland) Act, 1861, shall be incorporated and construed together as one act.

4. This act may be cited for all purposes as "The Summary Procedure on Bills of Exchange (Ireland) Act, 1862."

CAP. XXIV.

An Act to continue The Peace Preservation (Ireland) Act, 1856, as amended by the Act of the Twenty-third and Twenty-fourth Years of Victoria, Chapter One hundred and thirty-eight. [30th June, 1862.]

19 & 20 Vic. c. 36. 23 & 24 Vic. c. 138.

Sec. 1. 19 & 20 Vic. c. 36, as amended by 23 & 24 Vic. c. 138, further continued.

'Whereas an act was passed in the nineteenth and twentieth years of her Majesty, chapter thirty-six, under the name or short title of "The Peace Preservation (Ireland) Act, 1856:" And whereas by an act passed in the twenty-third and twenty-fourth years of her Majesty, chapter one hundred and thirty-eight, the said recited act was amended and further continued until the first day of July one thousand eight hundred and sixty-two, and it is expedient that the said first-recited act, as so amended, should be further continued for a limited time: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. "The Peace Preservation (Ireland) Act, 1856," as the same is amended by the act of the twenty-third and twenty-fourth years of her Majesty, chapter one hundred and thirty-eight, shall continue in force until the first day of July one thousand eight hundred and sixty-four, and until the end of the then next session of Parliament.

CAP. XXV.

An Act to confirm certain Provisional Orders under the Local Government Act, 1858, relating to the Districts of Hanley, Stroud, Ilfracombe, Longton, Halesfax, Ipswich, and Sandown. [30th June, 1862.]

CAP. XXVI.

An Act to extend the Power of making Statutes possessed by the University of Oxford, and to make further Provision for the Administration of Justice in the Court of the Chancellor of the said University. [30th June, 1862.]

CAP. XXVII.

An Act to authorize Payments for a further Period out of the Revenues of India in respect of the Retiring Pay, Pensions, and other Expenses of that nature of Her Majesty's British Forces serving in India. [30th June, 1862.]

CAP. XXVIII.

An Act to alter and amend the Universities (Scotland) Act in so far as relates to the Request of the late Doctor Alexander Murray in the University of Aberdeen. [30th June, 1862.]

CAP. XXIX.

An Act to amend and enlarge the Acts for the Improvement of Landed Property in Ireland.

[30th June, 1862.]

10 & 11 Vict. c. 23. 12 & 13 Vict. c. 23. 13 & 14 Vict. c. 31. 13 & 14 Vict. c. 113. 15 & 16 Vict. c. 34. 23 & 24 Vict. c. 19. 24 & 25 Vict. c. 34.

Sec. 1. *Power to commissioners of Public Works to make additional loans.*

2. *Power of commissioners to make loans as authorized by 24 & 25 Vict. c. 34, not affected.*

3. *Time for completion of works extended.*

4. *Recited Acts and this act to be as one.*

5. *Duration of powers of commissioners.*

‘Whereas an act was passed in the tenth year of her Majesty, intituled *An Act to facilitate the Improvement of Landed Property in Ireland*; and a further act of the twelfth and thirteenth years of her Majesty, chapter twenty-three, was passed “to authorize further advances of money for the improvement of landed property and the extension and promotion of drainage and other works of public utility in Ireland;” and a further act of the thirteenth and fourteenth years of her Majesty, chapter thirty-one, was passed “to authorize further advances of money for drainage and the improvement of landed property in the United Kingdom, and to amend the acts relating to such advances;” and a further act was passed in the thirteenth and fourteenth years of her Majesty, chapter one hundred and thirteen, “to authorize the transfer of loans for the improvement of land in Ireland to other land;” and a further act was passed in the fifteenth and sixteenth years of her Majesty, chapter thirty-four, “to extend the act to facilitate the improvement of landed property in Ireland, and the acts amending the same, to the erection of scotch mills for flax in Ireland;” and a further act was passed in the twenty-third year of her Majesty, chapter nineteen, “to extend the act to facilitate the improvement of landed property in Ireland, and the acts amending the same, to the erection of dwellings for the laboring classes in Ireland;” and a further act was passed in the twenty-fourth and twenty-fifth years of her Majesty, chapter thirty-four, “to extend the provisions of the acts to facilitate the improvement of landed property in Ireland, and to further provide for the erection of dwellings for the labouring poor in Ireland:” And whereas it is expedient to amend and enlarge the provisions of the said recited acts in the manner herein-after mentioned:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That notwithstanding anything in the said act of the thirteenth and fourteenth of her Majesty, chapter thirty-one, to the contrary, it shall be lawful for the commissioners of public works, with the sanction of the commissioners of her Majesty’s treasury, to make loans to any owner of land in Ireland under the provisions and for the purposes of the said recited acts or any of them, of any sum or sums of money not exceeding in the whole the sum of three thousand pounds to any one owner, in addition to and over and above any sum or sums of money which the said commissioners of public works may have heretofore advanced or are authorized to advance under the powers and provisions of the said recited acts or any of them.

2. Provided that nothing in this act contained shall affect, lessen, or abridge the power of the said commissioners of public works to advance money for the erection of dwellings for the labouring classes in Ireland, to the amount specified in and by the said act of the twenty-fourth and twenty-fifth years of her Majesty, chapter thirty-four, as if this act had not passed.

3. It shall be lawful for the said commissioners of public works to fix for the completion of any works for which loans may be made under the said recited acts and this act

such period, and from time to time such further period within seven years from the date of the first advance of any loan under the said recited acts or this act, as the said commissioners may think fit.

4. This act and the said recited acts shall be construed together as one act.

5. The powers conferred by the first section of this act upon the commissioners of public works shall be in force until the first day of January one thousand eight hundred and sixty-four.

CAP. XXX.

An Act to amend an Act of the last Session for authorizing Advances of Money out of the Consolidated Fund for carrying on Public Works and Fisheries for Employment of the Poor, and for facilitating the Construction and Improvement of Harbours, and for other purposes.

[30th June, 1862.]

24 & 25 Vict., c. 80.

Sec. 1. *Instalments may be issued when required for purposes of loans under recited Act, instead of quarterly.*

‘Whereas by an act of the twenty-fourth and twenty-fifth years of her present Majesty, chapter eighty, the commissioners of her Majesty’s treasury of the United Kingdom of Great Britain and Ireland are empowered to cause to be issued out of the consolidated fund of the United Kingdom of Great Britain and Ireland, or out of the growing produce thereof, for the purposes therein mentioned, a sum not exceeding three hundred and sixty thousand pounds per annum during the five years next ensuing the fourth day of April one thousand eight hundred and sixty-two, by quarterly instalments, or issues not exceeding ninety thousand pounds per quarter, as therein mentioned, and for the purpose of loans under “The Harbours and Passing Tolls, &c., Act, 1861,” a further sum not exceeding three hundred and fifty thousand pounds per annum during the five years next ensuing the passing of that act, by quarterly instalments, or issues not exceeding eighty-seven thousand five hundred pounds per quarter, as therein mentioned: And whereas it is expedient to amend the said act, and to provide that instead of making such issues quarterly the same may be issued from time to time when and as the same or any part thereof shall be actually required for the purposes of loans authorized by the said act:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In case any or either of the said instalments authorized by the said act to be issued shall not be required by the commissioners for carrying into execution the said act to be issued quarterly, and shall not have been issued, it shall be lawful for the commissioners of her Majesty’s treasury from time to time, or at any time after the expiration of any such quarter, to issue out of the growing produce of the consolidated fund for the purposes of the said act all or such part or parts of the said respective quarterly instalments which shall not have been previously issued as shall from time to time be required by the commissioners for carrying into execution the said act: Provided always, that nothing in this act contained shall authorize the issue of any larger sum or sums of money in the whole than the aggregate amount of the quarterly instalments or issues which under the terms of the said recited act may then have become due or issuable.

CAP. XXXI.

An Act to apply the Sum of Ten Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and sixty-two.

[7th July, 1862.]

CAP. XXXII.

An Act to continue the Act of the Second and Third

Years of *Victoria*, Chapter Seventy-four, for preventing the administering of unlawful Oaths in *Ireland*, as amended by an Act of the Eleventh and Twelfth Years of *Victoria*. [7th July, 1862.]

CAP. XXXIII.

An Act for vesting in Her Majesty's Principal Secretary of State for the War Department the Lands of the Royal Military College at *Sandhurst*, and for completing certain Exchanges of Lands now or late of the said College. [7th July, 1862.]

CAP. XXXIV.

An Act for the Discontinuance of *Portsmouth Fair* in the County of *Southampton*. [7th July, 1862.]

CAP. XXXV.

An Act to amend the Acts for the Regulation of Public Houses in *Scotland*. [7th July, 1862.]

CAP. XXXVI.

An Act to appropriate certain Portions of Land lying between High and Low Water Mark, situate in the Parishes of *Shoebury* and *Wakering* in the County of *Essex*, as Ranges for the Use and Practice of Artillery. [17th July, 1862.]

CAP. XXXVII.

An Act to remove Doubts concerning, and to amend the Law relating to, the private Estates of Her Majesty, Her Heirs and Successors. [17th July, 1862.]

CAP. XXXVIII.

An Act to amend the Laws relating to the Sale of Spirits. [17th July, 1862.]

Recital of Sect 12 of 24 G. 2, c. 40. enacting that no action should be brought to recover any debt for spirituous liquors, unless contracted at one time to the amount of 20s. Recited enactment repealed.

'Whereas by the twelfth section of an act passed in the twenty-fourth year of the reign of King George the Second, chapter forty, intituled *An Act for granting to His Majesty an additional Duty upon Spirituous Liquors, and upon Licences for retailing the same; and for repealing the Act of the Twentieth Year of His present Majesty's Reign, intituled 'An Act for granting a Duty to His Majesty to be paid by Distillers upon Licences to be taken out by them for retailing Spirituous Liquors,' and for the more effectually restraining the retailing of distilled Spirituous Liquors; and for allowing a Drawback upon the Exportation of British-made Spirits: and that the Parish of St. Mary-le-Bon in the County of Middlesex shall be under the Inspection of the Head Office of Excise, it is amongst other things enacted, that no person or persons whatsoever shall be entitled unto, or maintain any cause, action, or suit for, or recover either in law or equity, any sum or sums of money, debt or demands whatsoever for or on account of any spirituous liquors, unless such debt shall have really been and bona fide contracted at one time to the amount of twenty shillings or upwards, nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at the least. and whereas it is expedient that the said recited enactment should be repealed so far as is herein-after mentioned.' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That so much of the said enactment as is herein-before recited shall be and the same is hereby repealed, so far only as relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold,*

and delivered at the residence of the purchaser thereof in quantities not less at any one time than a repeated quart.

CAP. XXXIX.

An Act for enabling the Commissioners of Her Majesty's Treasury to make Arrangements with the *Red Sea and India Telegraph Company*. [17th July, 1862.]

CAP. XL.

An Act to carry into effect the Treaty between Her Majesty and the United States of America for the Suppression of the *African Slave Trade*: [17th July, 1862.]

CAP. XLI.

An Act for amending "The Rifle Volunteer Grounds Act, 1860." [17th July, 1862.]

CAP. XLII.

An Act to regulate the Procedure in the High Court of Chancery and the Court of Chancery of the County Palatine of *Lancaster*. [17th July, 1862.]

CAP. XLIII.

An Act to provide for the Education and Maintenance of Pauper Children in certain Schools and Institutions. [17th July, 1862.]

CAP. XLIV.

An Act to amend the Law relating to the giving of Aid to discharged Prisoners. [17th July, 1862.]

CAP. XLV.

An Act to amend "The *West Indian Incumbered Estates Acts, 1854 and 1858*." [17th July, 1862.]

CAP. XLVI.

An Act for the better Regulation in certain Cases of the Procedure in the High Court of Chancery in *Ireland*. [17th July, 1862.]

- Sec. 1. *Short title.*
2. *Interpretation of terms.*
3. *Court shall determine every question of law and fact incident to the relief sought.*
4. *Where questions of fact may be more conveniently tried at assizes, issues may be directed.*
5. *Provisions of 21 & 22 Vict. c. 27, to apply to this Act.*
6. *Proviso in cases where object of suit to recover or defend possession of land under a legal title.*
7. *Court of Chancery may sit with assistance of common law judge.*
8. *Act not to affect general practice of court.*
9. *Commencement of act.*

'Whereas the High Court of Chancery in *Ireland* has power in certain cases to refuse or postpone the application of remedies within its jurisdiction until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of her Majesty's courts of common law: and whereas it is expedient that the said power should no longer exist, and that in all such cases every question of law and of fact, cognizable in a court of common law, arising in the said Court of Chancery, on which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be determined by or before the said court itself: and whereas by "The Chancery Regulation Act, 1862," passed in this present session, provision has been made for the better regulation in such cases of the procedure in the Court of Chancery in *England* by taking away such power, and providing for the determination of such questions in the court itself, and it is expedient that similar provisions should be made for the Court of Chancery in *Ireland*:' Be it enacted by the Queen's most ex-

cellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited and referred to as "The Chancery Regulation (*Ireland*) Act, 1862."

2. The words "High Court of Chancery," "Court of Chancery," and "Court," when used in this act, shall mean and include the lord chancellor, the master of the rolls, and any master in chancery, or any judge or judges by whom any cause, cause petition, or matter depending in the Court of Chancery in *Ireland* may, by the law and practice of that court, be now or at any time hereafter heard.

3. In all cases in which any relief or remedy within the jurisdiction of the Court of Chancery in *Ireland* is or shall be sought in any cause, cause petition, or matter instituted or pending in that court, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court.

4. Provided always, that whenever it shall appear to the court that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in the county of *Dublin* or in the county of the City of *Dublin* for the trial of issues in the superior courts of common law, it shall be lawful for such court, notwithstanding anything in this act contained, to direct an issue to try any question of fact at the assizes to be held in and for any county where the same may be conveniently tried, or at any such sitting for the trial of issues in the county or City of *Dublin* as aforesaid; and (subject to such general orders, if any, as may hereafter be made in relation thereto,) the practice hitherto existing in such court in reference to the trial of issues shall prevail in reference to the trial of any issues directed under this proviso.

5. All the provisions with reference to the trial of questions of fact by or before the High Court of Chancery in *Ireland*, which are contained in "The Chancery Amendment Act, 1858," shall apply to the determination of questions of fact by or before the said court under this act.

6. Provided also, that in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage (and whether mesne profits or damages shall or shall not also be sought in such suit,) such relief only shall be given in equity as would have been proper according to the rules and practice of the court if this act had not passed; and nothing in this act shall make it necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law.

7. Nothing in this act contained shall alter or affect the power of the High Court of Chancery, or the Court of Appeal in Chancery in *Ireland*, to sit with the assistance of a judge in any of her Majesty's courts of common law.

8. Nothing in this act contained shall, except in the cases and to the extent herein-before specially provided, be deemed in any manner to vary, alter, or affect the law, practice, or procedure of the High Court of Chancery in *Ireland* as to any cause, cause petition, or suit or matter depending in that court or the hearing or disposal of the same, and in cases to which the provisions of this act apply all orders and decrees made by the court, whether involving the determination of a legal right or otherwise, shall be subject to re-hearing or appeal in all respects as any other decrees or orders of the court may now be re-heard or appealed from, subject to the rules and regulations as to re-hearing and appeal which may from time to time be applicable to such decrees and orders respectively.

9. This act shall commence and take effect from and af-

ter the first day of *November* one thousand eight hundred and sixty-two.

CAP. XLVII.

An Act to authorize the Inclosure of certain Lands in pursuance of a Report of the Inclosure Commissioners for *England* and *Wales*. [29th July, 1862.]

CAP. XLVIII.

An Act respecting the Establishment and Government of Provinces in *New Zealand*, and to enable the Legislature of *New Zealand* to repeal the Seventy-third Section of an Act, intituled *An Act to grant a Representative Constitution to the Colony of New Zealand*. [29th July, 1862.]

CAP. XLIX.

An Act to authorize the Completion, after His Royal Highness *Albert Edward Prince of Wales* shall attain the Age of Twenty-one Years, of Arrangements commenced during his Minority, under the Provisions of an Act passed in the Session of Parliament held in the Seventh and Eighth Years of the Reign of Her Majesty Queen *Victoria*, intituled *An Act to enable the Council of His Royal Highness Albert Edward Prince of Wales to sell and exchange Lands and enfranchise Copyholds Parcel of the Possessions of the Duchy of Cornwall, to purchase other Lands; and for other Purposes*. [29th July, 1862.]

CAP. L.

An Act to amend certain Provisions of the Acts of the Twenty-fourth and Twenty-fifth Years of Her Majesty, Chapters Ninety-six, Ninety-seven, Ninety-nine, and One hundred, respectively, relating to Summary Jurisdiction in *Ireland*. [29th July, 1862.]

24 & 25 Vict. cc. 96, 97, 99, 100.

Sec. 1. Commencement of Act.

2. As to Prosecution of offences made punishable on summary conviction in *Ireland*.

3. Provisions in 24 & 25 Vict., cc. 96 and 97, relating to mode of compelling appearances not to extend to *Ireland*. All such proceedings, &c. to be subject to provisions of 14 & 15 Vict., c. 93, and 21 & 22 Vict., c. 100.

4. Penalty on stealing trees, shrubs, &c. (under the value of £5) growing anywhere.

5. Penalty on stealing trees, plants, vegetables, &c., severed from the soil or turf fuel (not exceeding 40s. in value.)

6. Penalty on persons possessing carcasses of sheep, &c. without accounting for the same.

7. Penalty on workmen making away with goods (not exceeding £5 in value) committed to his care.

8. Penalty on stealing poultry (not exceeding 5s. in value).

9. Assault cases may be proceeded with although party aggrieved declines to prosecute.

10. Summary Jurisdiction in cases of assault on peace officers and others.

11. Extent of Act.

'WHEREAS it is expedient to amend certain provisions of the acts of the twenty-fourth and twenty-fifth years of her Majesty, chapters ninety-six, ninety-seven, ninety-nine and one-hundred respectively, relating to summary jurisdiction in *Ireland*:' Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. This act shall commence and take effect on the first day of *September*, one thousand eight hundred and sixty-two.

2. From and after the commencement of this act every offence by this act and the said recited acts, respectively, made punishable on summary conviction in *Ireland*, may

be prosecuted before any justice or justices sitting in Petty Sessions in *Ireland*, or before any two justices sitting out of Petty Sessions, (when the offender shall be unable to procure bail for his appearance at Petty Sessions), or before any divisional justice of the police district of *Dublin* metropolis; and no stipendiary magistrate in *Ireland*, not being a justice of the police district in *Dublin* metropolis, shall have any further or other jurisdiction than any other justice of the peace in respect of any such offence.

3. The provisions contained in the one hundred and fifth section of the said act of the last session, chapter ninety-six, and in the sixty-second section of the said act of the same session, chapter ninety-seven, relating to the mode of compelling the appearance of persons punishable on summary conviction, shall not extend to *Ireland*; and from and after the commencement of this act, whenever information shall be given to any justice or justices in *Ireland* that any person has committed or is suspected to have committed any offence within the limits of the jurisdiction of such justice or justices for which such persons shall be punishable upon a summary conviction, all proceedings as to compelling the appearance of any person against whom any such complaint shall have been made, or of any witness, and as to the hearing and determination of such complaints, and as to the making and executing of any orders relating thereto, shall be subject in all respects to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," as the same is amended by "The Petty Sessions Clerk (*Ireland*), Act, 1858," when the case shall be heard in any Petty Sessions district, and to the provisions of the acts relating to the divisional police offices when the case shall be heard in the police district of *Dublin* metropolis, so far as the said provisions shall be consistent with any special provisions of this act.

4. Any person who shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any growing tree, sapling, shrub, or underwood, or any growing fruit, or vegetable production, or any growing cultivated root or plant, shall (in case the value of the property stolen or the amount of the injury done shall not exceed five pounds) pay to the party aggrieved the value of the property stolen or the amount of the injury done, and shall also be liable to a fine not exceeding five pounds, or to be imprisoned for any period not exceeding three months; and the offences in this and the following sections mentioned may be prosecuted summarily before one or more justices of the peace, as hereinbefore mentioned.

5. Any person who shall steal, or damage with intent to steal, the whole or any part of any tree, sapling, shrub, or underwood, or any cultivated plant, root, fruit, or vegetable production severed from the soil, or any turf or peat manufactured or partly manufactured for fuel, (in case the value of such article or articles stolen, or the amount of the injury done, shall not exceed forty shillings,) shall pay to the party aggrieved the value of the property stolen, or the amount of the injury done, and shall also be liable to a fine not exceeding five pounds, or to be imprisoned for a term not exceeding three months.

6. Whenever any credible witness shall prove upon oath, before a justice of the peace, that there is reasonable cause to suspect that any of the articles of property following; that is to say, the carcase of any sheep or lamb, or the head, skin, or any part thereof, or the fleece of any sheep or lamb, has been stolen or unlawfully taken, and is to be found in any house or other place, it shall be lawful for such justice to issue a warrant to search such house or place for such articles of property; and any person in whose possession or on whose premises any of the said articles of property shall be found by virtue of any such search warrant (or by any member of the constabulary or metropolitan police forces when executing any warrant, or otherwise acting in the discharge of his duty), and who shall not satisfy the judge before whom he shall be brought, that he came lawfully by the same, or that the same was on his premises without his knowledge or assent, may be committed by such justices to gaol until the next day of

holding petty sessions for the district, unless he shall enter into a recognizance with one or more sureties to appear at such petty sessions; and if such person shall not account for the same in manner aforesaid, he shall, on summary conviction by such justice or justices aforesaid, and at his or their discretion, either be committed pursuant to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," to be imprisoned for a term not exceeding three months, or be liable to a fine not exceeding five pounds.

7. Any artificer, workman, journeyman, apprentice, servant, or other person who shall unlawfully dispose of, or retain in his possession without the consent of the person by whom he shall be hired, retained, or employed, any goods, wares, work, or materials committed to his care or charge (the value of such goods, wares, work, or materials not exceeding the sum of five pounds), shall pay to the party aggrieved such compensation as the justices shall think reasonable, and shall also be liable to a fine not exceeding forty shillings, or to be imprisoned for a term not exceeding one month.

8. Any person who shall steal, or injure with intent to steal, any turkey, goose, or other poultry, (where the value of such poultry so stolen or injured shall not exceed five shillings,) shall be liable to a fine not exceeding twenty shillings, or to be imprisoned for a period not exceeding two weeks.

9. It shall be lawful for the justices at Petty Sessions, if they shall so think fit, to proceed against any person or persons charged with being guilty of an assault, pursuant to the provisions of the statute twenty-fourth and twenty-fifth *Victoria*, chapter one hundred, section forty-two, notwithstanding that a party aggrieved may decline or refuse to prefer a complaint.

10. 'And whereas by the act of the 24th and 25th of *Victoria*, chapter one hundred, section thirty-eight, certain assaults therein specified on peace officers and others are made misdemeanors, and punishable with imprisonment for a term not exceeding two years, with or without hard labour, and it is desirable also to give a summary jurisdiction in petty cases for the same offences: Be it enacted that two justices of the peace shall have a concurrent jurisdiction to punish such assaults under the forty-second section of the said Act, if they shall consider the offence so trivial as not to require being dealt with by a superior tribunal.

11. This Act shall extend to *Ireland* only.

CAP. LL

An Act for confirming, with Amendments, certain provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, and The General Pier and Harbour Act, 1861, Amendment Act, relating to *Carrickfergus*.
[29th July, 1862.]

Sec. 1. Orders in schedule confirmed, except the clauses named herein.

2. Short title. Preamble. 1. Incorporation of commissioners. 2. The undertakers. 3. Commissioners Clauses Act incorporated. 4. Borrowing. 5. Sinking Fund. 6. Re-borrowing. 7. Receiver. 8. Money to be applied to purposes of order. 9. Power to take specified lands by agreement. 10. Lands Clauses Acts incorporated. 11. Power to make works. 12. Description of pier and breakwater. 13. Consent of commissioners of woods and forests. 14. Power to take rates according to schedule (B). 15. Custom House officers exempt from rates. 16. Application of rates and moneys received by the commissioners. 17. Lifeboats tide-gauges, &c. 18. Lands for extraordinary purposes. 19. Measures and weighers. 20. Steam engines, diving bells, lighters, &c. 21. Pilotage, lights, buoys, and beacons. 22. Part V. of 24 and 25 Vict., c. 47 to apply. 23. Short title.

'WHEREAS a provisional order was made by the Board of Trade under the General Pier and Harbour Act, 1861,

and the General Pier and Harbour Act, 1861, Amendment Act, is not of any validity or force whatever until the confirmation thereof by act of Parliament: And whereas it is expedient that the several provisional orders made by the board of trade under the said acts and set out in the schedule hereto should be confirmed, with amendments, by Act of Parliament: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The several provisional orders set out in the schedule hereto shall be and are hereby confirmed, except that

The clause numbered 13 in the *Carrickfergus Harbour Order*, shall be deemed to be and the same is by this act expunged from the said orders respectively, which orders shall, with the omission of the said several clauses, be valid and effectual, and be construed as if the same several clauses had never been inserted therein.

2. This Act may be cited as the *Pier and Harbour Orders Confirmation Act, 1862*.

The SCHEDULE of Provisional Orders.

1. CARRICKFERGUS.—Improvement of the harbour.

CARRICKFERGUS.

Provisional Order of the Board of Trade for the Improvement, Maintenance, and Regulation of the Harbour of Carrickfergus in the County of the Town of Carrickfergus.

Whereas, under The General Pier and Harbour Act, 1861, the municipal commissioners of the borough of Carrickfergus, as owners of the port of Carrickfergus, made application by a memorial to the Lords of the Committee of her Majesty's most honourable Privy Council appointed for the consideration of matters relating to trade and foreign plantations, herein-after called the board of trade, praying for (among other things) a provisional order under the said act for executing the works herein-after mentioned, with power for the said commissioners to levy and recover rates according to the schedule in the memorial referred to:

And whereas the estimated expenditure on the proposed works is six thousand pounds and no more:

And whereas, within the time in the said act limited in this behalf, the promoters deposited copies of the said memorial, and of the plans, sections, and working drawings of the proposed works, at the office of the clerk of the peace for the county of the town of Carrickfergus, and notice of such deposit was published according to the requirements of the said act:

And whereas the promoters deposited at the admiralty office copies of the said memorial, plans, sections, and working drawings, and on the application of the promoters the lords of the admiralty have given their sanction to the proposed works:

And whereas the promoters prepared a schedule of rates to be levied at the proposed works, and published the same, according to the requirements of the said act, and deposited a printed copy thereof at the office of the said clerk of the peace, and transmitted a copy thereof to the Board of Trade, and therewith a statement showing the state of the existing works, and the rates then leviable thereat, the average revenue derived at such works for the three years preceding in the said act, the estimated amount of the rates to be levied at the existing works, and also at the proposed works, and the estimated amount proposed to be expended on the works:

And whereas the Board of Trade, at the time in the said act appointed in this behalf, took the said schedule and statement into consideration, and made such inquiries and obtained such further information in reference to the several matters therein set forth as they deemed expedient:

And whereas the said schedule was prepared, published, deposited, and transmitted as aforesaid before the passing of The General Pier and Harbour Act, 1861, Amendment Act:

And whereas it appears to the Board of Trade to be expedient that the same should be authorized by a provisional order, and accordingly the Board of Trade have finally adjusted and fixed the schedule of rates hereto annexed, such rates not exceeding the rates specified in the schedule as prepared, published, deposited, and transmitted as aforesaid:

And whereas the consent in writing of the Commissioners of her Majesty's Woods, Forests, and Land Revenues to the making of this provisional order has been obtained:

And whereas the Board of Trade, after making such inquiries as they have thought expedient, have settled this present provisional order, and intend to cause a bill to be introduced into Parliament for the purpose of obtaining an act for the confirmation of this provisional order (until which confirmation this provisional order will not be of any validity or force whatever):

Now, therefore, the Board of Trade do, by this their Provisional Order in pursuance of the General Pier and Harbour Act, 1861, and the General Pier and Harbour Act, 1861, Amendment Act, and by virtue and in exercise of the powers thereby respectively in them vested, and of every other power enabling them in this behalf, order—

That, from and immediately after the passing of an act of Parliament confirming this provisional order, the following provisions shall take effect and be in force:—

Carrickfergus Harbour Commissioners.

1. The municipal commissioners for the borough of Carrickfergus, and their successors in office, shall be and are hereby, for the purposes of this order, incorporated by the name of the Carrickfergus Harbour Commissioners, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands and other property for the purposes, but subject to the restrictions, of this order.

2. The Carrickfergus harbour commissioners, hereinafter called the commissioners, shall be the undertakers of the works authorized by this order.

3. The Commissioners Clauses Act, 1847—except the following sections thereof, namely, sections 6 to 25 (both inclusive), and 24, 26, 27, and 28—shall be incorporated with this order.

4. The commissioners may borrow on mortgage or bond at interest such sums of money as may be required for the purposes of the works authorized by this order, not exceeding in the whole the sum of £6,000.

5. In order to create a sinking fund for the discharge of the principal money so borrowed, the commissioners shall yearly set apart the surplus revenue of the harbour, and shall deposit the same in some joint stock bank of issue in Ireland, to be increased by accumulation in the way of compound interest or otherwise, until the time when the accumulated fund shall be sufficient to pay off the principal money borrowed, or any such part thereof as the commissioners may think ought to be then paid off, and the commissioners shall then apply such accumulated fund in such payment accordingly; but so that the commissioners shall not allow any sum exceeding £500 to remain so deposited for a longer time than six calendar months without applying the same in such payment as aforesaid.

6. Any money borrowed under this order and discharged by means of the sinking fund aforesaid shall not be re-borrowed; but any money borrowed and discharged otherwise than by means of such sinking fund may be re-borrowed, if required for the purposes of this order, and so *toties quoties*.

7. The mortgagees of the commissioners may enforce the payment of the arrears of interest, or of the arrears of principal and interest, due to them on their respective mortgages, by the appointment of a receiver. The amount to authorize a requisition for a receiver shall be £1,000.

8. Every part of the money borrowed under this order shall be applied only for purposes authorized by this order.

Taking of Lands.

9. For the purposes of this order, the commissioners

may from time to time, by agreement, enter on, take, or use all or any part of the lands shown on the deposited plans as intended to be taken for the purposes of the proposed works, and also all or any part of the lands described in Schedule (A.) to this order annexed.

10. The Lands Clauses Consolidation Act, 1845, except with respect to the purchase and taking of lands otherwise than by agreement, and The Lands Clauses Consolidation Acts Amendment Act, 1860, shall be incorporated with this order.

Works.

11. Subject to the provisions of this order, the commissioners may, on the lands taken by them under this order, and in the lines and according to the levels and within the limits of deviation shown on the deposited plans and sections, make and maintain the works shown on the deposited plans.

12. The works by this order authorized comprise the following:

(1.) A pier on the eastern side of the harbour, commencing near the landward end of the existing pier or quay, and running in a southerly direction for 600 feet, then with a cant to the westward for 100 feet; the first 350 feet of the pier to be of stone work, the remainder of open pile work;

(2.) A stone breakwater to protect the same, 400 feet in length, lying about 550 feet to the westward of and parallel to the pier, with an easterly cant at the south end;

with a clear width of entrance between the pier and the breakwater of 400 feet.

Rates.

13. The commissioners shall not construct any work on any part of the shore or bed of the sea below high-water mark without the previous consent of her Majesty, her heirs and successors, signified in writing under the hand of one of the Commissioners of her Majesty's Woods, Forests, and Land Revenues, and then only according to such plan and under such restrictions and regulations as the last-mentioned commissioners or one of them approve of, such approval being signified as last aforesaid. After any such work is constructed with such consent as aforesaid, the commissioners shall not alter or extend the same without first obtaining the like consent and approval. If any work be commenced, constructed, altered, or extended, contrary to this provision, the Commissioners of her Majesty's Woods, Forests, and Land Revenues may, at the expense of the commissioners incorporated by this order, abate and remove it or any part of it, and restore the site thereof to its former condition. The amount of such expense shall be a debt due to the crown from the commissioners incorporated by this order, and shall be recoverable as such, with costs, or the same may be recovered with costs as a penalty is recoverable from those commissioners.

14. The commissioners may demand and receive in respect of the vessels, goods and things described in Schedule (B.) hereto, any sums not exceeding the rates in that schedule specified.

15. Officers of customs, being in the execution of their duty, shall at all times have free ingress, passage, and egress, on, into, along, through, and out of the pier and harbour, by land, and with their vessels, and otherwise, without payment.

16. The commissioners shall apply all rates received under this order, and all other moneys coming to their hands from the existing harbour, or new works, or the lands or property connected therewith, for the purposes and in the order following, and not otherwise:—

- (1.) In paying the costs of and connected with the preparation and making of this order:
- (2.) In paying the expenses of the maintenance, management, and regulation of the existing harbour and new works, and the lands and property connected therewith:
- (3.) In paying the interest on any money borrowed under this order, and any sum payable on account of the principal thereof:

(4.) In paying the rent of the property described in Schedule (A.) hereto, and in fining down such rent in pursuance of any agreement in that behalf made or to be made:

(5.) As to the surplus revenue of the harbour, that is to say, so much of the rates and other moneys aforesaid as may remain after making the several payments before in this provision directed,—in creating a sinking fund in manner before in this order specified.

General Provisions.

17. The following provisions of the Harbours, Docks, and Piers Clauses Act, 1847, shall not be incorporated with this order, namely, sections 16, 17, 18, and 19.

18. The commissioners shall not purchase for extraordinary purposes lands exceeding in extent in the whole two acres.

19. The commissioners shall have the appointment of meters and weighers within the harbour.

20. The commissioners may provide such steam engines, steam vessels, piling engines, diving bells, ballast lighters, rubbish lighters, and other machinery and vessels, as they may think necessary for effectuating any of the purposes of this order; and may demand and receive such sums for the use of the same as they may think reasonable.

21. The commissioners shall be a pilotage authority and a local authority within the meaning of The Merchant Shipping Act, 1854, with all the powers by that Act conferred on pilotage authorities and on local authorities.

22. Part V. of The Harbours and Passing Tolls, &c., Act, 1861, shall apply to Carrickfergus Harbour as altered under this order.

23. This order may be cited as The Carrickfergus Harbour Order, 1862.

Board of Trade, Whitehall.

Dated this 19th day of May, 1862.

(Signed) T. H. FARRER,
Assistant Secretary.

Schedules.

SCHEDULE (A.)

A tenement and premises situate in the Irish quarter of the town of Carrickfergus, known as Wilson's or Barnett's Quay, comprised and particularly described in an agreement dated the 1st day of November, 1861, and made between William Davys Duncan Wilson, Esq., of the one part, and the Municipal Commissioners of the Borough of Carrickfergus of the other part.

SCHEDULE (B.)

I.—RATES ON VESSELS USING OR ENTERING THE EXISTING HARBOUR OR NEW WORKS.

	s.	d.
For every vessel per register ton	0	2
All pleasure boats, boats entirely open, and fishing boats, exempt.		

II.—RATES ON GOODS SHIPPED OR UNSHIPED, RECEIVED OR DELIVERED, WITHIN THE EXISTING HARBOUR OR AT THE NEW WORKS.

Bricks	per ton	0	1½
Cattle—bulls, cows, oxen, and horses	each	0	1
Cattle—calves, pigs, sheep, and lambs	per score	0	3
Clover seed	per sack	0	1½
Coals	per ton	0	1½
Deals	per 120	1	0
Flour	per ton	0	1½
Gunpowder	per barrel	0	0½
Iron	per ton	0	1½
Lead	per ton	0	1½
Meal	per ton	0	1½
Salt rock	per ton	0	1
Slates	per ton	0	1½
Stones	per ton	0	1½
Timber of all kinds, except deals, per load of 50 feet		0	2

All other Goods, not particularly enumerated above.

Light goods per barrel bulk 0 1
Heavy goods per ton 0 2

In charging the rates on goods, the gross weight, or measurement of all goods to be taken; and for any less weights, measures, and quantities than those above specified, a proportion of the respective rate shall be charged.

Five cubic feet not exceeding 2½ cwt. to be rated as a barrel bulk; but, when the weight of 5 cubic feet is greater than 2½ cwt., then 2½ cwt. to be rated as a barrel bulk.

III.—RATES FOR THE USE OF CRANES, WEIGHING MACHINES, AND SHEDS PROVIDED AT THE EXISTING HARBOUR OR NEW WORKS.

1st. Rates of Craneage.

All goods or packages not exceeding 1 ton	. 0 1½
Exceeding 1 ton and not exceeding 2 tons	. 0 2
Exceeding 2 tons and not exceeding 3 tons	. 0 3
Exceeding 3 tons and not exceeding 4 tons	. 0 4
Exceeding 4 tons and not exceeding 5 tons	. 0 5
Exceeding 5 tons and not exceeding 6 tons	. 0 6
Exceeding 6 tons	. 0 7

2nd. Weighing Machines.

For goods weighed, 1d. for each ton or part of a ton.

3rd. Shed Dues.

For each ton of goods of 8 barrels bulk, or for each ton of goods of 20 cwt., which shall remain in the sheds or on the quays of the harbour for a longer time than 48 hours, the sum of 3d., and the sum of 1½d., per ton for each day during which such goods shall remain after the first 48 hours.

SCHEDULE.

I.—RATES ON VESSELS USING THE PIER.

For every vessel under the burden of 15 tons per ton	. 0 4
For every vessel of the burden of 15 tons, and under 50 tons per ton	. 0 6
For every vessel of the burden of 50 tons, and under 100 tons per ton	. 0 8
For every vessel of the burden of 100 tons, and under 150 tons per ton	. 0 10
For every vessel of the burden of 150 tons, and upwards per ton	. 1 0
All lighters for any vessel in the roads shall be exempt from rates; but if the vessel do not use the pier, every lighter shall pay for each trip per ton	. 0 2
All boats entirely open, landing or taking on board goods or dried or salted fish each	. 0 6
All drave or large boats using the pier with fresh fish each	. 0 4

II.—RATES ON GOODS SHIPPED OR UNSHIPPED AT THE PIER.

Ale per hogshead	. 0 6
Ale (bottled) per barrel bulk	. 0 3
Anchor per cwt.	. 0 9
Anchor stock per foot run	. 0 2
Bark per ton	. 1 0
Bedding (seaman's) 0 3
Beef or pork per ton	. 1 4
Beef or pork per barrel	. 0 2
Blubber per ton of 252 gallons	. 1 0
Bone dust per ton	. 0 8
Bones of cattle per ton	. 0 6
Bottles per gross	. 0 2
Bricks per 1,000	. 0 8
Butter per barrel	. 0 4
Casks (empty) not being returned packages per puncheon	. 0 3

Other casks in proportion.

Cattle:

Bulls each	. 0 3
Cows and oxen each	. 0 2
Calves each	. 0 ½

Horses each	. 0 2
Pigs each	. 0 ½
Sheep per score	. 0 6
Lambs per score	. 0 3
Chalk per ton	. 0 8
Cheese per cwt.	. 0 4
Chimney cans per 100	. 1 4
Clay (fire, manufactured) per ton	. 0 6
Clay (common) per ton	. 0 2
Cloth, haberdashery, &c. per barrel bulk	. 0 2
Coaches:	
Chaises and other four wheeled carriages	. each 0 8
Gigs, carts, and other two-wheeled carriages	. each 0 6
Coals (Scotch, English, smithy, and culm) per ton	. 0 3
Copper per ton	. 1 4
Corks per barrel bulk	. 0 2
Corn:	
Wheat and malt per quarter	. 0 3
Barley, beans, peas, tares, oats, rye, buckwheat, and Indian corn per quarter	. 0 2
Crystal per barrel bulk	. 0 2
Dissolved bones and other artificial manures per ton	. 0 8
Dogs (sporting only) each	. 0 2
Drugs per barrel bulk	. 0 3
Earthenware per crate	. 0 8
Eggs per barrel bulk	. 0 2
Fish (dried and salted) per ton	. 1 4
Haddocks, cod, salmon, and all fresh fish not enumerated per barrel bulk	. 0 2
Flax per ton	. 1 4
Flour per sack	. 0 2
Flour per barrel	. 0 1½
Fruit per bushel or sieve	. 0 2
Glass per barrel bulk	. 0 3
Groceries, viz:	
Almonds, figs, cinnamon, currants, pepper, pistachio, plums, prunes, raisins, and the like per barrel bulk	. 0 3
Guano per ton	. 0 8
Gunpowder per barrel	. 0 8
Hams, bacon, or tongues per cwt.	. 0 3
Hardware per barrel bulk	. 0 8
Hares and rabbits per dozen	. 0 2
Any less quantity 0 1
Hay per ton	. 0 8
Hemp per ton	. 1 4
Herrings (fresh) per cran	. 0 1
Herrings (cured) per barrel	. 0 3
Hides:	
Ox, cow, or horse (salted or dried) per ton	. 1 4
Calf skins per 120	. 0 10
Sheep skins per 120	. 0 10
Lamb skins per 120	. 0 5
Hoops of wood per 1,500	. 1 0
Household furniture (new) per barrel bulk	. 0 1
Household furniture (belonging to parties changing their residences only) per 10 barrels bulk	. 0 6
Husbandry utensils per ton	. 1 4
Husbandry utensils per barie bulk	. 0 2
Iron:	
Bar, bolt, and rod per ton	. 1 4
Pig and old per ton	. 0 8
Manufactured, cast, and wrought per cwt.	. 0 2
Chain cables per ton	. 1 4
Kelp per ton	. 0 8
Lead (all kinds) per ton	. 1 4
Leather (tanned and dressed) per ton	. 1 4
Lime per chaldron of 16 boils	. 1 4
Limestone per ton	. 0 3
Lime or moulding sand per ton	. 0 3
Machinery per ton	. 1 4
Machinery per barrel bulk	. 0 3
Manure (street) per ton	. 0 2
Masts and spars, ten inches in diameter and upwards, each	. 4 6
Under 10 inches each	. 3 0

Meal	per bag of 280lbs	0 2
Meat (fresh)	per ton	1 4
Meat (fresh)	per barrel	0 2
Milk	per 3 large pitchers	0 ½
Musical instruments	per barrel bulk	0 3
Oils	per ton	0 1
Ores:		
Copper, iron, lead, and other ores	per ton	0 8
Oysters	per bushel	0 3
Passengers' luggage, not exceeding 4 barrels bulk, free. All above 4 barrels bulk	per barrel bulk	0 3
Peats	per ton	0 3
Pitch	per barrel	0 3
Porter	per hogshead	0 4
Porter (bottled)	per barrel bulk	0 2
Potatoes	per ton	0 6
Poultry, including pigeons, game, &c.	per dozen	0 1
Any less quantity		0 ½
Rags (linen)	per ton	1 4
Other rags, old rope, and the like	per ton	0 10
Rape Cakes	per ton	0 8
Salt	per ton	0 10
Seeds:		
Flax and rape	per hogshead	0 6
Flax	per barrel	0 3
Flax, in bulk	per quarter	0 2
Clover	per ton	1 4
Garden	per ton	1 4
Hemp and canary	per ton	1 4
Rye Grass	per 3 bushels	0 2
Shrimp baskets	each	0 2
Skin, seal	per 120	0 8
Slates, under size	per 1000	0 6
Sizeable	per 1000	0 10
Over size	per 100	1 4
Spirits (Foreign and British)	per hogshead of 56 Gallons	0 8
Stones:		
Rubble	per ton of 16 cubic feet	0 2
Hewn ashlar freestone	per ton of 16 cubic feet	0 4
Rough ashlar freestone	per ton of 16 cubic feet	0 3
Pavement not exceeding 3 in. thick per 70 ft.		0 4
Pavement above 3 in. thick per 16 cubic feet		0 4
Scythe stones	per score	0 1
Mill stones	each	0 8
Steel	per ton	1 4
Sugar	per ton	1 4
Tallow	per ton	1 4
Tar	per barrel	0 2
Tea	per chest	0 3
Tiles (roofing)	per 1000	0 9
Tiles or pipes for draining	per 1000	0 8
Tin of all kinds	per ton	1 4
Tobacco	per ton	2 6
Treenails, under 2 feet in length	per 1000	0 6
Treenails, exceeding 2 feet in length	per 1000	1 0
Turnips	per ton	0 6
Turpentine	per hogshead	0 6
Vegetables	per cartload	0 2
Vinegar	per hogshead	0 6
Vitriol	per carboy	0 2
Whalebone	per ton	2 6
Wine	per hogshead	0 8
Wine (bottled)	per barrel bulk	0 4
Wood:		
Fir, pine, and other descriptions not enumerated	per load of 50 feet	0 10
Oak or wainscot	per load of 50 feet	1 0
Firewood	per fathom	0 6
Laths and lathwood per fathom of 216 cubic ft.		2 6
Handspokes	per 120	0 10
Oars	per 120	2 6
Spars, under 22 feet in length, above 2½ and under 4 inches in diameter		2 6
Spars 2½ inches in diameter and under per 120		1 4
Spars 22 feet in length and upwards, and not exceeding 4 inches in diameter		6 6

Spars of all lengths, above 4 and under 6 inches in diameter	per 120	12 0
Spokes of wheels not exceeding 2 feet in length	per 120	0 4
Exceeding 2 feet in length	per 120	0 6
Wedges	per 1000	1 0
Pipe staves and others in proportion	per standard hundred	1 0
Lignum vitæ, fastic, logwood, mahogany, and rosewood	per ton	1 4
Wool	per cwt.	0 2
Yarn	per ton	1 4
Zinc	per ton	1 4

All other goods not particularly enumerated in the above Table.

Light goods	per barrel bulk	0 2
Heavy goods	per ton	1 4

In charging the rates on goods, the gross weight or measurement of all goods to be taken, and, for any less weights, measures, and quantities, than those above specified, a proportion of the respective rates shall be charged.

Five cubic feet, not exceeding 2½ cwt., to be rated as a barrel bulk; but when the weight of 5 cubic feet is greater than 2½ cwt., then 2½ cwt. to be rated as a barrel bulk.

III.—RATES FOR USE OF CRANES, WEIGHING MACHINES, AND SHEDS.

1st. Rates of Cranes.

All goods or packages not exceeding 1 ton	0 3
Exceeding 1 ton and not exceeding 2 tons	0 4
Exceeding 2 tons and not exceeding 3 tons	0 6
Exceeding 3 tons and not exceeding 4 tons	0 8
Exceeding 4 tons and not exceeding 5 tons	0 10
Exceeding 5 tons and not exceeding 6 tons	1 0
Exceeding 6 tons and not exceeding 7 tons	1 2
Exceeding 7 tons and not exceeding 8 tons	1 4
Exceeding 8 tons and not exceeding 9 tons	1 6
Exceeding 9 tons and not exceeding 10 tons	2 0
Exceeding 10 tons	2 0

2nd. Weighing Machines.

For goods weighed, for each ton or part of a ton	0 1
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3rd. Shed Dues.

For each ton of goods of 8 barrels bulk, or for each ton of goods of 20 cwt., which shall remain in the sheds or other works of the pier for a longer time than 48 hours, the sum of 3d.; and the sum of 1½d. per ton for each day during which such goods shall remain after the first 48 hours.

For any portmanteau, trunk, parcel, or other article of passengers' luggage, for each day or part of a day, per package 0 2

IV.—RATES ON PASSENGERS LANDING ON OR EMBARKING FROM THE PIER.

For every passenger or other person who shall land on the said pier from, or embark from it on board of, any ship, vessel, packet, or passage boat, not being boats or vessels used for pleasure only, for each and every time, any sum not exceeding 0 0 2

For every person who shall land on the said pier from, or embark from it on board of, any boat or vessel used for pleasure only, for each and every time, any sum not exceeding 0 0 6

For every person who shall use the said pier for the purpose of walking for exercise, pleasure, or any other purpose, except for embarking or disembarking, for each and every time, any sum not exceeding 0 0 2

For every master of any vessel, boat, or wherry, being an inhabitant of the town of Deal or parish of Walmer, and using the said pier for

the purpose of going to or returning from his own vessel, boat, or wherry, an annual sum not exceeding 1 0 0

CAP. LII.

An Act to amend an Act of the Twenty-fourth and Twenty-fifth Years of the Reign of Her Majesty, to prevent the future Grant by Copy of Court Roll and certain Leases of Lands and Hereditaments in *England* belonging to Ecclesiastical Benefices. [29th July, 1862.]

CAP. LIII.

An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates. [29th July, 1862.]

CAP. LIV.

An Act to make further Provision respecting Lunacy in *Scotland*. [29th July, 1862.]

CAP. LV.

An Act for the Settlement of a Loan due from the Island of *Jamaica* to the Imperial Government. [29th July, 1862.]

CAP. LVI.

An Act to confirm certain Provisional Orders made under an Act of the Fifteenth Year of Her present Majesty, to facilitate Arrangements for the Relief of Turnpike Trusts. [29th July, 1862.]

CAP. LVII.

An Act to authorize the Sale of Her Majesty's Bakehouse in *Peaseod Street, Windsor*, and the Application of the Proceeds in the Purchase of Land or Buildings to be held with *Windsor Castle*. [29th July, 1862.]

CAP. LVIII.

An Act to make further Provision with respect to the raising of Money for erecting and improving Parochial Buildings in *Scotland*. [29th July, 1862.]

CAP. LIX.

An Act to render Owners of Dogs in *Ireland* liable for Injuries to Sheep. [29th July, 1862.]

Sec. 1. *Owner of dog to be liable in damages for any injury committed by his dog. Recovery of damages.*

2. *Who shall be deemed the owner of the dog.*

3. *Extent of act.*

'Whereas it is expedient to amend the law as to the liability of the owners of dogs for injuries done to sheep by such dogs: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The owner of every dog shall be liable in damages for injury done to any sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such animal, or the owner's knowledge of such previous mischievous propensity, or that the injury was attributable to neglect on the part of such owner: such damages shall be recoverable by the owner of the sheep killed or injured in any court of competent jurisdiction; where the amount of the damages claimed shall not exceed five pounds, the same shall be recoverable in a summary way before any justice or justices sitting in Petty Sessions under the provisions of "The Petty Sessions, *Ireland*, Act, 1851," or of any act amending the same.

2. The occupier of any house or premises where any dog

was kept, or permitted to live or remain, at the time of such injury, shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept, or permitted to live or remain, in the said house or premises without his sanction or knowledge: provided always, that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the premises in which part such dog shall have been kept, or permitted to live or remain, at the time of such injury, shall be deemed to be the owner of such dog.

3. This Act shall extend to *Ireland* only.

CAP. LX.

An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and to extend the time limited for those Purposes respectively. [29th July, 1862.]

CAP. LXI.

An Act for the better Management of Highways in *England*. [29th July, 1862.]

CAP. LXII.

An Act to amend the Law relating to the Duration of contested Elections for Counties in *Ireland*, and for establishing additional Places for taking the Poll thereat. [29th July, 1862.]

13 & 14 Vict. c. 68.

Sec. 1. *Commencement of act.*

2. *This act incorporated with recited act.*

3. *Provisions of 13 & 14 Vic. c. 68, relating to duration of poll at contested elections for counties in Ireland repealed.*

4. *Regulating time for polling at elections for knights of the shire in Ireland, &c. Elections on or before the 1st January, 1863, not to be affected.*

5. *Duty of poll clerks at such elections.*

6. *Poll may be closed in certain cases as heretofore.*

7. *Proceedings in cases of riot.*

8. *Additional polling places may be appointed upon petition from justices in Quarter Sessions assembled to Lord Lieutenant.*

9. *Place in which the court for revision of lists may be held.*

10. *Declaration or order to be certified by clerk of Privy Council, and published in Dublin Gazette.*

'Whereas an Act was passed in the thirteenth and fourteenth years of the reign of her Majesty, intitled *An Act to shorten the Duration of Elections in Ireland, and for establishing additional Places for taking the poll thereat*; and it is expedient to amend certain provisions of the said act relating to contested elections for counties in *Ireland*, and to limit the time of taking the poll at such elections to one day, and to establish additional places for taking the poll at such elections: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall commence and take effect from and after the first day of *January* one thousand eight hundred and sixty-three, save as herein-after excepted.

2. This act shall be deemed to be incorporated with the said recited act, and shall be as if the said recited act (except such parts thereof as have been repealed or amended by this act) and this act were one act.

3. So much of the said recited act as authorizes the continuance of the polling at every contested election of a knight or knights of the shire to serve in Parliament for any county in *Ireland* for two days, and prescribes the duties of the sheriff and sheriff deputies and clerk at such poll

during those days, and fixes the commencement and limits the hours of polling on such days, and prevents the commencement of such polling on a *Saturday*, shall be and the same is hereby repealed.

4. At every contested election of a knight or knights of the shire to serve in Parliament for any county in *Ireland* which shall take place after the commencement of this act, the polling shall commence on the next day but two after the day fixed for the election (such day not being *Sunday*, *Good Friday*, or *Christmas Day*), and shall continue for one day only, save in the cases hereinafter mentioned, and shall commence at the hour of eight in the forenoon of the day next but two after the day fixed for the election, and be kept open until five in the afternoon of such day, any statute to the contrary notwithstanding: provided always, that when such next day but two after the day fixed for the election shall be *Sunday*, *Good Friday*, or *Christmas Day*, then in case it be *Sunday* the poll shall be on the *Monday* next following, and in case it be *Good Friday* then on the *Saturday* next following, and in case it be *Christmas Day* then on the next day following if the same shall not be *Sunday*, and if it be *Sunday*, on the next following *Monday*: provided always, that in case any election shall take place for any county in *Ireland* before or on the said first day of *January* one thousand eight hundred and sixty-three, the poll and proceedings thereat shall be taken in the same manner as if this act had not been passed.

5. The clerks appointed to take the poll at the several places appointed for polling for the several baronies or half baronies, or any division thereof respectively, and in the several polling booths, shall, at the final close of the day's poll, enclose and seal their several books, and shall publicly deliver them, so enclosed and sealed, to the sheriff or sheriff's deputy presiding at such poll; and every such deputy who shall have received any such poll books shall forthwith deliver the same, so enclosed and sealed, to the sheriff or his under-sheriff, who shall receive and keep all the poll books unopened until the reassembling of the court on the day next but one after the close of the poll, unless such day shall be *Sunday*, and then on the *Monday* following, at an hour not earlier than eleven in the forenoon of the said day, when he shall openly break the seals thereon, and cast up the number of votes as they appear in the said several books, and shall openly declare the state of the poll, and shall declare the member or members chosen, at or before the hour of two in the afternoon of the said day, any statute to the contrary notwithstanding.

6. Nothing in this act contained shall prevent any sheriff or other returning officer, or the lawful deputy of any sheriff or returning officer, from closing the poll at any contested election for any county in *Ireland*, previous to the expiration of the time fixed by this act, in any case where the same might have been lawfully closed before the passing of this act.

7. Where the proceedings at any election after the commencement of this act (whether such proceedings shall consist of the nomination of a candidate or candidates or of the taking of the poll) shall be interrupted or obstructed by any riot or open violence at or near the place of election or a polling place, or shall be interrupted or obstructed by any riot or open violence taking place elsewhere by the violent or forcible prevention, obstruction, or interruption of voters proceeding on their way to such election or polling place (such last-mentioned prevention, obstruction, or interruption of voters proceeding on their way as aforesaid being shown by affidavit,) the sheriff or other returning officer, or the lawful deputy of any sheriff or returning officer, shall not for such cause terminate the business of such nomination, nor finally close the poll, but shall adjourn the nomination or the taking of the poll, at the particular polling place or polling places at or near to which, or on the way to which, such interruption or obstruction shall have happened, until the following day, and, if necessary, shall further adjourn such nomination or poll, as the case may be, until such interruption or obstruction shall have ceased, when the sheriff or returning officer, or his deputy, shall again proceed with the business of the nomination or

with the taking the poll, as the case may be, at the place or places at or near to which, or on the way to which, the same respectively may have been interrupted or obstructed; and the day on which the business of the nomination shall have been concluded shall be deemed to have been the day fixed for the election, and the commencement of the poll shall be regulated accordingly; and any day whereon the poll shall have been so adjourned shall not at such place or places be reckoned the day of polling at such election within the meaning of this act; and whenever the poll shall have been so adjourned by any deputy of any sheriff or other returning officer, such deputy shall forthwith give notice of such adjournment to the sheriff or returning officer, who shall not finally declare the state of the poll, or make proclamation of the member or members chosen, until the poll so adjourned at such place or places as aforesaid shall have been finally closed, and the poll books delivered or transmitted to such sheriff or other returning officer, anything hereinbefore contained, or in any other statute, to the contrary notwithstanding: Provided always, that this act shall not be taken to authorize an adjournment to a *Sunday*, but that in every case in which the day to which the adjournment would otherwise be made shall happen to be a *Sunday*, *Good Friday*, or *Christmas day*, that day or days shall be passed over, and the following shall be the day to which the adjournment shall be made.

8. It shall be lawful for the Lord Lieutenant or other chief governor or governors of *Ireland*, by and with the advice of the Privy Council in *Ireland*, from time to time hereafter, on petition from the justices of any county or riding in *Ireland* in Quarter Sessions assembled, representing that the polling places for such county or riding are insufficient in number or inconveniently situated, and praying that the place or places mentioned in the said petition may be a polling place or polling places for the county or riding within which such place or places is or are situated, or may be discontinued as such polling place or places, and that a barony or baronies, half barony or half baronies, or any portion thereof respectively, in such petition mentioned, may constitute a district for polling at a polling place in such petition mentioned, (anything in the said recited act, providing that a barony or half barony shall not be divided, to the contrary notwithstanding,) or praying that any polling district or districts may be altered, and that any barony or half barony, or any portion thereof respectively, may be detached from any such polling district, and be annexed to any other polling district, as the case may be, to declare that any place or places mentioned in the said petition shall be a polling place or polling places for that county or riding, or shall be discontinued as such polling place or places, and that the barony or baronies, half barony or half baronies, or any portion thereof respectively in such petition mentioned, shall constitute a district for polling at such polling place, and that the other polling districts of the said county or riding shall be altered accordingly; or to declare that any polling district or districts shall be altered, and that any barony or half barony, or portion thereof respectively, shall be detached from any such polling district, and be annexed to any other polling district.

9. Notwithstanding the provisions of the Act of the thirteenth and fourteenth years of her present Majesty, chapter sixty-nine, section forty-six, it shall not be necessary for the assistant-barrister or chairman of Quarter Sessions to hold a separate court for the revision of the list of parliamentary voters who are to poll in any such new district so to be constituted and declared at the polling place appointed for such new district; but it shall be lawful for the said assistant-barrister or chairman, if he shall so think fit, to revise the said list of voters for such new district at a court to be held at the place in which the list of parliamentary voters for the barony or half barony out of which such district shall be constituted had been held previous to the constitution of such new district, or at such other place as the Lord Lieutenant or other chief governor of *Ireland* shall appoint.

10. Every such declaration or order for creating addi-

tional polling places and the polling districts for the same, or for discontinuing or altering any polling district or districts, shall be certified under the hand of the clerk of the said privy council, and when so certified shall be published in the *Dublin Gazette*, and shall be of the same force and effect as if the same had been made by the authority of Parliament: Provided always, that no such petition as aforesaid shall be made by such justices so assembled unless a notice in writing shall have been delivered, one month at the least before the holding of such Quarter Sessions, to the clerk of the peace of the county or riding wherein the same are held, signed by two justices of the peace for such county or riding, and residing therein, or by ten inhabitants, being registered voters for such county or riding, which notice shall state that the court will, when such sessions are held, be moved to make such petition; nor unless the clerk of the peace shall, ten days at the least before the holding of such sessions, have caused a copy of such notice to be inserted twice at the least in two of the newspapers of such county or riding, if two newspapers are published therein, or, if not, in a newspaper published or commonly circulated therein, together with a notice of the day upon which, and the place at which, such Quarter Sessions will be held; provided also, that when such motion is made any person objecting to the same shall be heard by such court against the same, or any part thereof, if he thinks fit.

CAP. LXIII.

An Act to amend "The Merchant Shipping Act, 1854,"
"The Merchant Shipping Act Amendment Act, 1855,"
and "The Customs Consolidation Act, 1853."

[29th July, 1862.]

17 & 18 Vict. c. 104; 18 & 19 Vict. c. 91;

16 & 17 Vict. c. 107.

Sec. 1. Short title.

2. Enactments in Table (A.) repealed.
3. Equities not excluded by Merchant Shipping Act.
4. Tonnage rates under local Acts may be levied on the registered tonnage.
5. Steam ships to carry certificated engineers.
6. Examinations for engineers certificates of competency.
7. Fees to be paid by applicants for examination.
8. Certificates of competency to be granted to those who pass.
9. Engineers certificates of service to be delivered on proof of certain services.
10. Certain provisions of Merchant Shipping Act to apply to engineers certificates.
11. Power of Board of Trade and Local Marine Board to investigate conduct of certificated engineers.
12. Declaration of engineer surveyor to contain statement concerning engineers certificate.
13. Third part of Act to apply to fishing boats, light-house vessels, and pleasure yachts, with certain exceptions.
14. Local Marine Board may determine number of quorum.
15. Titles of shipping masters.
16. Punishment for embezzlement in shipping offices.
17. Examinations of masters and mates at ports where there are no local Marine Boards.
18. Construction of sect. 182 of principal Act; stipulations concerning salvage.
19. Payment of wages to seamen abroad under section 209 of principal Act.
20. Wages and effects of deceased seamen.
21. Recovery of wages, &c., of seamen lost with their ship.
22. Relief of distressed seamen to be regulated by Board of Trade.
23. Power of cancelling certificate to rest with the court which hears the case.
24. Certificate to be delivered up.
25. Enactment of regulations concerning lights, fog signals, and sailing rules in schedule, Table (C.)

26. Regulations to be published.
27. Owners and masters bound to obey them.
28. Breaches of regulations to imply wilful default of person in charge.
29. If collision ensues from breach of the regulations, ship to be deemed in fault.
30. Inspection for enforcing regulations.
31. Rules for harbours under local Acts to continue in force.
32. In harbours and rivers where no such rules exist they may be made.
33. In case of collision one ship shall assist the other.
34. Surveys of steamers.
35. Penalties on drunken or disorderly passengers; on persons molesting passengers; penalties on persons forcing way on board the ship when full; and on persons refusing to quit the ship when full; penalties for avoiding payment of fares.
36. Penalty for injuring steamer or molesting crew.
37. Manner of apprehending offenders.
38. Provisions as to carrying dangerous goods.
39. Power of pilotage authorities to exempt from compulsory pilotage; to alter and reduce rates of pilotage; to arrange the limits of pilotage districts. Power by provisional order, to transfer pilotage jurisdiction; and to make consequent arrangements; to constitute new authorities; to exempt from compulsory pilotage in any district; to enable existing authorities to grant licences and fix rates; to raise rates; to facilitate recovery of rates in certain cases; to facilitate grants of licences.
40. Regulations with respect to manner of making and confirming provisional orders.
41. Extension of exemptions from compulsory pilotage.
42. Arrangement of pilot funds for Bristol Channel pilots.
43. Lights, &c., under local authorities to be inspected, &c. by Trinity House and other general authorities.
44. Liability for, and recovery of light dues.
45. Powers of consignees to retain light dues paid by them.
46. Dues may be levied for local lights.
47. Application of and accounts of such dues.
48. Construction of sect. 431 of principal Act.
49. Extension and amendment of summary jurisdiction in small salvage cases.
50. Receiver may appoint a valuer in salvage cases.
51. Jurisdiction of Court of Session in salvage cases.
52. Delivery of wreck by receiver not to prejudice title.
53. Crown rights to wreck. 1 Vict. c. 2.
54. Shipowners liability limited.
55. Limitation of invalidity of insurances.
56. Proof of passengers on board lost ship.
57. Foreign ships in British jurisdiction to be subject to regulations in Table (C.) in schedule.
58. Regulations, when adopted by a foreign country, may be applied to its ships on the high seas.
59. Provisions concerning salvage of life may, with the consent of any foreign country, be applied to its ships on the high seas.
60. Ships of foreign countries adopting the rule for measurement of tonnage need not be re-measured in this country.
61. Effect of order in council.
62. Orders in council may be limited as to time, and qualified.
63. Orders in council may be revoked and altered.
64. Orders in council to be published in London Gazette.
65. 20 & 21 Vict. c. 43, s. 8, not to apply to proceedings under Board of Trade or this Act, &c.
66. Interpretation of terms — "Report," "Entry," "Goods," "Wharf," "Warehouse," "Wharf Owner," "Warehouse Owner," "Shipowner," "Owner of Goods."

67. *Power to shipowner to enter and land goods in default of entry and landing by owner of goods.*
68. *If, when goods are landed, the shipowner give notice for that purpose, the lien for freight is to continue.*
69. *Lien to be discharged on proof of payment.*
70. *Lien to be discharged on deposit with warehouse owner.*
71. *Warehouse owner may, at the end of fifteen days, if no notice is given, pay deposit to shipowner.*
72. *Courses to be taken if notice to retain is given.*
73. *After ninety days warehouse owner may sell goods by public auction.*
74. *Notices of sale to be given.*
75. *Moneys arising from sale, how to be applied.*
76. *Warehouse owners rent and expenses.*
77. *Warehouse owners protection.*
78. *Saving powers under local Acts.*

"Whereas it is expedient further to amend "The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853;" Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited as "The Merchant Shipping Act Amendment Act, 1862," and shall be construed with and as part of "The Merchant Shipping Act, 1854," hereinafter termed the Principal Act.

2. The enactments described in Table (A.) in the schedule to this act shall be repealed as therein mentioned, except as to any liabilities incurred before such repeal.

Registry and Measurement of Tonnage (Part II. of Merchant Shipping Act, 1854.)

3. It is hereby declared that the expression "beneficial interest," whenever used in the second part of the Principal Act, includes interests arising under contract and other equitable interests; and the intention of the said act is that, without prejudice to the provisions contained in the said act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said act on registered owners and mortgagees, and without prejudice to the provisions contained in the said act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.

4. Any body corporate or persons having power to levy tonnage rates on ships may, if they think fit, with the consent of the Board of Trade, levy such tonnage rates upon the registered tonnage of the ships as determined by the rules for the measurement of tonnage for the time being in force under the Principal Act, notwithstanding that the local act or acts under which such rates are levied provides for levying the same upon some different system of tonnage measurement.

Certificates for Engineers (Part III. of Merchant Shipping Act, 1854.)

5. On and after the first day of June one thousand eight hundred and sixty-three, every steam ship which is required by the Principal Act to have a master possessing a certificate from the Board of Trade shall also have an engineer or engineers possessing a certificate or certificates from the Board of Trade as follows; that is to say,

- (1.) Engineers certificates shall be of two grades, viz., "first-class engineers certificates," and "second-class engineers certificates";
- (2.) Every foreign-going steam ship of one hundred nominal horse power or upwards shall have as its first and second engineers two certificated engineers, the first possessing a "first-class engineer's certificate," and the second possessing a

"second-class engineer's certificate," or a certificate of the higher grade:

- (3.) Every foreign-going steam ship of less than one hundred nominal horse power shall have as its only or first engineer an engineer possessing a "second-class engineer's certificate," or a certificate of the higher grade;
- (4.) Every sea-going home trade passenger steam ship shall have as its only or first engineer an engineer possessing a "second-class engineer's certificate," or a certificate of the higher grade;
- (5.) Every person who, having been engaged to serve in any of the above capacities in any such steam ship as aforesaid, goes to sea in that capacity without being at the time entitled to and possessed of such certificate as is required by this section, and every person who employs any person in any of the above capacities in such ship without ascertaining that he is at the time entitled to and possessed of such certificate as is required by this section, shall for each such offence incur a penalty not exceeding fifty pounds.

6. The Board of Trade shall from time to time cause examinations to be held of persons who may be desirous of obtaining certificates of competency as engineers: For the purpose of such examinations the Board of Trade shall from time to time appoint and remove examiners, and award the remuneration to be paid to them; lay down rules as to the qualification of applicants, and as to the times and places of examination; and generally do all such acts as it thinks expedient in order to carry into effect the examination of such engineers as aforesaid.

7. All applicants for examination shall pay such fees, not exceeding the sums specified in the Table marked (B.) in the schedule hereto, as the Board of Trade directs; and such fees shall be paid to such persons as the said board appoints for that purpose, and shall be carried to the account of the mercantile marine fund.

8. The Board of Trade shall deliver to every applicant who is duly reported to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, and ability, a certificate of competency, as first-class engineer or as second-class engineer, as the case may be.

9. Certificates of service for engineers, differing in form from certificates of competency, shall be granted as follows; that is to say,

- (1.) Every person who before the first day of April one thousand eight hundred and sixty-two has served as first engineer in any foreign-going steam ship of one hundred nominal horse power or upwards, or who has attained or attains the rank of engineer in the service of her Majesty or of the East India Company, shall be entitled to a "first-class engineer's certificate" of service;
- (2.) Every person who before the first day of April one thousand eight hundred and sixty-two has served as second engineer in any foreign-going steam ship of one hundred nominal horse power or upwards, or as first or only engineer in any other steam ship, or who has attained or attains the rank of first-class assistant engineer in the service of her Majesty, shall be entitled to a "second-class engineer's certificate" of service;

Each of such certificates of service shall contain particulars of the name, place, and time of birth, and the length and nature of the previous service of the person to whom the same is delivered; and the Board of Trade shall deliver such certificates of service to the various persons so respectively entitled thereto, upon their proving themselves to have attained such rank or to have served as aforesaid, and upon their giving a full and satisfactory account of the particulars aforesaid.

10. The provisions of the Principal Act, with respect to the certificates of competency or service of masters and mates, contained in the 138th, 139th, 140th, 161st, and 162nd sections of the said act, shall apply to certificates of

competency or service granted under this act in the same manner as if certificates of competency and service to be granted to engineers under this act were specially mentioned and included in the said sections.

11. The power by the 241st section of the principal act given to the board of trade or to any local marine board of instituting investigations into the conduct of any master or mate, whom it has reason to believe to be from incompetency or misconduct unfit to discharge his duties, shall extend to any certificated engineer whom the board of trade or any local marine board has reason to believe to be from incompetency or misconduct unfit to discharge his duties, in the same manner as if in the said section the words "certificated engineer," had been inserted after "master" wherever "master" occurs in such section.

12. The declaration required to be given by the engineer surveyor under section 309 of the principal act, shall in the case of a ship by this act required to have a certificated engineer, contain, in addition to the statements in the said section mentioned, a statement that the certificate or certificates of the engineer or engineers of such ship is or are such and in such condition as is required by this act.

Masters and Seamen (Part III of Merchant Shipping Act, 1854).

13. The following vessels, that is to say,—

- (1.) Registered seagoing ships exclusively employed in fishing on the coasts of the United Kingdom,
- (2.) Seagoing ships belonging to any of the three general Lighthouse Boards;
- (3.) Seagoing ships being pleasure yachts.

Shall be subject to the whole of the third part of the principal act; except,—sections 136, 143, 145, 147, 149, 150, 151, 152, 153, 154, 155, 157, 158, 161, 162, 166, 170, 171, 231, 256, 279, 280, 281, 282, 283, 284, 285, 286, and 287.

14. 'Whereas doubts have been entertained whether local marine boards have the power of determining a quorum: It is hereby declared, That the power by the 119th section of the principal act given to every local marine board of regulating the mode in which its meetings are to be held and its business conducted includes the power of determining a quorum; nevertheless, after the passing of this act, such quorum shall never consist of less than three members.

15. The offices termed shipping offices in the principal act shall be termed mercantile marine offices, and the officers termed shipping masters and deputy shipping masters in the principal act shall be termed superintendents and deputy superintendents of such offices; but nothing in this section contained shall invalidate or affect any act which may be done at any such office under the title of a shipping office, or any act which may be done by, with, or to any of the said officers under the title of shipping master or deputy shipping master.

16. Any person appointed to any office or service by or under any local marine board shall be deemed to be a clerk or servant within the meaning of the sixty-eighth section of the act of the twenty-fifth year of the reign of her present Majesty, chapter ninety-six:

If any such person fraudulently applies or disposes of any chattel, money, or valuable security received by him whilst employed in such office or service for or on account of any such local marine board, or for or on account of any other public board or department, to his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him, or fraudulently withholds, retains, or keeps back the same or any part thereof contrary to any lawful directions or instructions which he is required to obey in relation to such office or service, he shall be deemed guilty of embezzlement within the meaning of the said section:

Any such person shall, on conviction of such offence as aforesaid, be liable to the same pains and penalties as are thereby imposed upon any clerk or servant for embezzlement:

In any indictment against such person for such offence

it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the board by which he was appointed, or of the board or department for or on account of which he may have received the same; and no greater particularity in the description of the property shall be required in such indictment in order to sustain the same, or in proof of the offence alleged, than is required in respect of an indictment or the subject matter thereof by the seventy-first section of the said last-mentioned act.

17. 'Whereas it is expedient to make provision in certain cases for holding examinations of applicants for certificates of competency at places where there are no local marine boards: Be it enacted, That the Board of Trade, if satisfied that serious inconvenience exists at any port in consequence of the distance which applicants for certificates have to travel in order to be examined, may, with the concurrence of any local marine board, send the examiner or examiners of that local marine board to the port where such inconvenience exists; and thereupon the said examiner or examiners shall proceed to such port, and shall there examine the applicants in the presence of such person or persons (if any) as the Board of Trade may appoint for the purpose; and such examinations shall be conducted in the same manner and shall have the same effect as other examinations under the said act.

18. It is hereby declared that the 182nd section of the principal act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

19. The payment of seamen's wages required by the 209th section of the principal act shall, whenever it is practicable so to do, be made in money and not by bill; and in cases where payment is made by bill drawn by the master, the owner of the ship shall be liable to pay the amount for which the same is drawn to the holder or indorsee thereof; and it shall not be necessary in any proceeding against the owner upon such bill to prove that the master had authority to draw the same; and any bill purporting to be drawn in pursuance of the said section, and to be indorsed as therein required, if produced out of the custody of the Board of Trade or of the Registrar-General of Seamen, or of any superintendent of any mercantile marine office, shall be received in evidence; and any indorsement on any such bill purporting to be made in pursuance of the said section, and to be signed by one of the functionaries therein mentioned, shall also be received in evidence, and shall be deemed to be *prima facie* evidence of the facts stated in such indorsement.

20. The 197th section of the principal act shall extend to seamen or apprentices who within the six months immediately preceding their death have belonged to a *British* ship; and such section shall be construed as if there were inserted in the first line thereof after the words "such seaman or apprentice as last aforesaid" the words "or if any seaman or apprentice who has within the six months immediately preceding his death belonged to a *British* ship."

21. The wages of seamen or apprentices who are lost with the ship to which they belong shall be dealt with as follows; (that is to say,)

- (1.) The Board of Trade may recover the same from the owner of the ship in the same manner in which seamen's wages are recoverable;
- (2.) In any proceedings for the recovery of such wages, if it is shown by some official return produced out of the custody of the Registrar-General of Seamen or by other evidence that the ship has twelve months or upwards before the institution of the proceeding left a port of departure, and if it is not shown that she has been heard of within twelve months after such departure, she shall be deemed to have been lost with all hands on board either immediately after the time she was last

heard of, or at such later time as the court hearing the case may think probable :

- (3.) The production out of the custody of the Registrar-General of Seamen or of the Board of Trade of any duplicate agreement or list of the crew made out at the time of the last departure of the ship from the United Kingdom, or of a certificate purporting to be a certificate from a consular or other public officer at any port abroad, stating that certain seamen or apprentices were shipped in the ship from the said port, shall, in the absence of proof to the contrary, be sufficient proof that the seamen or apprentices therein named were on board at the time of the loss :
- (4.) The Board of Trade shall deal with such wages in the manner in which they deal with the wages of other deceased seamen and apprentices under the principal act.

22. 'Whereas under the 211th and 212th sections of the principal act, and the 16th section of "The Merchant Shipping Act Amendment Act, 1855," provision is made for relieving and sending home seamen found in distress abroad: And whereas doubts are entertained whether power exists under the said sections of making regulations and imposing conditions which are necessary for the prevention of desertion and misconduct and the undue expenditure of public money: Be it enacted, and it is hereby declared, that the claims of seamen to be relieved or sent home in pursuance of the said sections or any of them shall be subject to such regulations and dependent on such conditions as the Board of Trade may from time to time make or impose; and no seaman shall have any right to demand to be relieved or sent home except in the cases and to the extent provided for by such regulations and conditions.

23. The following rules shall be observed with respect to the cancellation and suspension of certificates; that is to say,—

- (1.) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the Local Marine Board, Magistrates, Naval Court, Admiralty Court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade:
- (2.) Such power shall extend to cancelling or suspending the certificates of engineers in the same manner as if "certificated engineer" or "certificated engineers" were inserted throughout such section after "master" or "masters":
- (3.) Every such board, court, or tribunal shall, at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence, to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their report:
- (4.) It shall be lawful for the Board of Trade, if they think the justice of the case require it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade in place of any certificate which has been cancelled or suspended:
- (5.) The 434th and 437th sections of the principal act shall be read as if for the word "nautical" were substituted the words "nautical or engineering," and as if for the word "person" and "assessor" respectively were substituted the words "person or persons" and "assessor or assessors" respectively:
- (6.) No certificate shall be cancelled or suspended under

this section unless a copy of the report of a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, nor, in the case of investigations conducted by justices or a stipendiary magistrate, unless one assessor at least expresses his concurrence in the report.

24. Every master, or mate, or engineer, whose certificate is or is to be suspended or cancelled in pursuance of this act shall, upon demand of the board, court, or tribunal by which the case is investigated or tried, deliver his certificate to them, or if it is not demanded by such board, court, or tribunal, shall, upon demand, deliver it to the Board of Trade, or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds.

Safety (Part IV. of Merchant Shipping Act, 1854.)

25. On and after the first day of June, one thousand eight hundred and sixty-three, or such later day as may be fixed for the purpose by order in council, the regulations contained in the table marked (C.) in the schedule hereto shall come into operation and be of the same force as if they were enacted in the body of this act; but her Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by order in council, annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution therefor; and any alterations in or additions to such regulations made in manner aforesaid shall be of the same force as the regulations in the said schedule.

26. The Board of Trade shall cause the said regulations and any alterations therein or additions thereto hereafter to be made to be printed, and shall furnish a copy thereof to any owner or master of a ship who applies for the same; and production of the gazette in which any order in council containing such regulations or any alterations therein or additions thereto is published, or of a copy of such regulations, alterations, or additions, signed or purporting to be signed by one of the secretaries or assistant secretaries of the Board of Trade, or sealed or purporting to be sealed with the seal of the Board of Trade, shall be sufficient evidence of the due making and purport of such regulations, alterations, or additions.

27. All owners and masters of ships shall be bound to take notice of all such regulations as aforesaid, and shall, so long as the same continue in force, be bound to obey them, and to carry and exhibit no other lights and to use no other fog signals than such as are required by the said regulations; and in case of wilful default, the master, or the owner of the ship if it appear that he was in such fault, shall, for each occasion upon which such regulations are infringed, be deemed to be guilty of a misdemeanor.

28. In case any damage to person or property arises from the non-observance by any ship of any regulation made by or in pursuance of this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

29. If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

30. The following steps may be taken in order to enforce compliance with the said regulations; that is to say,

- (1.) The surveyors appointed under the third part of the principal act, or such other persons as the Board of Trade may appoint for the purpose, may inspect any ships for the purpose of seeing that such ships are properly provided with lights and with the means of making fog signals in pursuance of the said regulations, and shall for that

purpose have the powers given to inspectors by the 14th section of the principal act:

- (2.) If any such surveyor or person finds that any ship is not so provided, he shall give to the master or owner notice in writing, pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same:
- (3.) Every notice so given shall be communicated in such manner as the Board of Trade may direct to the Collector or Collectors of Customs at any port or ports from which such ship may seek to clear or at which her transire is to be obtained; and no collector to whom such communication is made shall clear such ship outwards or grant her a transire, or allow her to proceed to sea, without a certificate under the hand of one of the said surveyors or other persons appointed by the Board of Trade as aforesaid, to the effect that the said ship is properly provided with lights and with the means of making fog signals in pursuance of the said regulations

31. Any rules concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any local act, shall continue and be of full force and effect notwithstanding anything in this act or in the schedule thereto contained.

32. In the case of any harbour, river, or other inland navigation for which such rules are not and cannot be made by or under the authority of any local act, it shall be lawful for her Majesty in council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or, if there is no such harbour trust or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules, when so made, shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in table (C) in the schedule to this act, notwithstanding anything in this act or in the schedule thereto contained.

33. In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision:

In case he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended.

34. Notwithstanding anything in the 311th section of the principal act contained, it shall not be necessary for the surveys of passenger steamers to be made in the months of *April and October*; but no declaration shall be given by any surveyor under the fourth part of the said act for a period exceeding six months, and no certificate issued by the Board of Trade shall remain in force more than six months from the date thereof.

35. The following offenders, that is to say,

- (1.) Any person who, being drunken or disorderly, has been on that account refused admission into any duly surveyed passenger steamer by the owner or any person in his employ, and who, after having had the amount of his fare (if he has paid the same) returned or tendered to him, nevertheless persists in attempting to enter such steamer;

- (2.) Any person who being drunken or disorderly on board any such steamer is requested by the owner or any person in his employ to leave the same at any place in the United Kingdom at which he can conveniently so do, and who, having had the amount of his fare (if he has paid the same) returned or tendered to him, refuses to comply with such request;
- (3.) Any person on board any such steamer who after warning by the master or any other officer of the steamer molests or continues to molest any passenger;
- (4.) Any person who, after having been refused admission into any such steamer by the owner or any person in his employ on account of such steamer being full, and who after having had the full amount of his fare (if he has paid the same) returned or tendered to him, nevertheless persists in attempting to enter the same;
- (5.) Any person having got on board any such steamer, who, upon being requested on the like account by the owner or any person in his employ to leave such steamer before the same has quitted the place at which such person got on board, and who upon having the full amount of his fare (if he has paid the same) returned or tendered to him, refuses to comply with such request;
- (6.) Any person who travels or attempts to travel in any such steamer without having previously paid his fare, and with intent to avoid payment thereof;
- (7.) Any person who having paid his fare for a certain distance, knowingly and wilfully proceeds in any such steamer beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof;
- (8.) Any person who knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit any such steamer; and
- (9.) Any person on board any such steamer who does not when required by the master or other officer of such steamer either pay his fare or exhibit such ticket or other receipt (if any) showing the payment of his fare as is usually given to persons travelling by and paying their fare for such steamer;

Shall for every such offence be liable to a penalty not exceeding forty shillings; but such liability shall not prejudice the recovery of any fare payable by him.

36. Any person on board any such steamer who wilfully does or causes to be done anything in such a manner as to obstruct or injure any part of the machinery or tackle of such steamer, or to obstruct, impede, or molest the crew or any of them in the navigation or management of such steamer, or otherwise in the execution of their duty upon or about such steamer, shall for every such offence be liable to a penalty not exceeding twenty pounds.

37. It shall be lawful for the master or other officer of any duly surveyed passenger steamer, and for all persons called by him to his assistance, to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this act, and whose name and address are unknown to such officer, and to convey such offender with all convenient despatch before some justice without any warrant or other authority than this act; and such justice shall have jurisdiction to try the case, and shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender.

38. The provisions of the 329th section of the principal act shall extend to foreign ships when within the limits of the United Kingdom.

Pilotage (Part V. of Merchant Shipping Act, 1854.)

39. Whereas it is enacted by the principal act that every pilotage authority shall have power, in manner and

heard of, or at such later time as the court hearing the case may think probable :

- (3.) The production out of the custody of the Registrar-General of Seamen or of the Board of Trade of any duplicate agreement or list of the crew made out at the time of the last departure of the ship from the United Kingdom, or of a certificate purporting to be a certificate from a consular or other public officer at any port abroad, stating that certain seamen or apprentices were shipped in the ship from the said port, shall, in the absence of proof to the contrary, be sufficient proof that the seamen or apprentices therein named were on board at the time of the loss :
- (4.) The Board of Trade shall deal with such wages in the manner in which they deal with the wages of other deceased seamen and apprentices under the principal act.

22. 'Whereas under the 211th and 212th sections of the principal act, and the 16th section of "The Merchant Shipping Act Amendment Act, 1855," provision is made for relieving and sending home seamen found in distress abroad: And whereas doubts are entertained whether power exists under the said sections of making regulations and imposing conditions which are necessary for the prevention of desertion and misconduct and the undue expenditure of public money: Be it enacted, and it is hereby declared, that the claims of seamen to be relieved or sent home in pursuance of the said sections or any of them shall be subject to such regulations and dependent on such conditions as the Board of Trade may from time to time make or impose; and no seaman shall have any right to demand to be relieved or sent home except in the cases and to the extent provided for by such regulations and conditions.

23. The following rules shall be observed with respect to the cancellation and suspension of certificates; that is to say,—

- (1.) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the Local Marine Board, Magistrates, Naval Court, Admiralty Court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade:
- (2.) Such power shall extend to cancelling or suspending the certificates of engineers in the same manner as if "certificated engineer" or "certificated engineers" were inserted throughout such section after "master" or "masters":
- (3.) Every such board, court, or tribunal shall, at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence, to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their report:
- (4.) It shall be lawful for the Board of Trade, if they think the justice of the case require it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade in place of any certificate which has been cancelled or suspended:
- (5.) The 434th and 437th sections of the principal act shall be read as if for the word "nautical" were substituted the words "nautical or engineering," and as if for the word "person" and "assessor" respectively were substituted the words "person or persons" and "assessor or assessors" respectively:
- (6.) No certificate shall be cancelled or suspended under

this section unless a copy of the report of a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, nor, in the case of investigations conducted by justices or a stipendiary magistrate, unless one assessor at least expresses his concurrence in the report.

24. Every master, or mate, or engineer, whose certificate is or is to be suspended or cancelled in pursuance of this act shall, upon demand of the board, court, or tribunal by which the case is investigated or tried, deliver his certificate to them, or if it is not demanded by such board, court, or tribunal, shall, upon demand, deliver it to the Board of Trade, or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds.

Safety (Part IV. of Merchant Shipping Act, 1854.)

25. On and after the first day of June, one thousand eight hundred and sixty-three, or such later day as may be fixed for the purpose by order in council, the regulations contained in the table marked (C.) in the schedule hereto shall come into operation and be of the same force as if they were enacted in the body of this act; but her Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by order in council, annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution thereof; and any alterations in or additions to such regulations made in manner aforesaid shall be of the same force as the regulations in the said schedule.

26. The Board of Trade shall cause the said regulations and any alterations therein or additions thereto hereafter to be made to be printed, and shall furnish a copy thereof to any owner or master of a ship who applies for the same; and production of the gazette in which any order in council containing such regulations or any alterations therein or additions thereto is published, or of a copy of such regulations, alterations, or additions, signed or purporting to be signed by one of the secretaries or assistant secretaries of the Board of Trade, or sealed or purporting to be sealed with the seal of the Board of Trade, shall be sufficient evidence of the due making and purport of such regulations, alterations, or additions.

27. All owners and masters of ships shall be bound to take notice of all such regulations as aforesaid, and shall, so long as the same continue in force, be bound to obey them, and to carry and exhibit no other lights and to use no other fog signals than such as are required by the said regulations; and in case of wilful default, the master, or the owner of the ship if it appear that he was in such fault, shall, for each occasion upon which such regulations are infringed, be deemed to be guilty of a misdemeanor.

28. In case any damage to person or property arises from the non-observance by any ship of any regulation made by or in pursuance of this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

29. If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

30. The following steps may be taken in order to enforce compliance with the said regulations; that is to say,

- (1.) The surveyors appointed under the third part of the principal act, or such other persons as the Board of Trade may appoint for the purpose, may inspect any ships for the purpose of seeing that such ships are properly provided with lights and with the means of making fog signals in pursuance of the said regulations, and shall for that

purpose have the powers given to inspectors by the 14th section of the principal act:

- (2.) If any such surveyor or person finds that any ship is not so provided, he shall give to the master or owner notice in writing, pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same:
- (3.) Every notice so given shall be communicated in such manner as the Board of Trade may direct to the Collector or Collectors of Customs at any port or ports from which such ship may seek to clear or at which her transire is to be obtained; and no collector to whom such communication is made shall clear such ship outwards or grant her a transire, or allow her to proceed to sea, without a certificate under the hand of one of the said surveyors or other persons appointed by the Board of Trade as aforesaid, to the effect that the said ship is properly provided with lights and with the means of making fog signals in pursuance of the said regulations

31. Any rules concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any local act, shall continue and be of full force and effect notwithstanding anything in this act or in the schedule thereto contained.

32. In the case of any harbour, river, or other inland navigation for which such rules are not and cannot be made by or under the authority of any local act, it shall be lawful for her Majesty in council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or, if there is no such harbour trust or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules, when so made, shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in table (C) in the schedule to this act, notwithstanding anything in this act or in the schedule thereto contained.

33. In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision:

In case he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended.

34. Notwithstanding anything in the 311th section of the principal act contained, it shall not be necessary for the surveys of passenger steamers to be made in the months of *April and October*; but no declaration shall be given by any surveyor under the fourth part of the said act for a period exceeding six months, and no certificate issued by the Board of Trade shall remain in force more than six months from the date thereof.

35. The following offenders, that is to say,

- (1.) Any person who, being drunken or disorderly, has been on that account refused admission into any duly surveyed passenger steamer by the owner or any person in his employ, and who, after having had the amount of his fare (if he has paid the same) returned or tendered to him, nevertheless persists in attempting to enter such steamer;

- (2.) Any person who being drunken or disorderly on board any such steamer is requested by the owner or any person in his employ to leave the same at any place in the United Kingdom at which he can conveniently so do, and who, having had the amount of his fare (if he has paid the same) returned or tendered to him, refuses to comply with such request;
- (3.) Any person on board any such steamer who after warning by the master or any other officer of the steamer molests or continues to molest any passenger;
- (4.) Any person who, after having been refused admission into any such steamer by the owner or any person in his employ on account of such steamer being full, and who after having had the full amount of his fare (if he has paid the same) returned or tendered to him, nevertheless persists in attempting to enter the same;
- (5.) Any person having got on board any such steamer, who, upon being requested on the like account by the owner or any person in his employ to leave such steamer before the same has quitted the place at which such person got on board, and who upon having the full amount of his fare (if he has paid the same) returned or tendered to him, refuses to comply with such request;
- (6.) Any person who travels or attempts to travel in any such steamer without having previously paid his fare, and with intent to avoid payment thereof;
- (7.) Any person who having paid his fare for a certain distance, knowingly and wilfully proceeds in any such steamer beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof;
- (8.) Any person who knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit any such steamer; and
- (9.) Any person on board any such steamer who does not when required by the master or other officer of such steamer either pay his fare or exhibit such ticket or other receipt (if any) showing the payment of his fare as is usually given to persons travelling by and paying their fare for such steamer;

Shall for every such offence be liable to a penalty not exceeding forty shillings; but such liability shall not prejudice the recovery of any fare payable by him.

36. Any person on board any such steamer who wilfully does or causes to be done anything in such a manner as to obstruct or injure any part of the machinery or tackle of such steamer, or to obstruct, impede, or molest the crew or any of them in the navigation or management of such steamer, or otherwise in the execution of their duty upon or about such steamer, shall for every such offence be liable to a penalty not exceeding twenty pounds.

37. It shall be lawful for the master or other officer of any duly surveyed passenger steamer, and for all persons called by him to his assistance, to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this act, and whose name and address are unknown to such officer, and to convey such offender with all convenient despatch before some justice without any warrant or other authority than this act; and such justice shall have jurisdiction to try the case, and shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender.

38. The provisions of the 329th section of the principal act shall extend to foreign ships when within the limits of the United Kingdom.

Pilotage (Part V. of Merchant Shipping Act, 1854.)

39. Whereas it is enacted by the principal act that every pilotage authority shall have power, in manner and

subject to the conditions therein mentioned, to do the following things; (that is to say)

- * To exempt the masters of any ships or of any classes of ships from being compelled to employ qualified pilots:
 - * To lower and modify the rates and prices or other remuneration to be demanded and received for the time being by pilots licensed by such authority:
 - * To make arrangements with any other pilotage authority for altering the limits of their respective districts, and for extending the powers of such other authority, and transferring its own powers to such last-mentioned authority:
- 'And whereas it is expedient that increased facilities should be given for effecting the objects contemplated by the said recited enactments, and for further amending the law concerning pilotage, and that in so doing means should be afforded for paying due regard to existing interests and to the circumstances of particular cases: Be it enacted, That it shall be lawful for the Board of Trade, by provisional order, to do the following things; that is to say,

- (1.) Whenever any pilotage authority residing or having its place of business at one port has or exercises jurisdiction in matters of pilotage in any other port, to transfer so much of the said jurisdiction as concerns such last-mentioned port to any harbour trust or other body exercising any local jurisdiction in maritime matters at the last-mentioned port or to any body to be constituted for the purpose by the provisional order, or, in cases where the said pilotage authority is not the *Trinity House of Deptford Strond*, to the said *Trinity House*; or to transfer the whole or any part of the jurisdiction of the said pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order, so as to represent the interests of the several ports concerned:
- (2.) To make the body corporate or persons to whom the said transfer is made a pilotage authority within the meaning of the principal act, with such powers for the purpose as may be in the provisional order in that behalf mentioned:

To determine the limits of the district of the pilotage authority to which the transfer of jurisdiction is made;

To sanction a scale of pilotage rates to be taken by the pilots to be licensed by the last-mentioned pilotage authority:

To determine to what extent and under what conditions any pilots already licensed by the former pilotage authority shall continue to act under the new pilotage authority:

To sanction arrangements for the apportionment of any pilotage funds belonging to the pilots licensed by the former pilotage authority between the pilots remaining under the jurisdiction of that authority and the pilots who are transferred to the jurisdiction of the new authority:

To provide for such compensation or superannuation as may be just to officers employed by the former pilotage authority and not continued by the new authority:
- (3.) To constitute a pilotage authority and to fix the limits of its district in any place in the United Kingdom where there is no such authority; so, however, that in the new pilotage districts so constituted there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots:
- (4.) To exempt the masters and owners of all ships, or of any classes of ships, from being obliged to employ pilots in any pilotage district or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them in any district or in any part of any pilotage district, and to annex any terms and conditions to such exemptions:

(5.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to licence pilots and fix pilotage rates for any part of the district within the jurisdiction of such authority for which no such licences or rates now exist:

(6.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to raise all or any of the pilotage rates now in force in the district or any part of the district within the jurisdiction of such authority:

(7.) In cases where the pilotage is not compulsory, and where there is no restriction on the number of pilots, or on the power of duly qualified persons to obtain licences as pilots, to give additional facilities for the recovery of pilotage rates and for the prevention of the employment of unqualified pilots:

(8.) To give facilities for enabling duly qualified persons after proper examination as to their qualifications, to obtain licences as pilots.

40. The following rules shall be observed with respect to provisional orders made in pursuance of this act:

1. Application in writing for such order shall be made to the Board of Trade by some persons interested in the pilotage of the district or in the operation of the laws or regulations relating to such pilotage.
 2. Notice of such application having been made shall be published once at the least in each of two successive weeks in the month immediately succeeding the time of such application in the *Shipping Gazette*, and in some newspaper or newspapers circulating in the county, or, if there are more than one, in the counties adjacent to the pilotage district to be affected by the order:
 3. The notice so published shall state the objects which it is proposed to effect by the provisional order:
 4. The Board of Trade on receiving the application shall refer the same to the pilotage authority or authorities of the district, and shall receive and consider any objections which may be made to the proposed provisional order, and shall for that purpose allow at least six weeks to elapse between the time of referring the application to the pilotage authority and the time of making the provisional order:
 5. The Board of Trade shall, after considering all objections, determine whether to proceed with the provisional order or not; and shall, if they determine to proceed with it, settle it in such manner and with such terms and conditions, not being inconsistent with the provisions of this act, as they may think fit; and shall, when they have settled the same, forward copies thereof to the persons making the application and to the pilotage authority or authorities of the district or districts to which it refers:
 6. No such provisional order shall take effect unless and until the same is confirmed by Parliament; and for the purpose of procuring such confirmation the Board of Trade shall introduce into Parliament a public general bill, or public general bills, in which, or in the schedule to which, the provisional order or provisional orders to be thereby confirmed shall be set out at length:
 7. If any petition is presented to either House of Parliament against any such provisional order as aforesaid in the progress through Parliament of the bill confirming the same, so much of the bill as relates to the order so petitioned against may be referred to a select committee, and the petitioner shall in such case be allowed to appear and oppose as in the case of private bills
41. The masters and owners of ships passing through

the limits of any pilotage district in the United Kingdom on their voyages between two places both situate out of such districts shall be exempted from any obligation to employ a pilot within such district, or to pay pilotage rates when not employing a pilot within such district: Provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or at any place situate above such district on the same river or its tributaries.

42. 'Whereas under the provisions of the *Bristol Channel Pilotage Act, 1861*, pilotage authorities have been established at the ports of *Newport* and *Gloucester*, and the pilots theretofore licensed by the *Trinity House of Depiford Strond* for those parts have ceased to be so licensed: And whereas no provision has been made by the said act for dealing with such interests as the said pilots may have in the *Trinity House Pilot Fund* mentioned in the principal act: Be it therefore enacted, That, notwithstanding the said pilots have ceased to be licensed by the *Trinity House*, the *Trinity House* may make such an equitable arrangement in the administration of the *Trinity House Pilot Fund* mentioned in the principal act with reference to the interests of the pilots so ceasing to be licensed by them as aforesaid as they may in their discretion think fit.

Lighthouses (Part VI. of Merchant Shipping Act, 1854).

43. The following rules shall be observed with respect to the inspection of local lighthouses, buoys, and beacons; that is to say,

- (1) It shall be the duty of each of the general lighthouse authorities, or of such persons as may be authorized by such authority for the purpose, to inspect all lights, buoys, and beacons situate within the limits of the jurisdiction of such general authority, but belonging to or under the jurisdiction of any local authorities, and to make such inquiries in respect thereof and of the management thereof as they may think fit:
- (2) All officers and others having the care of such lighthouses, buoys, or beacons, or concerned in the management thereof, shall furnish all such information and explanations concerning the same as they may require:
- (3) All such local authorities and their respective officers shall at all times give to the inspecting authority all such returns, explanations, or information concerning the lighthouses, buoys, and beacons within their jurisdiction, and the management thereof, as the said authority may from time to time require:
- (4) The inspecting authority shall communicate to each local authority the results of its inspection of the lighthouses, buoys, and beacons within its jurisdiction, and shall also make general reports of the results of its inspection of local lighthouses, buoys, and beacons to the Board of Trade; and such reports shall be laid before Parliament:
- (5) The powers given by the 394th section of the Principal Act to the general lighthouse authorities shall, so far as the same are applicable, extend and apply to the case of local buoys and beacons, other than local buoys and beacons placed or erected for temporary purposes, as well as to the case of local lighthouses:

44. The following persons shall be liable to pay light dues for any ship in respect of which light dues are payable: (that is to say), the owner or master, or such consignees or agents thereof as have paid or made themselves liable to pay any other charge on account of such ship in the port of her arrival or discharge, and in default of payment such light dues may be recovered in the same manner as penalties of the like amount may be recovered by virtue of the principal act.

45. Every consignee and agent (not being the owner or master) hereby made liable for the payment of light dues

in respect of any ship, may out of any monies in his hands received on account of such ship, or belonging to the owner thereof, retain the amount of all dues so paid by him, together with any reasonable expenses he may have incurred by reason of such payment or liability.

46. If any lighthouse, buoy, or beacon is erected or placed, or reconstructed, repaired, or replaced by any local authority having jurisdiction in the matter of lighthouses, buoys, or beacons, her Majesty may, on the application of the said local authority, by order in council fix such dues to be paid to the said local authority in respect of every ship which enters the port or harbour under the jurisdiction of such local authority or the estuary wherein such lighthouse, buoy, or beacon is situate, and which passes the said lighthouse, buoy, or beacon, and derives benefit therefrom, as her Majesty may deem reasonable:

The dues for the time being fixed by any such order in council as aforesaid shall be paid accordingly by the master of the said ship or other person or persons by whom the said light dues, if levied by one of the general lighthouse authorities, would be payable, and shall be recoverable in the same manner as light dues payable to such general authorities are recoverable.

47. All light dues leviable by any local authority under this act shall be applied for the purposes of the construction, placing, maintenance, and improvement of the lighthouses, buoys, and beacons in respect of which the same are levied, and for no other purpose:

The local authority to whom the same are paid shall keep a separate account of the receipt and expenditure of such dues, and shall once in every year, or at such other time as the Board of Trade may determine, send a copy of such account to the Board of Trade, and shall send the same in such form and shall give such particulars in relation thereto as the Board of Trade may require:

Her Majesty may by order in council from time to time reduce, alter, or increase all or any of such dues, so that the same may, so far as it is practicable, be sufficient and not more than sufficient for the payment of the expenses incurred by the local authority in respect of the lighthouses, buoys, or beacons for which the dues are levied.

48. The 431st section of the principal act shall be read as if after the word "ships" there were inserted the words "and boats."

Wreck and Salvage (Part VIII of Merchant Shipping Act, 1854).

49. The provisions contained in the eighth part of the Principal Act for giving summary jurisdiction to two justices in salvage cases and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows; (that is to say):

- (1.) Such provision shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal act.
- (2.) Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not:
- (3.) It shall be lawful for one of her Majesty's principal secretaries of state, or in *Ireland* for the Lord Lieutenant or other chief governor or governors, to appoint out of the justices for any borough or county a rota of justices by whom jurisdiction in salvage cases shall be exercised:
- (4.) When no such rota is appointed, it shall be lawful for the salvors, by writing addressed to the justice's clerk, to name one justice, and for the owner of the property saved in like manner to name the other:
- (5.) If either party fails to name a justice within a reasonable time, the case may be tried by two or more justices at petty sessions:
- (6.) It shall be competent for any stipendiary magistrate, and also in *England* for any county court judge, in *Scotland* for the sheriff or sheriff sub-

stitute of any county, and in *Ireland* for the recorder of any borough in which there is a recorder, or for the chairman of quarter sessions in any county, to exercise the same jurisdiction in salvage cases as is given to two justices :

(7.) It shall be lawful for one of her Majesty's principal Secretaries of State to determine a scale of costs to be awarded in salvage cases by any such justices or court as aforesaid :

(8.) All the provisions of the principal act relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in such cases, shall, except so far as the same are altered by this act, extend and apply to all such proceedings, whether under the principal act or this act, or both of such acts.

50. Whenever any salvage question arises the receiver of wreck for the district may, upon application from either of the parties, appoint a valuer to value the property in respect of which the salvage claim is made, and shall, when the valuation has been returned to him, give a copy of the valuation to both parties ; and any copy of such valuation, purporting to be signed by the valuer, and to be attested by the receiver, shall be received in evidence in any subsequent proceeding ; and there shall be paid in respect of such valuation, by the party applying for the same, such fee as the Board of Trade may direct.

51. The words " court of session " in the four hundred and sixty-eighth section of the principal act shall be deemed to mean and include either division of the court of session or the Lord Ordinary officiating on the hills during vacation.

52. Upon delivery of wreck or of the proceeds of wrecks by any receiver to any person in pursuance of the provisions of the eighth part of the principal act such receiver shall be discharged from all liability in respect thereof, but such delivery shall not be deemed to prejudice or affect any question concerning the right or title to the said wreck which may be raised by third parties, nor shall any such delivery prejudice or affect any question concerning the title to the soil on which the wreck may have been found.

53. ' Whereas by the principal act it is provided that the proceeds of wreck, if the same is not claimed by the owner within a year, and if no person other than her Majesty, her heirs and successors, is proved to be entitled thereto, shall, subject to certain deductions, be paid into the receipt of her Majesty's Exchequer in such manner as the Commissioners of the Treasury may direct, and that the same shall be carried to and form part of the consolidated fund of the United Kingdom :

' And whereas doubts have been entertained whether the said last-recited provision is consistent with the arrangements concerning the hereditary revenues of the Crown effected by the act of the first year of her present Majesty, chapter two : And whereas doubts have also been entertained whether due provision is made by the said act for paying to the revenues of the duchies of *Lancaster* and *Cornwall* respectively such of the said proceeds as may belong to those duchies :

It is hereby declared, That such of the said proceeds of wreck as belong to her Majesty in right of her crown shall, during the life of her present Majesty (whom God long preserve), be carried to and form part of the consolidated fund of the United Kingdom, and shall after the decease of her present Majesty (whom God long preserve) be payable and paid to her Majesty's heirs and successors :

And it is hereby further declared, That such of the said proceeds of wreck as belong to her Majesty in right of her duchy of *Lancaster* shall be paid to the receiver-general of the said duchy or his sufficient deputy or deputies as part of the revenues of the said duchy and be dealt with accordingly :

And it is hereby further declared and enacted, That the provision in the principal act contained regarding the sale of unclaimed wreck to which no owner establishes his claim within the period of one year, and to which no ad-

miral, vice admiral, lord of any manor, or person other than her Majesty, her heirs and successors, is proved to be entitled, is intended and shall be construed to apply to wreck of the sea belonging to her Majesty, her heirs and successors, in respect of the duchy of *Cornwall*, or to the Duke of *Cornwall*, for the time being in respect of his duchy of *Cornwall*: But that the proceeds of such wreck shall, subject to such deductions as are in the same act mentioned, form part of the revenues of the duchy of *Cornwall*, and be dealt with accordingly.

Liability of Shipowners (Part IX. of Merchant Shipping Act, 1854).

54. The owners of any ship, whether *British* or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship ;

(2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship ;

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat ;

(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat :

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage ; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage ; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room :

In the case of any foreign ship which has been or can be measured according to *British* law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship :

In the case of any foreign ship which has not been and cannot be measured under *British* law, the surveyor-general of tonnage in the United Kingdom, and the chief measuring officer in any *British* possession abroad, shall, on receiving from or by direction of the court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would in his opinion have been the tonnage of such ship if she had been duly measured according to *British* law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship.

55. Insurances effected against any or all of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk.

56. In any proceeding under the 506th section of the principal act or any act amending the same against the owner of any ship or share therein in respect of loss of life, the master's list or the duplicate list of passengers delivered to the proper officer of customs under the 16th section of " The Passengers Act, 1855," shall, in the absence of proof to the contrary, be sufficient proof that the persons in respect of whose death any such prosecution or proceeding is instituted were passengers on board such ship at the time of their deaths.

Arrangements concerning Lights, Sailing rules, Salvage, and Measurement of Tonnage in the Case of Foreign Ships.

57. Whenever foreign ships are within *British* jurisdiction, the regulations for preventing collision contained in

table (C.) in the schedule to this act, or such other regulations for preventing collision as are for the time being in force under this act, and all provisions of this act relating to such regulations, or otherwise relating to collisions, shall apply to such foreign ships; and in any cases arising in any *British* court of justice concerning matters happening within *British* jurisdiction, foreign ships shall, so far as regards such regulations and provisions, be treated as if they were *British* ships.

58. Whenever it is made to appear to her Majesty that the government of any foreign country is willing that the regulations for preventing collision contained in table (C.) in the schedule to this act, or such other regulations for preventing collision as are for the time being in force under this act, or any of the said regulations, or any provisions of this act relating to collisions, should apply to the ships of such country when beyond the limits of *British* jurisdiction, her Majesty may, by order in council, direct that such regulations, and all provisions of this act which relate to such regulations, and all such other provisions as aforesaid, shall apply to the ships of the said foreign country, whether within *British* jurisdiction or not.

59. Whenever it is made to appear to her Majesty that the government of any foreign country is willing that salvage shall be awarded by *British* courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of *British* jurisdiction, her Majesty may, by order in council, direct that the provisions of the principal act and of this act, with respect to salvage for services rendered in saving life from *British* ships, shall in all *British* courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within *British* jurisdiction or not.

60. Whenever it is made to appear to her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal act have been adopted by the government of any foreign country, and are in force in that country, it shall be lawful for her Majesty, by order in council, to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers; and thereupon it shall no longer be necessary for such ships to be re-measured in any port or place in her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of *British* ships is deemed to be the tonnage of such ships.

61. Whenever an order in council has been issued under this act, applying any provision of this act or any regulation made by or in pursuance of this act to the ships of any foreign country, such ships shall in all cases arising in any *British* court be deemed to be subject to such provision or regulation, and shall for the purpose of such provision or regulation, be treated as if they were *British* ships.

62. In issuing any order in council under this act her Majesty may limit the time during which it is to remain in operation, and may make the same subject to such conditions and qualifications, if any, as may be deemed expedient, and thereupon the operation of the said order shall be limited and modified accordingly.

63. Her Majesty may by order in council from time to time revoke or alter any order previously made under this act.

64. Every order in council to be made under this act shall be published in the *London Gazette* as soon as may be after the making thereof; and the production of a copy of the *London Gazette* containing such order shall be received in evidence, and shall be proof that the order therein published has been duly made and issued; and it shall not be necessary to plead such order specially.

Legal Procedure.

65. Nothing in the third section of the act passed in the twentieth and twenty-first years of the reign of her present Majesty, chapter forty-three, except as much

thereof as provides for the payment of any fees that may be due to the clerk of the justices, shall be deemed to apply to extend to any proceeding under the direction of the Board of Trade, or under or by virtue of the provisions of the principal act or this act, or any act amending the same.

Delivery of Goods and Lien for Freight.

66. The following terms used in the sections of this act hereinafter contained shall have the respective meanings hereby assigned to them, if not inconsistent with the context or subject matter; that is to say,

The word "report" shall mean the report required by the customs laws to be made by the master of any importing ship:

The word "entry" shall mean the entry required by the customs laws to be made for the landing or discharge of goods from an importing ship:

The word "goods" shall include every description of wares and merchandise:

The word "wharf" shall include all wharves, quays, docks, and premises in or upon which any goods when landed from ships may be lawfully placed:

The word "warehouse" shall include all warehouses, buildings, and premises in which goods when landed from ships may be lawfully placed:

The expression "wharf owner" shall mean the occupier of any wharf, as herein-before defined:

The expression "warehouse owner" shall mean the occupier of any warehouse, as herein-before defined:

The word "shipowner" shall include the master of the ship and every other person authorized to act as agent for the owner, or entitled to receive the freight, demurrage, or other charges payable in respect of such ship:

The expression "owner of goods" shall include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien.

67. Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times, in the manner, and subject to the conditions following; (that is to say,)

(1.) If a time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the time so expressed;

(2.) If no time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a *Sunday* or holiday, after the report of the ship;

(3.) If any wharf or warehouse is named in the charter party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently there received, the shipowner in landing them by virtue of this enactment shall cause them to be placed on such wharf or in such warehouse:

(4.) In other cases the shipowner in landing goods by virtue of this enactment shall place them in or on some wharf or warehouse on or in which goods of a like nature are usually placed; such wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the Commissioners of Customs for the landing of dutiable goods:

(5.) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner:

(6.) If any goods are, for the purpose of convenience in

assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner:

- (7.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery and has also failed at the time of such offer to give the owner of the goods correct information of the time at which goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense.

68. If, at the time when any goods are landed from any ship, and placed in the custody of any person as a wharf or warehouse owner, the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharf or warehouse owner receiving such goods shall retain them until the lien is discharged as herein-after mentioned, and shall, if he fail so to do, make good to the shipowner any loss thereby occasioned to him.

69. Upon the production to the wharf or warehouse owner of a receipt for the amount claimed as due, and delivery to the wharf or warehouse owner of a copy thereof or of a release of freight from the shipowner, the said lien shall be discharged.

70. The owner of the goods may deposit with the wharf or warehouse owner a sum of money equal in amount to the sum so claimed as aforesaid by the shipowner, and thereupon the lien shall be discharged; but without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

71. If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does not within fifteen days after making it give to the wharf or warehouse owner notice in writing to retain it, stating in such notice the sum, if any, which he admits to be payable to the ship owner, or, as the case may be, that he does not admit any sum to be so payable, the wharf or warehouse owner may, at the expiration of such fifteen days pay the sum so deposited over to the shipowner, and shall by such payment be discharged from all liability in respect thereof.

72. If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does within fifteen days after making it give to the wharf or warehouse owner such notice in writing as aforesaid, the wharf or warehouse owner shall immediately apprise the shipowner of such notice, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by such notice to be payable, and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the said notice; and at the expiration of such thirty days,

unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof.

73. If the lien is not discharged, and no deposit is made as herein-before mentioned, the wharf or warehouse owner may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as he in his discretion thinks fit, sell by public auction, either for home use or exportation, the said goods or so much thereof as may be necessary to satisfy the charges herein-after mentioned.

74. Before making such sale the wharf or warehouse owner shall give notice thereof by advertisement in two newspapers circulating in the neighbourhood, or in one daily newspaper published in London and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner, or is otherwise known to him, give notice of the sale to the owner of the goods by letter sent by the post; but the title of a *bonâ fide* purchaser of such goods shall not be invalidated by reason of the omission to send notice as herein-before mentioned, nor shall any such purchaser be bound to inquire whether such notice has been sent.

75. In every case of any such sale as aforesaid the wharf or warehouse owner shall apply the monies received from the sale as follows, and in the following order:

1. If the goods are sold for home use in payment of any customs or excise duties owing in respect thereof:
2. In payment of the expenses of the sale:
3. In the absence of any agreement between the wharf or warehouse owner and the ship owner concerning the priority of their respective charges, in payment of the rent, rates, and other charges due to the wharf or warehouse owner in respect of the said goods:
4. In payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods:
5. But in case of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their respective charges, then such charges shall have priority according to the terms of such agreement;

and the surplus, if any, shall be paid to the owner of the goods.

76. Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses.

77. Nothing in this act contained shall compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if this act had not passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this act.

78. Nothing in this act contained shall take away or abridge any powers given by any local act to any harbour trust, body corporate, or persons whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods; nor shall anything in this act contained take away or diminish any rights or remedies given to any shipowner or wharf or warehouse owner by any local act.

The SCHEDULE referred to in this act.

TABLE (A.) See Sect. 2.

Enactments to be repealed.

Reference to Act.	Title of Act.	Extent of Repeal.
8 & 9 Vict., c. 91.	An Act for the warehousing of goods.	Section 51 to be repealed immediately on the passing of this act.
16 & 17 Vict., c. 107.	Customs Consolidation Act, 1853.	The last proviso in section 74, and sections 170, 171, and 172, to be repealed immediately on the passing of this act.
17 & 18 Vict., c. 104.	Merchant Shipping Act, 1854	Sections 295, 296, 297, 298, 299, to be repealed from the date at which the regulations contained in table C. in this schedule come into operation. Sections 300, 323, 323, 504, and 505 to be repealed immediately on the passing of this act.
19 & 20 Vict., c. 75.	An Act for the further Alteration and Amendment of the Laws and Duties of Customs.	Section 8 to be repealed immediately on the passing of this act.

TABLE (B.) See Sect. 6.

Fees to be charged on Examination of Engineers.

For a first-class engineers certificate	- £2 0 0
For a second-class engineers certificate	- 1 0 0

TABLE (C.) See Sect. 25.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
CONTENTS.

Article 1. Preliminary.

Rules concerning Lights.

2. Lights to be carried as follows:
3. Lights for steam ships.
4. Lights for steam tugs.
5. Lights for sailing ships.
6. Exceptional lights for small sailing vessels.
7. Lights for ships at anchor.
8. Lights for pilot vessels.
9. Lights for fishing vessels and boats.

Rules concerning Fog Signals.

10. Fog signals.

Steering and Sailing Rules.

11. Two sailing ships meeting.
12. Two sailing ships crossing.
13. Two ships under steam meeting.
14. Two ships under steam crossing.
15. Sailing ship and ship under steam.
16. Ships under steam to slacken speed.
17. Vessels overtaking other vessels.
18. Construction of articles 12, 14, 15, and 17.
19. Proviso to save special cases.
20. No ship under any circumstances to neglect precautions.

Preliminary.

Art. 1. In the following rules every steam ship which is under sail and not under steam is to be considered a sailing ship; and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights

Art. 2. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

Art. 3. Seagoing steamships when under weigh shall carry:

(a.) *At the foremast head*, a bright white light so fixed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least five miles.

(b.) *On the starboard side*, a green light so constructed as to throw an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw light from right ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles:

(c.) *On the port side*, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles:

(d.) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. Steam ships when towing other ships shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam ships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steam ships are required to carry.

Art. 5. Sailing ships under weigh or being towed shall carry the same lights as steam ships under weigh, with the exception of the white mast-head lights, which they shall never carry.

Art. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck on their respective sides of the vessel ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, they shall each be painted outside with the colour of the light they respectively contain, and shall be provided with suitable screens.

Art. 7. Ships, whether steam ships or sailing ships, when at anchor in roadsteads or fairways, shall between sunrise and sunset exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon, and at a distance of at least one mile.

Art. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast-head visible all round the horizon,—and shall also exhibit a flare-up light every fifteen minutes.

Art. 9. Open fishing boats and other open boats shall not be required to carry side lights required for other vessels; but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side; and on the approach of or to other vessels such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

Fishing vessels and open boats when at anchor or attached to their nets and stationary shall exhibit a bright white light.

Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition if considered expedient.

Rules concerning Fog Signals.

Art. 10. Whenever there is fog, whether by day or night, the fog signals described below shall be carried and used, and shall be sounded at least every five minutes, viz.—

(a.) Steam ships under weigh shall use a steam whistle placed before the funnel not less than eight feet from the deck.

(b.) Sailing ships under weigh shall use a fog horn.

(c.) Steam ships and sailing ships when not under weigh shall use a bell.

Steering and Sailing Rules.

Art. 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. 12. When two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Art. 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 15. If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship.

Art. 16. Every steam ship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam ship shall, when in a fog, go at a moderate speed.

Art. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. 18. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following articles.

Art. 19. In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

Art. 20. Nothing in these rules shall exonerate any ship or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

CAP. LXIV.

An Act for the better Protection of Her Majesty's Naval and Victualling Stores. [29th July, 1862.]

CAP. LXV.

An Act for the more speedy Trial of certain Homicides committed by Persons subject to the Mutiny Act. [29th July, 1862.]

Sec. 1. *The Queen's Bench or a judge may order certain prisoners to be indicted and tried under the provisions of this act.*

2. *And upon such order the prisoner shall be re-*

moved to the Gaol of Newgate in London or the Richmond Bridewell in Dublin, and the depositions, &c., returned to the court at which the prisoner is to be indicted.

3. *A prisoner removed may be indicted and tried in London or Dublin.*

4. *A certificate of his removal under this act and of the cause of his committal shall be endorsed on the indictment.*

5. *When indorsement to be amended.*

6. *Indictment need not follow the commitment.*

7. *No objection to be taken to any order, and no proof to be required of the subjection of any person to the Mutiny Act.*

8. *Any person convicted may be sentenced to be punished either in the county where the offence was committed or within the jurisdiction of the court by which he shall be tried.*

9. *On notice given by prosecutor, recognizances to bind parties to give evidence at the inquiry and trial.*

10. *Power to compel witnesses to attend trials.*

11. *Expenses of prosecution and rewards may be ordered to be paid.*

12. *Power to order payment of expenses of prisoner's witnesses.*

13. *No proof to be required of due removal of prisoner. Verdicts and judgments to be valid.*

14. *The prisoner may be removed to and from the Central Criminal Court as often as necessary.*

15. *Court before which indictment found to have the same authority as if the offence had been committed within its jurisdiction.*

16. *Sections 21, 27, and 28 of 19 Vic. c. 16 extended to this act.*

17. *Prosecutors and witnesses may be bound by recognizances to appear again before the said court.*

18. *Her Majesty in Council may make rules for purposes of this act.*

19. *Act not to affect any Peer.*

20. *Interpretation of terms.*

21. *Short title.*

Whereas it is expedient that persons subject to the present or any future Mutiny Act who shall be guilty of the murder or manslaughter of any person subject to the said act or acts should be brought to speedy punishment, and that the offences of such persons should in certain cases be inquired of and tried with all convenient speed, and that the inquiry, trial, and punishment should in certain cases be more speedy than the usual course of practice in respect of the times of issuing her Majesty's commissions of Oyer and Terminer or gaol delivery will allow: and whereas it would contribute to the more speedy punishment of persons guilty thereof, and to the maintenance of good order and military discipline, if, when charged with murder or manslaughter committed in *England or Wales*, and out of the jurisdiction of the Central Criminal Court, such persons were rendered liable to be indicted and tried at the Central Criminal Court, and if when charged with murder or manslaughter committed in *Ireland* and elsewhere than in the county of the city of *Dublin* or the county of *Dublin*, such persons were rendered liable to be indicted and tried before and by the commissioners appointed by virtue of any commission of Oyer and Terminer or of gaol delivery under the great seal of *Ireland* for the county of the city of *Dublin*: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Whenever any person shall have been committed for any murder or manslaughter committed or supposed to have been committed at any place in *England or Wales*, and out of the jurisdiction of the Central Criminal Court, or at any place in *Ireland* other than the county of the city of *Dublin* or the county of *Dublin*, and it shall appear to her Majesty's Court of Queen's Bench in that part

of the United Kingdom, wherein the said offence was committed or supposed to have been committed, in Term time, or to any judge thereof, or of any of her Majesty's Superior Courts of Common Law in the same part of the United Kingdom, in vacation, that the said person (hereinafter called the prisoner) was at the time of the commission or supposed commission of the said murder or manslaughter subject to the present or any future Mutiny Act, and that the person (hereinafter called the deceased) for the murder or manslaughter of whom the prisoner shall have been committed was at the time last aforesaid subject to the said act or acts, it shall be lawful for such Court of Queen's Bench in Term time, or for such judge in vacation, without the prisoner being brought or appearing in person before the said court or judge, upon the application of her Majesty's principal Secretary of State for the War Department, and upon his certificate in writing, in the form numbered 1 in the schedule to this act annexed, or to the like effect, duly signed, that it would contribute to the maintenance of good order and military discipline if the said prisoner were to be indicted and tried under the provisions of this act, to order that the said prisoner shall be indicted and tried under the provisions of this act, and such order may be in one of the forms numbered 2 in the schedule to this act annexed, or to the like effect.

2. Whenever any such order shall have been made, the gaoler or keeper of any gaol or house of correction in which the said prisoner shall be confined shall forthwith upon the delivery to him of an office copy of such order, without writ of habeas corpus or other writ for that purpose, cause such prisoner, with his commitment and detainer, to be safely removed to her Majesty's gaol of *Newgate* in the city of *London* if the said prisoner shall be confined in *England* or *Wales*, and to her Majesty's gaol called *Richmond Bridewell* in the county of the city of *Dublin* if the said prisoner shall be confined in *Ireland*, and thereupon the keeper of such gaol shall receive such prisoner into his custody in such gaol, there to remain until he shall be delivered by due course of law; and the justice or coroner by whom the prisoner was committed, or any other person having the custody or possession thereof, shall forthwith upon the delivery to him of an office copy of such order transmit any recognizances, depositions, examinations, or informations relating to the murder or manslaughter mentioned in such order which shall be in his custody or possession to the proper officer of the court at and before which the prisoner shall be rendered liable to be indicted under the provisions of this act, to be by him kept among the records of the court.

3. Whenever any prisoner shall have been removed to the said gaol of *Newgate* in the city of *London* under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed within the jurisdiction of the Central Criminal Court; and whenever any prisoner shall have been removed to the *Richmond Bridewell* in the county of the city of *Dublin* under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed in the county of the city of *Dublin*.

4. Whenever any prisoner so removed to one of the said gaols shall be indicted under the provisions of this act, an office copy of the before-mentioned order of the Court of Queen's Bench, or of a judge, shall be delivered to the proper officer of the court at and before which the prisoner shall be rendered liable to be indicted under the provisions of this act, and such officer shall thereupon, by indorsement on the back of the bill of indictment, before its presentment by the Grand Jury, or by direction of the justices, judges, or commissioners of the court before whom such

indictment shall be tried, or any two or more of them, at any other time, certify that the prisoner was committed for the murder or manslaughter of the deceased, and was removed to the gaol of *Newgate* or the *Richmond Bridewell*, as the case may be, under the provisions of this act; and such endorsement, which may be in the form numbered 3 in the schedule to this act annexed, or to the like effect, and which may be amended by the said last-mentioned justices, judges, or commissioners, or any two or more of them, at any time, and in such manner, and as often as to them shall seem fit, shall be conclusive proof that the said prisoner was committed for the murder or manslaughter of the deceased, and was removed to the said gaol of *Newgate* or the said *Richmond Bridewell* under the provisions of this act; and such indorsement shall not constitute or be deemed or taken to be a portion of the indictment.

5. Whenever any indictment found under the provisions of this act shall be amended in any manner, the before-mentioned indorsement thereon shall, if it be necessary, be amended in the like manner.

6. A prisoner committed for murder may be indicted under the provisions of this act for manslaughter, and a prisoner committed for manslaughter may be indicted under the same provisions for murder.

7. It shall not be lawful for any person, either by himself or his counsel, to take any objection, either in the court at, before, or by which the prisoner shall be indicted, arraigned, tried, convicted, or sentenced under the provisions of this act, or in any Court of Error, to any order of the said Court of Queen's Bench or of any judge, or to any other proceeding under or by virtue of which the prisoner shall have been removed to the gaol of *Newgate* or the *Richmond Bridewell*; and the form of the indictment under the provisions of this act shall be the same as that of indictments for murder or manslaughter committed within the jurisdiction of the court at and before which such prisoner shall be indicted under the provisions of this act; and it shall not be necessary to prove on the trial of the prisoner that either the prisoner or the deceased was or were at the time of the commission or supposed commission of the said murder or manslaughter subject to the provisions of any Mutiny Act; and the prisoner shall not be acquitted by reason only of its appearing that the prisoner or the deceased was not or were not at the time last aforesaid subject to the provisions of any Mutiny Act.

8. When any person shall have been convicted of any offence upon the trial of any indictment found under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the court before which any such conviction shall have taken place, or for any two or more of them, or, in case sentence shall not then be passed, for the justices, judges, or commissioners of the said court, or for any two or more of them, at any subsequent sessions of the said court, to order and adjudge such convict to be punished according to law at any place either within the jurisdiction of the said court or within the county or place where such offence shall have been committed or supposed to have been committed; and in cases where such justices, judges, or commissioners, or any two or more of them, shall order such convict to be punished in such county or place, it shall be lawful for such justices, judges, or commissioners, or any two or more of them, after passing sentence upon such convict, to make an order commanding the keeper of the gaol of *Newgate* or of the *Richmond Bridewell* to cause such convict to be delivered into the custody of the gaoler or keeper of the gaol or house of correction in such county or place, together with such order, and commanding such gaoler or keeper to receive such convict into his custody in such gaol or house of correction, and him there safely to keep until such sentence shall have been executed upon such convict according to law, or until he shall be otherwise delivered by due course of law, and also to make an order commanding the sheriff of such county or place to execute such sentence upon such convict within such county or place according to law in the

same manner as if he had been tried and received such sentence in such county or place; and every such sheriff, gaoler, and keeper respectively is hereby commanded to perform and execute according to law each and everything which he shall be commanded to perform and execute by any such order; and the several forms in the schedule to the act made and passed in the nineteenth year of Queen Victoria, intituled *An Act to empower the Court of Queen's Bench to order certain Offenders to be tried at the Central Criminal Court*, contained, or forms to the like effect, shall be deemed good, valid and sufficient in law, and in the case of any order directed to any sheriff, and commanding him to execute any sentence, it shall be sufficient to deliver such order either to such sheriff or to his under sheriff.

9. Every recognizance which shall be entered into for the prosecution of the prisoner, and every recognizance of any witness to give evidence against him for his said offence, shall, in case any such order shall be made as is mentioned in the first section of this act, be obligatory on each of the parties bound by such recognizance to prosecute and give evidence, and to do all other things mentioned with reference to the said inquiry and trial at the court at or before which the prisoner shall be indicted and tried under the provisions of this act, in like manner as if such recognizance had been originally entered into for prosecuting such offence, or giving evidence, or doing other things before the said last-mentioned court; provided that notice in writing shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the said last-mentioned court upon the inquiry into and trial of the said offence; and the prosecutor is hereby required on notice given to him that such order as is mentioned in the first section of this act has been made, to give such notice or notices in writing as are in this section mentioned.

10. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to issue process to compel the attendance of witnesses, as well on the part of the prosecution as on the part of the defence, on the trial of such indictment, in like manner as in cases of indictments found at the said court for offences committed within the jurisdiction of the said court; and every such process shall and may be lawfully executed at any place in that part of the United Kingdom wherein the gaol to which the prisoner shall have been removed under the provisions of this act shall be situate.

11. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made as to such court may seem reasonable and sufficient, to be paid forthwith by the proper officer of the said court, and such monies shall be repaid to the said officer by the same persons who would have been liable to pay the same, as if such court were holden under commissions of Oyer and Terminer and gaol delivery for the county or place in which the prisoner was committed.

12. Whenever any prisoner shall be tried at any court under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the said court before whom any such prisoner shall be tried, or for any two or more of them, if it shall seem reasonable so to do, to order the payment of the expenses of the witnesses on the part of the defence; and such payment shall be made accordingly, in the same manner in all respects as if such witnesses were witnesses on the part of the prosecution; and the commissioners of her Majesty's treasury shall, upon receipt of such last-mentioned order, and out of any monies provided by Parliament for law charges in *England or Ireland*, as the case may be, repay such sum or sums as shall be therein specified to the person who shall have paid the same.

13. Whenever any such order shall have been made as

is mentioned in the first section of this act, it shall not be necessary for any purpose whatsoever to prove that the prisoner has been duly removed to the gaol of *Newgate* or the *Richmond Bridewell* under the provisions of this act, or that he was committed for the murder or manslaughter of the deceased; and no evidence or proof to the contrary shall be admitted; and every verdict and judgment which shall be given upon any indictment tried under the provisions of this act shall be deemed as good, valid, and sufficient in law as if the offence charged in such indictment had been actually committed within the jurisdiction of the said court before which such indictment shall be tried.

14. Whenever any person shall have been removed into the custody of the said keeper of the said gaol of *Newgate* or of the *Richmond Bridewell* under the provisions of this act, such person shall, without writ of habeas corpus or other writ for that purpose, be removed into and from the court at or before which such indictment shall be found, tried or proceeded upon, when and as often as it may be necessary, by the keeper of the said gaol of *Newgate* or of the *Richmond Bridewell*, with his commitment and detainer, in order that he may be tried, sentenced, or otherwise dealt with according to law; and such removal shall not be deemed an escape.

15. Whenever any indictment shall have been found under the provisions of this act, the justices, judges, or commissioners of the court at or before which such indictment shall be found, tried, or proceeded upon for the time being, or any two or more of them, shall possess the same power, jurisdiction, and authority as to all matters and things whatsoever as if the offence charged in the said indictment had actually been committed within the jurisdiction of the said court; and every such offence may be dealt with, tried, and determined by and before such justices, judges, or commissioners, or any two or more of them in the same manner in all respects as if the same had actually been committed within the jurisdiction of the said court: provided that nothing in this section contained shall limit or lessen any power, jurisdiction, or authority conferred upon the said justices, judges, or commissioners, or any two or more of them, by this act.

16. The provisions of the twenty-first section of the said act made and passed in the nineteenth year of her Majesty Queen Victoria shall apply to every prisoner removed to any gaol under the provisions of this act, in the same manner in all respects and for all intents and purposes as if such prisoner had been so removed as in any of the preceding sections of the said act is mentioned, and as if that section had been re-enacted herein with reference to prisoners removed to any gaol under the provisions of this act; and where any person shall have been removed to any gaol under the provisions of this act, the provisions of the twenty-seventh and twenty-eighth sections of the same act shall apply in the same manner in all respects as in the case where any person shall have been removed or committed to the said gaol of *Newgate* under the provisions of the said act.

17. Whenever any prosecutor and witnesses in any case where any indictment shall have been found under the provisions of this act shall appear before the court at or before which such indictment shall be found, tried, or proceeded upon, it shall be lawful for such court, from time to time and as often as to the same court shall seem fit, to require such prosecutor and witnesses to enter into such recognizance in such sum of money, and with such condition as to appearance at the said court, and otherwise, as to the said court shall seem fit.

18. It shall be lawful for her Majesty, by and with the advice of her most honorable Privy Council, from time to time to make rules and regulations touching the said gaol of *Newgate*, or any other gaol or prison, and the government and keeping thereof; and it shall be lawful for the Lord Lieutenant or other chief governor or governors of *Ireland*, by and with the advice of the privy council, from time to time to make rules and regulations touching the said *Richmond Bridewell* for the purposes of this act, and

touching the alteration of any commissions, writs, precepts, or other proceedings whatsoever for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by authority of Parliament, and shall be notified in the *London or Dublin Gazette*, or in such other manner as her Majesty, by and with the advice of her most honorable privy council shall think fit to direct.

19. Nothing in this act contained shall render any person claiming the privilege of peerage triable under the provisions of this act.

20. In the construction of this act the words "present Mutiny Act" shall be understood to mean the act made and passed in this present Parliament, intituled *An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters*; and the words "future Mutiny Act" shall be understood to mean any act hereafter to be made and passed for the purposes and with the intents and objects of the present Mutiny Act, or for the like purposes, and with the like intents and objects.

21. In citing this act in any instrument, document, or proceeding it shall be sufficient to use the expression "The Jurisdiction in Homicides Act, 1862."

SCHEDULE referred to in the foregoing act.

1. Form of certificate mentioned in the first section.

I, the undersigned, her Majesty's principal Secretary of State for the War Department, having been credibly informed that [name or names of prisoner or prisoners] lately committed for the murder [or manslaughter] of [name of person killed] deceased, and now confined in the gaol [house of correction] at _____ in the county of _____ is a person [are persons] subject to the Mutiny Act, and that the said [name of person deceased] deceased was at the time of the alleged murder [or manslaughter] also subject to the said act, and that the said murder or supposed murder [or manslaughter or supposed manslaughter] was committed in England or Wales, and out of the jurisdiction of the Central Criminal Court [or in Ireland and elsewhere than in the county of the city of Dublin, in the county of Dublin], and having been credibly informed of the circumstances relating to the said alleged crime, and deeming it expedient that a more speedy trial of the said [name or names of prisoner or prisoners] should be had than the usual course of practice allows, do hereby certify my belief that it would contribute to the maintenance of good order and military discipline if the said [name or names of prisoner or prisoners] were to be indicted and tried under the provisions of the Jurisdiction in Homicides Act, 1862.

Given under my hand this _____ day of _____ A.D.
[Signature of the said Secretary of State.]

2. Form of order of the Court of Queen's Bench mentioned in the first section.

In her Majesty's Court of Queen's Bench. [Name of Term] Term, A.D. [Year of our Lord].

Whereas it appears by the affidavit [or affidavits] of [name or names of deponent or deponents], that [name or names of prisoner or prisoners], now in the custody of the gaoler or keeper of the gaol [or house of correction] at _____ in the county of _____ was [or were] committed for the murder [or manslaughter] of [name of deceased] deceased, and that as well the said [name or names of prisoner or prisoners] as the said [name of deceased] deceased were at the time of the commission or supposed commission of the said murder [or manslaughter] subject to the Mutiny Act: now thereupon, and on the application and certificate of her Majesty's principal Secretary of State for the War Department, it is ordered, that the said [name or names of prisoner or prisoners] be indicted and tried under the provisions of the Jurisdiction in Homicides Act, 1862.

By the Court.

2. Form of order of a judge mentioned in the first section.

Whereas it appears [follow the last preceding form as

far as the words "Secretary of State for the War Department"], I do order that the said [name or names of prisoner or prisoners] be indicted and tried under the provisions of the Jurisdiction in Homicides Act, 1862.

Given under my hand in vacation, this _____ day of _____, A.D. [Year of our Lord].
[Signature of Judge.]

3. Form of indorsement mentioned in the fourth section.

I certify that [name or names of prisoner or prisoners] was [or were] committed for the murder [or manslaughter] of [name of deceased] deceased, and that he [or they] has [or have] been removed to the gaol of Newgate [or the Richmond Bridewell] under the provisions of the Jurisdiction in Homicides Act, 1862.

[Signature of proper Officer of the Court.]

CAP. LXVI.

An Act for the Safe-keeping of Petroleum.

[29th July, 1862.]

CAP. LXVII.

An Act for obtaining a Declaration of Title.

[29th July, 1862.]

CAP. LXVIII.

An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.
[29th July, 1862.]

Sec. 1. Copyright in works hereafter made or sold to vest in the author for his life and for seven years after his death.

2. Not to prejudice certain rights.

3. Assignments, Licences, &c., to be in writing.

4. Register of proprietors of copyright in paintings, drawings, and photographs to be kept at Stationers' Hall as in 5 & 6 Vic., c. 45.

5. Certain enactments of 5 & 6 Vic., c. 45, to apply to the books to be kept under this act.

6. Penalties on infringement of copyright.

7. Penalties on fraudulent productions and sales. Penalties.

8. Recovery of pecuniary penalties. In England and Ireland. In Scotland.

9. Court in which action is pending may make order for injunction, &c.

10. Importation of pirated works prohibited. Application in such cases of Customs Acts.

11. Saving of right to bring action for damages.

12. Provisions of 7 & 8 Vic., c. 12, to be considered as included in this act.

'Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or

disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect.

2. Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

3. All copyright under this act shall be deemed personal or moveable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose, in writing.

4. There shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the act passed in the sixth year of her present Majesty, intituled *An Act to amend the Law of Copyright*, a book or books, entitled "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto. If the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

5. The several enactments in the said act of the sixth year of her present Majesty contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this act, and to the entries and assignments of copyright and proprietorship therein under this act, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said act of the sixth year of her present Majesty may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said company of stationers for making any entry required by this act shall be one shilling only.

6. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright

in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

7. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram.

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work.

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken.

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker.

Every offender under this section shall upon conviction forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid: provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed.

8. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this act, and pursuant to any act for the protection of copyright engravings, may be recovered by the

person hereinbefore and in any such act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant or the complainer, as follows :

In *England and Ireland*, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides.

In *Scotland* by action before the court of session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by pouncing: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and absolving the defender, to find the complainant liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise.

9. In any action in any of her Majesty's superior Courts of Record at *Westminster* and in *Dublin*, for the infringement of any such copyright as aforesaid, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit.

10. All repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this act, shall have been made in any foreign state, or in any part of the *British* dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorized in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officer of her Majesty's customs.

11. If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a

special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity.

12. This act shall be considered as including the provisions of the act passed in the session of Parliament held in the seventh and eighth years of her present Majesty, intitled *An Act to amend the Law relating to International Copyright*, in the same manner as if such provisions were part of this act.

CAP. LXIX.

An Act for transferring from the Admiralty to the Board of Trade certain powers and duties relative to harbours and navigation under local and other acts; and for other purposes. [29th July, 1862.]

Sec. 1. *Short title.*

2. *Interpretation of terms.*

3. *Board of Trade may exercise powers under the 14 & 15 Vict. c. 49.*

4. *Board of Trade to inform Admiralty of pending schemes. Admiralty may intervene where necessary for protection of interests of naval service.*

5. *Consent, &c., of Board of Trade as to harbour works on tidal lands, lifeboats, &c.*

6. *Consent and approval of Board of Trade to railway works on tidal lands.*

7. *Plans, &c., to be deposited with Board of Trade under 23 & 24 Vict. c. 152, s. 41.*

8. *Powers for protection of navigation, &c., under local acts for harbours, railways, and other works on tidal lands, &c., to be exercised by Board of Trade.*

9. *Power to Admiralty to retain authority over ports, &c., where dockyards, &c., are situate.*

10. *Exception as to Mersey and Thames. 5 & 6 Vict. c. 110. 20 & 21 Vict. c. 147, s. 3.*

11. *Parts of 24 & 25 Vict., c. 45, relative to Admiralty repealed.*

12. *Pier and Harbour Act Amendment Act repealed as to deposit, &c.*

13. *Board of Trade to furnish to Admiralty information as to applications, &c.*

14. *Provisions of same act made applicable to Board of Trade.*

15. *Notices of piers, &c., to be given to Board of Trade. 46 G. 3, c. 153.*

16. *Provisions as to ballast to be administered by Board of Trade. 54 G. 3, c. 159, ss. 14, 16.*

17. *Transfer of harbours in schedule. Powers, &c., under acts in schedule and other acts to be exercised by Board of Trade.*

18. *Prerogative of crown and general conservancy powers of Admiralty.*

19. *Acts done, contracts and appointments made, proceedings, pending, &c., under provisions of former acts not to be prejudicially affected.*

20. *Power to borrow under 24 & 25 Vict. c. 47, s. 3.*

21. *Borrowing power not restrained by limitation of amount in special act.*

22. *Maximum rates mentioned in 24 & 25 Vict. c. 47, s. 3, p. 7, repealed.*

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This act may be cited as *The Harbours Transfer Act, 1862.*

2. In this Act—

The term "the Admiralty" shall be taken to mean the lord high admiral of the United Kingdom for the time being, or the commissioners for the time being for ex-

ecuting the office of lord high admiral; and when the said term is used in reference to any other act, it shall be taken to comprise any term whatsoever used in such other act to designate such lord high admiral or commissioners:

The term "the Board of Trade" shall be taken to mean the lords of the committee of privy council for the time being appointed for the consideration of matters relating to trade and foreign plantations.

Preliminary Inquiries Act, 1851.

3. Whenever after the end of the present session of Parliament application is made to Parliament for any such bill as is described in the Preliminary Inquiries Act, 1851, the Board of Trade may exercise the powers by that act given to the Admiralty; and in relation to every such bill that act shall be read as if the Board of Trade were therein named instead of the Admiralty.

4. Provided always, as follows:

- (1.) In each year as soon as may be, and not more than fourteen days after the deposit at the office of the Board of Trade of such documents as may be required by the standing orders of either House of Parliament to be there deposited with reference to such bills as aforesaid, the Board of Trade shall furnish to the Admiralty a list of all such bills for which applications to Parliament may be then pending, with a short statement of the nature of the works for the construction whereof powers are sought by such bills respectively:
- (2.) Where in any case, on consideration of the information so furnished, the Admiralty are of opinion that it is proper for them to take steps for the protection of the interests of her Majesty's naval service, they may exercise the powers given to them by the Preliminary Inquiries Act, 1851, as if this act had not been passed, and whether the standing orders of either House of Parliament may or may not have required any documents to be deposited at the Admiralty office.

Harbours, Docks, and Piers Clauses Act, 1847.

5. With respect to any special act that may be passed after the end of the present session of Parliament, the following sections of the Harbours, Docks, and Piers Clauses Act, 1847, and all provisions relative thereto in that act or in any such future special act contained, shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty; namely, sections twelve, thirteen, sixteen, eighteen, and nineteen.

Railways Clauses Consolidation Acts, 1845.

6. With respect to any special act that may be passed after the end of the present session of Parliament, sections seventeen of the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, respectively, and all provisions relative thereto in the said acts or in any such future special act contained, shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty.

Tramways (Ireland) Act, 1860.

7. With respect to applications made after the thirty-first day of December, one thousand eight hundred and sixty-two, under the Tramways (Ireland) Act, 1860, section forty-one of that act shall be read as if the Board of Trade were therein named instead of the Admiralty.

Special Acts for Railways, Harbours, &c.

8. Where any special or local or local and personal act or act of a local or local and personal nature, already passed or to be passed before the end of the present session of Parliament,—

- (1.) Authorizing or regulating the construction of a railway, or the execution of any work whatever, situate on or affecting tidal lands, or the shore of the sea or of any navigable river, where and so far up the same as the tide flows and reflows; or,
- (2.) Authorizing or regulating the construction or improving of a harbour, dock, or pier, or works connected therewith, by any company, body cor-

porate, commissioners, trustees, undertakers, persons or person; or,

- (3.) Constituting or altering or regulating the constitution of any harbour or conservancy authority; or,
- (4.) Altering or regulating the powers or duties of any harbour or conservancy authority,—

contains either expressly or by incorporation or reference or otherwise any provision for any of the purposes following:—

For preventing the construction or execution of any work or the doing of any thing without the consent or approval of the admiralty, or for authorizing or requiring any work to be constructed, executed, or maintained, or any thing to be done with the consent or on the requisition or to the satisfaction of the Admiralty:

For empowering the Admiralty to exercise any authority concerning lifeboats, mortars, rockets, tide gauges, or barometers to be provided by any undertakers:

For empowering the Admiralty to make a local survey or examination at the expense of any company, body, or person:

For empowering the Admiralty, in case of any work being abandoned or suffered to fall into disuse or decay, or in any other case, to abate, remove, or alter any work or any part of it, or restore the site thereof to its former condition, at the like expense:

For empowering the Admiralty to exercise any authority concerning lights to be maintained at night during the construction or execution of any work:

For empowering the Admiralty or the first lord of the Admiralty to nominate or appoint a member or members of any board or body of trustees, commissioners, or conservators, or of any harbour or conservancy authority:

For empowering the Admiralty to determine any dispute or difference between or among any bodies or persons: For empowering the Admiralty or the first lord of the Admiralty to nominate or appoint any arbitrator, referee, or umpire, or any engineer, inspector, or officer, or any person to fill any place or discharge any duty under such act:

or any other provision for the protection management, or regulation of harbours or navigation, or for the exercise of any control or power over or in relation to any harbour authority, or any other provision in any wise relating to conservancy, or authorizing or requiring any act or thing concerning harbours or navigation or conservancy to be done by or in relation to the Admiralty,—

Then from and after the thirty-first day of December, one thousand eight hundred and sixty-two, such acts and all enactments relative thereto shall be read and construed as if in the respective provisions aforesaid the Board of Trade were named instead of the Admiralty, and the president of the Board of Trade instead of the first lord of the Admiralty.

9. Provided always, That where it appears to the Admiralty that the interests of her Majesty's naval service require that the whole or any part of any harbour, port, bay, estuary, or navigable river in, on, or adjoining to which there is or shall be any of her Majesty's dockyards, victualling yards, steam factory yards, arsenals, or naval stations, should be excepted, either entirely or in some respects, out of the operation of the last foregoing section, the Admiralty may give notice in writing to the Board of Trade that any such harbour, port, bay, estuary, or navigable river as aforesaid, or such part thereof as is in the notice specified, is to be deemed so excepted, either entirely or in the respects therein mentioned; and every such notice shall be published by the Admiralty in the *London, Edinburgh, or Dublin Gazette*, (according as the place affected may be in *England, Scotland, or Ireland*;) and thereupon the harbour, port, bay, estuary, or navigable river to which such notice relates, or the part thereof therein specified, shall, either entirely or in the respects therein mentioned, as the case may require be and remain as if this act had not been passed, but any such notice

may be from time to time varied or at any time revoked by a like notice published in like manner.

10. Provided also, that nothing herein-before contained shall affect—

- (1.) The act of the session of the fifth and sixth years of her Majesty, "for better preserving the navigation of the river *Mersey*;"
- (2.) So much of section three of the act of the session of the twentieth and twenty-first years of her Majesty, to provide for the conservation of the river *Thames*, and for the regulation, management, and improvement thereof," as empowers the Admiralty to appoint two of the conservators of the river *Thames*.

General Pier and Harbour Act, 1861, and Amendment Act.

11. From and after the end of the present session of Parliament, the following provisions of The General Pier and Harbour Act, 1861, shall be repealed; namely, so much of section six as shall be then in force, sections seven and eight, and so much of section fifteen as relates to the consent of the Admiralty.

12. From and after the end of the present session of Parliament, any provision of the General Pier and Harbour Act, 1861, Amendment Act, requiring any deposit of documents to be made at the Admiralty office, shall be repealed.

13. In each year, not later than the seventh day of *January*, the Board of Trade shall furnish to the Admiralty a list of all applications for provisional orders under the last-mentioned acts then pending, with a short statement of the nature of the works for the construction whereof powers are sought by such proposed provisional orders respectively.

14. From and after the end of the present session of Parliament, the following sections of the General Pier and Harbour Act, 1861, Amendment Act, and all provisions relative thereto in any other act or in any provisional order of the Board of Trade contained, shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty; namely, sections seven, eight, nine, ten, and eleven.

Public Harbours, 46 Geo. 3, c. 153.

15. From and after the thirty-first day of *December* one thousand eight hundred and sixty-two, the act of the forty-sixth year of King *George* the Third (chapter one hundred and fifty-three), "for the preservation of the public harbours of the United Kingdom," shall be read as if the Board of Trade were therein named instead of the Admiralty.

Ballast, 54 Geo. 3, c. 159.

16. From and after the thirty-first day of *December* one thousand eight hundred and sixty-two, sections fourteen and sixteen of the act of the fifty-fourth year of King *George* the third (chapter one hundred and fifty-nine), "for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the United Kingdom, and of his Majesty's docks, dock yards, arsenals, wharfs, moorings, and stores therein, and for repealing several acts passed for that purpose," and all provisions in the said act contained relative thereto, shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty.

Holyhead and Portpatrick.

17. On the first day of *January* one thousand eight hundred and sixty-three, the harbours specified in the schedule to this act, and all breakwaters, piers, jetties, quays, wharves, lighthouses, roads, approaches, works, and buildings belonging thereto, and the ground and soil thereof, and all lands and hereditaments acquired for the purposes thereof, so far as on that day such harbours and property shall be vested in the Admiralty or in any commissioner for the execution of any act for any estate or interest, but not further or otherwise, shall be transferred to and vested in the Board of Trade in trust for her Majesty, her heirs and successors, for the public service; and on and after the same day the enactments mentioned in the said sche-

dule, and every other enactment relating to or affecting the same harbours shall be read and construed as if the Board of Trade were therein named instead of the Admiralty or instead of any such commissioner, as the case may be.

Savings.

18. Nothing in this act shall affect—

- (1.) Any estate, right, title, interest, prerogative, royalty, jurisdiction, or authority of or belonging to her Majesty the Queen, her heirs or successors, in right of her crown, or of her office of admiral, or otherwise;
- (2.) Any right, duty, power, jurisdiction, or authority vested in or performed or exercised by, or capable of being performed or exercised by the lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral, otherwise than under or by virtue of the several acts and parts of acts herein-before expressly mentioned or referred to.

19. Nothing in this act shall prejudicially affect—

- (1.) Any purchase, sale, conveyance, covenant, contract, deed, act, or thing which before the passing of this act has been or before the respective days whereon the several provisions of this act commence and take effect shall be made, entered into, executed, or done under or by virtue of any act or part of an act herein-before expressly mentioned or referred to; and the same respectively shall continue in as full force and be as valid and effectual as if this act had not been passed, the Board of Trade being only substituted for the Admiralty;
- 2.) Any debt or money demand, or any right or cause of action or suit, or other remedy of, for, or against the Admiralty or any other body or person; and the same shall and may be paid, discharged, enjoyed, used, or exercised as if this act had not been passed, the Board of Trade being only substituted for the Admiralty;
- (3.) Any nomination or appointment of any member of any board or body of trustees, commissioners, or conservators, or of any harbour or conservancy authority, which before the passing of this act has been or before the respective days aforesaid shall be made under any such act as aforesaid;
- (4.) Any action, suit, prosecution, proceeding, or thing which before the passing of this act has been or before the respective days aforesaid shall be commenced under or by virtue of any such act; and the same shall and may be carried on and completed as if this act had not been passed, the Board of Trade being only substituted for the Admiralty.

Borrowing Powers of Harbour Authorities.

20. The power given to a harbour authority by the Harbours and Passing Tolls, &c., Act, 1861, to borrow from the Public Works Loan Commissioners, shall be deemed to apply whether the harbour authority has or has not power to borrow under a special act.

21. A harbour authority may, subject and according to the provisions of the last-mentioned act, borrow money to any amount whatever, notwithstanding any limitation of the amount to be borrowed by such harbour authority contained in any special act; but nothing in the Harbours and Passing Tolls, &c., Act, 1861, or in this act, shall be deemed to give to any loan made or to be made under the Harbours and Passing Tolls, &c., Act, 1861, equality, as to order of charge or of payment of principal or interest, with any loan made or to be made under any special act, except only as to such portion (if any) of the monies raised under the Harbours and Passing Tolls, &c., Act, 1861, as might have been raised under the special act solely, or to repeal or alter any provision of any special act whereby any harbour authority being a company is restricted from borrowing until a definite portion of capital is subscribed for or taken or paid up.

22. Section three, paragraph seven, of the Harbours and Passing Tolls, &c., Act, 1861, shall be read and construed as if the words "not exceeding the rates specified in the schedule to the Burgh Harbours (Scotland) Act, 1853," were omitted therefrom.

SCHEDULE.

Holyhead harbour, and the harbour of refuge at or near Holyhead—17 & 18 Vict. c. 44.

Portpatrick harbour—1 G. 4, c. 112, sects. 8, 9 (except so much as relates to the signing of contracts), 10 to 22 (both inclusive), 28, 30, 31, 32. 24 & 25 Vict. c. 106.

CAP. LXX.

An Act for giving effect to a Convention between her Majesty and the King of Denmark for the mutual Surrender of Criminals. [29th July, 1862.]

CAP. LXXI.

An Act to apply a Sum out of the Consolidated Fund and the Surplus of Ways and Means to the Service of the year one thousand eight hundred and sixty-two, and to appropriate the Supplies granted in this Session of Parliament. [7th August, 1862.]

CAP. LXXII.

An Act to continue certain turnpike Acts in Great Britain. [7th August, 1862.]

CAP. LXXIII.

An Act for continuing the Copyhold, Inclosure, and Tithe Commission, and entitling the Commissioners to Superannuation Allowance. [7th August, 1862.]

CAP. LXXIV.

An Act to enable the Commissioners of Her Majesty's Works to acquire additional Land for the purposes of the "Public Offices Extension Act of 1859," by way of Exchange for Land already acquired but not wanted for the purposes of the said Act. [7th August, 1862.]

CAP. LXXV.

An Act to revive and continue an Act for amending the Laws relating to Savings Banks in Ireland. [7th August, 1862.]

22 Vict. c. 17.

Sec. 1. *Recited act revived and continued.*

'Whereas an Act was passed in the session held in the twenty-second year of her Majesty, intituled *An Act to continue an Act of the Eleventh and Twelfth Years of Her present Majesty, for amending the Laws relating to Savings Banks in Ireland*, which last-mentioned act was limited to continue until the first day of January, one thousand eight hundred and sixty-one, and until the end of the then next ensuing session of Parliament: And whereas it is expedient that the said act of the eleventh and twelfth years of her present Majesty should be revived and continued for a limited time: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. That the said act of the eleventh and twelfth years of her Majesty shall continue in force until the first day of January, one thousand eight hundred and sixty-five, and until the end of the then next ensuing session of Parliament, and this act shall be deemed and taken to have effect with respect to the said last-mentioned act from the expiration of the time limited for the continuance of the said act, as fully and effectually, to all intents and purposes, as if this act had actually passed before the expiration of the time so limited.

CAP. LXXVI.

An Act to amend "The Weights and Measures (Ireland) Act, 1860;" to abolish local and customary Denomina-

tions of Weight, and to regulate the mode of weighing Articles sold in Ireland. [7th August, 1862.]

23 & 24 Vict. c. 119.

Sec. 1. *Commencement of act.*

2. *Short title.*

3. *Certain sections of recited act repealed.*

4. *This act incorporated with recited act.*

5. *Certain head and other constables to be ex officio inspectors of weights and measures.*

6. *Inspector-General to appoint one officer in each county or borough to have custody of imperial standards, who shall also stamp sub-standards.*

7. *Grand jury and town council to provide one set of copies of imperial standards for each county or borough, and also as many sub-standards as may be necessary.*

8. *Ex-officio inspectors of weights and measures may enter shops, &c., to inspect beams, &c.*

9. *Judges of assize to order copies of standards &c., in counties in Ireland when it has not been done by grand juries.*

10. *Chairman of quarter sessions to order copies of standard weights and measures in boroughs within the county, in case it has not been done by town council.*

11. *Extent of part II.*

12. *Contracts to be made by denominations of imperial weight, otherwise to be void.*

13. *Mode of weighing. Deductions prohibited.*

14. *Penalty on counterfeiting of brand.*

15. *Penalty for fraudulently increasing weight of butter in casks.*

16. *Penalty for fraudulently increasing weight of fleeces.*

17. *Penalties how recoverable.* 14 & 15 Vict. c. 93.

18. *Limitations of proceedings for penalties.*

19. *Nothing to prevent persons being indicted for offences.*

'Whereas an act was passed in the twenty-third and twenty-fourth years of the reign of her Majesty, intituled *An Act to amend the Law relating to Weights and Measures in Ireland*: And whereas it is expedient that the said act should be amended in the manner herein-after mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows.

PART I.

1. This act shall commence and take effect on the first day of January, one thousand eight hundred and sixty-three.

2. This act may for all purposes be cited as "The Weights and Measures (Ireland) Amendment Act, 1862."

3. The fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth and fourteenth sections of the said recited act (except so much of the said fourth section as repeals the eighteenth section of "The Summary Jurisdiction (Ireland) Act, 1851,") shall be and are hereby repealed: Provided always, that, notwithstanding such repeal of the said eleventh and twelfth sections, all such expenses as are mentioned in the said sections respectively which shall have been incurred, and shall not have been paid before the commencement of this act, shall be presented, raised, and levied in the manner directed by the said sections respectively.

4. This act shall be deemed to be incorporated with the said recited act, and shall be as if the said recited act (except such parts thereof as have been repealed or amended by this act) and this act were one act.

5. From and after the commencement of this act, such head or other constables only in each petty sessions district as shall be selected under this act by the inspector-general of constabulary in Ireland, with the approval of the Lord Lieutenant, shall be *ex officio* inspectors of weights and measures within such district, and shall possess and exercise all the powers and authorities, and be subject to the like penalties for any neglect or offence in

the discharge of such duties, which any inspector of weights and measures heretofore possessed or exercised or had been liable to under and by virtue of the act of the fifth and sixth years of King *William the Fourth*, chapter sixty-three, or any other act now in force, and shall perform such duties, under the direction of the Justices at petty sessions, without fee or reward, and notwithstanding any manorial jurisdiction or claim of jurisdiction within such district: Provided that if within one month from the date of such selection the Justices shall signify their disapproval of the selection of any head or other constable, another selection shall be made by the same authority, subject to the same conditions, and the Inspector-general of constabulary shall give notice, or cause notice to be given, to the clerk of the petty sessions district, within three days of any such selection having been made in his district, who shall immediately make known the said selection to the Justices of the district.

6. The Inspector-general of constabulary shall, with the approval of the Lord Lieutenant, also appoint some sub-inspector of constabulary in every county or borough in *Ireland* to have the charge of such copy or copies of the imperial standard weights and measures as shall have been provided for such county or borough under the provisions of the said first-recited act, or may be so provided under this act; and such sub-inspector shall duly stamp or cause to be duly stamped from time to time such sub-standard weights and measures as may be transmitted to him for such purpose; and any inspector of weights and measures in any such county or borough in whose custody any copy or copies of the imperial standard weights and measures shall have been deposited, under the provisions of the said first-recited act, shall, within one calendar month after the commencement of this act, transmit the same to the sub-inspector appointed to have the custody of the same, under the provisions of this act, subject to a penalty for neglect or refusal not exceeding ten pounds.

7. It shall be lawful for the grand jury of each county and the town council of each borough and they are hereby required to provide one complete set of copies of the imperial standard weights and measures for each such county or borough respectively, where the same has not been already provided, and to have the same from time to time duly compared and re-verified in the manner required by the fifteenth section of the said first recited act, and also to provide for each such county or borough respectively as many copies in iron or other sufficient material of the county copies of the imperial standard weights and measures, and such accurate beams and scales, as shall be necessary for such county or borough respectively; and such inspector-general may direct that such copies shall be duly stamped by the sub-inspector of constabulary in whose custody any copy or copies of the imperial standard weights and measures shall have been placed, as herein-before mentioned, and the said last-mentioned copies shall be called "the sub-standard weights and measures;" and such grand jury and town council shall also provide such good and sufficient stamps for stamping or sealing weights and measures used or to be used in such county or borough respectively as they shall consider to be necessary for such purpose: Provided always, that not less than one set of "the sub-standard weights and measures," and one set of accurate beams and scales, shall be provided for each petty sessions district in any county, and not less than two such sets shall be provided for any borough.

8. It shall be lawful for every *ex officio* inspector of weights and measures, in addition to the powers given to such inspectors by the said first-recited act, at all reasonable times to enter into any shop, store, warehouse, yard, or place within his jurisdiction where goods shall be purchased or exposed or kept for sale and there to inspect all beams, scales, balances, and weights and measures in the possession of any person purchasing, selling, offering, or exposing for sale any goods; and if upon such inspection or examination any such beams, scales, or balances, or weights or measures, shall be found light or unjust, or otherwise contrary to the provisions of the said act of the

fifth and sixth years of King *William the Fourth* or this act, or if any fraud shall be wilfully committed in the using thereof, the same shall be liable to be seized and forfeited, and the person or persons using or having in his or her possession any such false or unjust beams, scales, or balances, or light or unjust weights or measures, shall be liable to any penalty not exceeding five pounds as shall be adjudged by any justice or justices before whom any such conviction shall take place.

9. The Judge of assize before the close of the assizes which shall be held for any county in *Ireland* next after the commencement of this act, and at the first assizes which shall be held in every succeeding year, shall inquire of the foreman of the grand jury whether one complete set of such copies of the imperial standard weights and measures, and a sufficient number of sub-standard copies of weights and measures, beams and scales, and county stamps, have been provided in such county; and in every case in which it shall appear to such judge, upon due inquiry, that one set at least of such copies, and a sufficient number of sub-standard copies, beams, scales, and county stamps, have not been so provided, such judge shall forthwith order the treasurer of the county to provide one complete set of such copies of the imperial weights and measures, and such number of sub-standard weights and measures, beams, and scales, and county stamps, as shall, subject to the provisions herein-before contained, appear to such judge to be sufficient for such county for the purposes of this act; and every such order shall have the effect of a presentment on the county at large for such sum as may be necessary to procure the same; and such treasurer shall, within three calendar months next after he shall receive such order, fully execute the same, or failing so to do shall be liable to any penalty not exceeding twenty pounds.

10. The chairman of quarter sessions for each county in *Ireland* at the quarter sessions of the peace which shall be held for such county next after the twenty-fifth day of *March*, in the year one thousand eight hundred and sixty-three, and at such quarter sessions in every succeeding year, shall inquire whether one complete set of such copies of the imperial standard weights and measures, and a sufficient number of sub-standard copies of weights and measures, beams and scales, and borough stamps, have been provided in each borough within such county; and in every case in which it shall appear to such chairman, upon due inquiry, that one set at least of such copies, and a sufficient number of sub-standard copies, beams, scales, and borough stamps, have not been so provided, such chairman of quarter sessions shall forthwith order the town clerk or other proper officer of such borough to provide one complete set of such copies of the imperial standard weights and measures, and also such number of sub-standard weights and measures, beams and scales, and borough stamps, as such chairman shall think sufficient, and every such order shall have the effect of an order of the town council of such borough to raise such amount by way of rate in such borough as may be necessary to procure a complete set of such copies of the imperial standard weights and measures, and also such number of copies of the sub-standard weights and measures, beams and scales, and borough stamps, as shall, subject to the provisions herein-before contained, appear to such chairman of quarter sessions to be sufficient, and as he shall direct; and such town clerk or other officer shall, within three calendar months next after he shall receive such order, fully execute the same, or failing so to do shall be liable to any penalty not exceeding twenty pounds: Provided always, that in any borough in which no rate is levied, and which borough is liable to the payment of county cess, the expenses incurred under the said recited act or this act shall be defrayed by the county in which the said borough or the greater part thereof is situate.

PART II.

Denominations of Weight and Mode of Weighing.

And whereas it is expedient to abolish all local and customary denominations of weight and to prohibit impro-

per deductions in weighing, and otherwise to regulate the mode of weighing articles sold: Be it therefore enacted as follows:

11. The provisions of this part of this act shall extend and apply throughout *Ireland* to all contracts, bargains, sales, and dealings, save as herein-after excepted.

12. Every contract, bargain, sale, or dealing—

For any quantity of corn, grain, pulses, potatoes, hay, straw, flax, roots, carcases of beef or mutton, butter, wool, or dead pigs, sold, delivered, or agreed for;

Or for any quantity of any other commodity sold, delivered, or agreed for by weight (not being a commodity which may by law be sold by troy weight or by apothecaries weight),

shall be made or had by one of the following denominations of imperial standard weight: namely,

The ounce avoirdupois;

The pound avoirdupois of sixteen ounces;

The stone of fourteen pounds;

The quarter hundred of twenty-eight pounds;

The half hundred of fifty-six pounds;

The hundredweight of one hundred and twelve pounds;

Or the ton of twenty hundredweight,

and not by any local or customary denomination of weight whatsoever, otherwise such contract, bargain, sale, or dealing shall be void: Provided always, that nothing in the present section shall be deemed to prevent the use, in any contract, bargain sale, or dealing, of the denomination of the quarter, half, or other aliquot part of the ounce, pound, or other denomination aforesaid, or shall be deemed to extend to any contract, bargain, sale, or dealing relating to standing or growing crops.

13. Every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purposes of every contract, bargain, sale, or dealing, the weight so ascertained shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or on any other account, or under any other name whatsoever, the weight of any sack, bag, cask, firkin, or other covering in which such article may be alone excepted, shall be claimed or made by any purchaser on any pretext whatever, under a penalty of not exceeding five pounds.

PART III.

Prevention of Frauds.

14. If any person commit any of the following offences he shall for each offence be liable to a penalty not exceeding five pounds.

(1.) If he, with intent to defraud, counterfeit or procure to be counterfeited any brand or stamp used by or under the authority of the owner or lessee of a market or fair, or of any person having by law the control of a market or fair, to denote the weight, measure, or quality of any article sold in the market, or fair, or within the prescribed limits, during the holding of the market or fair, or of any cask, firkin, or other vessel, covering, or thing in which such article is sold, or the impression of any such brand or stamp:

(2.) Or, with the like intent, use or procure to be used any such counterfeit brand or stamp or impression:

(3.) Or, with the like intent, alter an impression of any such genuine brand or stamp:

(4.) Or, with the like intent, have in his possession anything having thereon an impression of any such counterfeit brand or stamp, or a fraudulently altered impression of any such genuine brand or stamp:

(5.) Or, with the like intent, transfer or apply any cask, firkin, or other vessel, covering, or thing, having thereon an impression of any such genuine brand or stamp, to any article other than that for denoting the weight, measure, or quality whereof such impression was made on such cask, firkin, or other vessel, covering, or thing; or in any

other manner alter the *bond fide* application of an impression of any such genuine brand or stamp:

(6.) Or knowingly weigh or cause to be weighed, contrary to the provisions of this act, or act or assist in committing or connive at any fraud respecting the weighing or the weight or measure of any such article as in Part II. of this act is mentioned:

(7.) Or, with intent to defraud, alter any ticket specifying the weight of any such article:

(8.) Or, with intent to defraud, make or use, or be privy to the making or using, of any such ticket, falsely stating the weight of any such article, or of any covering, cart, or load:

(9.) Or shall dispose of, sell, or cause to be sold any weight or measure having a false or counterfeit stamp, or a stamp purporting to resemble a genuine stamp.

15. If any person shall wilfully pack up or mix, or cause to be packed up or mixed, with or in any butter contained in any firkin or cask, any salt, pickle, or other substance, with intent to increase the weight of such butter, and shall bring or send any butter so packed or mixed to any market for sale, he shall be liable to pay a fine not exceeding forty shillings, or be imprisoned for any period not exceeding one month, as the justice or justices shall determine.

16. If any person shall wind or cause to be wound in any fleece any wool not being sufficiently rived or washed, or wind or cause to be wound within any fleeces any deceitful locks, coats, skin, or lamb's wool, or any substance, matter, or thing whereby the fleeces may be rendered more weighty, to the deceit and loss of the buyer, such person shall be liable to a penalty of two shillings for every fleece so fraudulently made up.

PART IV.

General Provisions.

17. Any penalty recoverable under the provisions of this act shall be recoverable in a summary way, with respect to the police district of *Dublin* metropolis, subject and according to the provisions of any act regulating the powers and duties of justices of the peace for such district, or of the police of such district, and with respect to other parts of *Ireland* before a justice or justices of the peace sitting in petty sessions, subject and according to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and any act amending the same.

18. No penalty imposed by part two or part three of this act shall be recovered unless proceedings for recovery thereof are commenced within three months next after the commission of the alleged offence, or in case of a continuing offence within three months after the alleged offence has ceased to be committed.

19. Nothing in this act shall be taken to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this act, or to prevent any person from being liable under any other act or otherwise to any other or higher penalty or punishment than is provided for any offence by this act, but so that no person be punished twice for the same offence.

CAP. LXXVII.

An Act to suspend the making of Lists and the Ballots for the Militia of the United Kingdom.

[7th August, 1862.]

CAP. LXXVIII.

An Act for providing a further sum towards defraying the Expenses of constructing Fortifications for the Protection of the Royal Arsenals and Dockyards and the Ports of *Dover* and *Portland*, and of creating a Central Arsenal.

[7th August, 1862.]

CAP. LXXIX.

An Act to amend the Law relating to Coal Mines.

[7th August, 1862.]

CAP. LXXX.

An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland; to grant allowances in certain cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant-Surgeons, and Surgeons' Mates of the Militia; and to authorize the employment of the Non-commissioned Officers.

[7th August, 1862.]

CAP. LXXXI.

An Act to make perpetual An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[7th August, 1862.]

CAP. LXXXII.

An Act for the more economical Recovery of Poor Rates and other Local Rates and Taxes. [7th August, 1862.]

CAP. LXXXIII.

An Act to amend the Laws in force for the Relief of the destitute Poor in Ireland, and to continue the Powers of the Commissioners. [7th August, 1862.]

Sec. 1. As to charging expenses of relief to electoral divisions.

2. Sec. 10 of 10 Vic. c. 31, repealed.
3. Power to guardians to admit poor persons requiring medical or surgical aid into hospitals.
4. Poor persons of sufficient ability to pay the cost of their maintenance in a hospital, or part thereof appropriated to a hospital, required to pay same.
5. As to admission of Constabulary patients.
6. Poor persons claiming to pay cost of their maintenance not to be disfranchised.
7. Guardians may send inmates of workhouse to hospital or infirmary.
8. Guardians to have same authority as parents in cases of children under 16 years of age relieved without parents.
9. Relief to orphans and deserted children.
10. Boards of guardians to recover costs of maintenance of illegitimate children in poor-houses under fourteen.
11. As to religious education of children the religion of whose parents is not known.
12. As to rating of unoccupied buildings.
13. County Cess collectors not to be entitled to collect Poor Rates in preference to other persons. 1 & 2 Vic. c. 56.
14. Not to affect district comprised in Dublin Rates Act. 12 & 13 Vict. c. 91.
15. Non-occupying ratepayers to give full description of the property in respect of which they claim to vote, and of their interest therein.
16. Limitation of property and proxy claims.
17. Owners or immediate lessors rated under sections 1 & 4 of 6 & 7 Vic. c. 92., sec. 63 of 12 & 13 Vic. c. 91, and sec. 10 of 12 & 13 Vic. c. 104 may vote as occupiers.
18. No person to vote for a greater amount of rent than the rateable value.
19. Occupiers and immediate lessors who are rated not to vote unless all rates six months due have been paid.
20. Guardian elected for two or more divisions to notify for which he will act.
21. Solicitors who are members of boards of guardians not to act for or against such boards.
22. Paid officers and others incapable of serving as guardians.
23. Burial expenses of persons dying unknown.
24. Where no new guardians nominated, old guardians to remain in office.
25. After division of electoral divisions into wards, ratepayers under the last rate may vote for guardians.

26. Appointment of commissioners administering laws for relief of poor in Ireland acting under 10 & 11 Vic. c. 90, &c. further continued.

Whereas it is expedient to amend the laws in force for the relief of the destitute poor in Ireland: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. For the purpose of charging the expense of relief to any electoral division, every person making application for relief after the passing of this act shall be deemed to have been resident in such electoral division in which, during the period of five years next before his application for relief, he shall have been longest usually resident, whether by usually occupying any tenement situate, or by usually sleeping, within such district: Provided always, that where any such person shall not have occupied a tenement or slept within any such electoral division for at least two years in the whole during the said period of five years, the expense of the relief of such person shall in such case be borne by and charged against the whole union in which he or she is relieved: Provided also, that where any person chargeable to any electoral division shall have received relief, and shall cease to be relieved, and shall thereafter within the period of twelve months again begin to receive relief, such last-mentioned relief shall be chargeable on the electoral division to which such person was in the first instance chargeable: Provided also, that the cost for the relief of destitute poor who shall not have resided in the union where such relief is given for the last five years next previous to receiving such relief shall be charged and chargeable according to the provisions of an act passed in the tenth year of her present Majesty, intituled *an act to make further provision for the relief of the destitute poor in Ireland*: Provided also, that in estimating the time of residence in the union or electoral division, residence in the workhouse shall be considered to be residence in the union, and also in the electoral division, if there be any such to which the pauper during such residence shall be chargeable, but shall not be considered to be residence in the electoral division in which the workhouse is situate unless the pauper be chargeable to such division.

2. And whereas by an act passed in the 10th year of the reign of her Majesty, chapter thirty-one, section ten, it is provided that no person who shall be in the occupation of any land of greater extent than the quarter of a statute acre shall be deemed and taken to be a destitute poor person under the provisions of an act passed in the second year of the reign of her Majesty, chapter fifty-six, for the more effectual relief of the destitute poor in Ireland, or of the acts amending the same: And whereas it is expedient that the said provision of the said act should be repealed as far as relates to relief within the workhouse: Therefore, from and after the passing of this act, the tenth section of the said act passed in the tenth year of the reign of her Majesty, chapter thirty-one, shall be and the same is hereby repealed: Provided always, that any person who shall be in occupation of any land of greater extent than a quarter of a statute acre, and who shall be considered by the Board of Guardians to require relief, shall be relieved by them in the workhouse, and not otherwise.

3. And whereas the guardians of the poor of unions in Ireland are empowered to admit into any building provided by them for a fever hospital, or into any part of the workhouse appropriated by them, with the consent of the Commissioners to that purpose, poor persons affected with fever or other dangerous contagious disease, and it is expedient to extend such power: Be it enacted, that it shall be lawful for such guardians to admit into the infirmary of the workhouse any poor persons requiring medical or surgical aid in hospital, and to provide for their treatment and maintenance therein, charging the expense thereof on the electoral division or union at large, as the case may be, according to such person's chargeability by residence under the laws which are or shall be in force for the relief of the destitute poor in Ireland: Provided that

no person admitted to the workhouse for medical or surgical treatment in hospital shall be required by the guardians to be accompanied by any member of his or her family as a condition of such person's admission into the workhouse.

4. Every poor person who shall be so admitted into the infirmary of the workhouse in pursuance of the authority in that behalf which is herein-before given, and every poor person who shall hereafter be admitted into any building provided by the guardians of any union for a fever hospital, or into any part of the workhouse appropriated as a fever hospital, who shall nevertheless be considered by the guardians to be of sufficient ability to pay the cost of his or her maintenance while in hospital, or some portion of such cost, shall be required to repay such proportion thereof as the guardians shall determine; provided that such proportion shall in no case exceed the average of the general cost of maintenance, medical and surgical treatment in such hospital or infirmary; and such sums shall be recoverable from such poor persons, or from those liable by law to maintain them, by the same ways and means as the cost of relief given by way of loan is recoverable under the acts in force for the relief of the destitute poor in *Ireland*; and all such sums, or any part thereof which shall be recovered, shall be lodged with the treasurer of the union, to the credit of the electoral division chargeable for the maintenance of such poor person or to the credit of the union, as the case may be: provided also, that for the purpose of the recovery of the cost of maintenance as aforesaid, every master or mistress shall be deemed liable to maintain his or her domestic servant so long as the service shall continue, and also his or her apprentice residing under his or her roof.

5. On the requisition of any inspector or sub-inspector of constabulary, or head constable in charge of a station, it shall be lawful for the board of guardians to admit into the workhouse infirmary or fever hospital any constable or sub-constable of the said force, on service within the union, who shall be suffering from fever or other disease or bodily injury requiring treatment in hospital; and every such constable or sub-constable shall contribute the full average cost of daily maintenance and establishment charges, medical and surgical treatment in such hospital for the whole term of his continuance therein; and the amount of such cost may be recovered by the guardians of the union by the same ways and means as the cost of relief given by way of loan is recoverable under the acts in force for the relief of the destitute poor in *Ireland*.

6. Every poor person admitted into fever hospital or infirmary of a workhouse who shall on admission claim to repay the entire cost of his or her maintenance therein, according to the full average cost thereof, as herein-before stated, and every poor person admitted into such fever hospital or infirmary on whose behalf the person liable by law to maintain such poor person shall claim to repay the entire cost of such maintenance therein as aforesaid, and every constable or sub-constable so admitted shall be entered in a separate register from that in which the other persons admitted into the workhouse are registered; and the person so relieved and the person so claiming shall not, after payment of the said charges of maintenance, be subject to any disfranchisement or disability as persons having received relief from the poor rates; and such register shall at all reasonable times be open for the inspection of those persons who shall desire to examine or take extracts from it, without any charge for such inspection or extracts; and a copy of such register, or of any part of it, signed by the clerk of the union, and under the seal of the Board of Guardians, shall be legal evidence of the facts stated in such copy in any court of record, without proof of the signature of the clerk, or of the affixing of such seal.

7. It shall be lawful for the guardians of any union in cases requiring special treatment to send any inmate or inmates of the workhouse of such union requiring medical or surgical treatment to any hospital or infirmary the governor, governors, or managers of which shall be willing and able to receive such inmate or inmates, and to

pay to the governor, governors, or managers of such hospital or infirmary, out of the rates of the union or electoral division, as the case may be, the cost of the maintenance and treatment in such hospital or infirmary of the persons so sent as aforesaid; and the guardians may also pay out of the rates of the union the cost of the conveyance of such persons from the workhouse of the union to such hospital or infirmary, and also the cost of the conveyance of such persons, when discharged from such hospital or infirmary, to the said workhouse; and the entire cost of such maintenance, treatment, and conveyance as aforesaid shall be deemed part of the cost of maintenance and treatment of such inmate or inmates in the workhouse of such union.

8. Every child under the age of fifteen years, without a parent, relieved in a workhouse, shall be subject to the authority of the Board of Guardians in the same manner as such child would be subject to the authority of its parents or parent, if living together with such parents or parent, excepting as regards the religious denomination of such child, and no such child shall be discharged from the workhouse otherwise than by the order of the Board of Guardians; but nothing herein shall authorize the detention of any child without a parent, if any relative of such child, who in the opinion of the Board of Guardians shall be a fit person to be intrusted with such child, and of sufficient ability to maintain such child, shall claim its discharge from the workhouse for the purpose of its being maintained out of the workhouse otherwise than at the charge of the poor rates.

9. "And whereas it has been found that the mortality among infant children admitted into workhouse without their mothers is very large, and that in other respects the workhouses are not well suited in all cases for the care and nurture of such children during infancy; and it is therefore expedient to extend the powers of boards of guardians for the relief of destitute poor children who are orphans, or who have been deserted by their parents: be it enacted, that it shall be lawful for the Board of Guardians to provide for the relief of any orphan or deserted child out of the workhouse, if they shall think fit to do so, by placing such child out at nurse, according to their discretion, provided that no child shall be placed out with any person who does not profess the same religion as that in which the child has been registered: provided that no child shall continue to be so relieved after the age of five years: provided always, that the guardians of the poor may, with consent of Poor Law Commissioners, continue such relief from year to year until the child attain the age of eight years, should the guardians consider that such extension of outdoor relief be necessary for the preservation of the child's health.

10. From and after the passing of this act, when oath shall have been made before any two justices of the peace in petty sessions (which oath the said justices are hereby empowered to administer) by the mother of any illegitimate child, and the same shall have been supported by corroborative evidence, it shall be lawful for the boards of guardians to recover from the putative father the cost of the maintenance of such illegitimate child during the time that he is in receipt of relief from the poor rates, and while under the age of fourteen; and such cost of maintenance, and the costs of suit, shall be recoverable by process in the name of the guardians before the barrister at Quarter Sessions from the person who shall have been adjudged to be the father of the child.

11. "And whereas by the act of the second year of the reign of her Majesty, intituled *an Act for the more effectual relief of the destitute poor in Ireland*, it is provided, that no order of the Commissioners nor any byelaw shall authorize the education of any child in a workhouse in any religious creed other than that professed by the parents or parent of the child, and to which such parents or parent shall object, and in the case of an orphan to which the guardian or guardians, godfather or godmother, shall object; but no such provision is made for the case of a child not being an orphan, the religion of whose parents or

parent is unknown: " be it enacted, that in every such last-mentioned case the guardian or guardians, godfather or godmother of the child, shall have the like power to object as the parents or parent of a child would have if living, or as the guardian or guardians, godfather or godmother, would have in the case of an orphan.

12. " And whereas doubts have existed as to the liability of unoccupied buildings to be rated in the rates for the relief of the poor and it is expedient to remove such doubts: " be it enacted, that from and after the passing of this act the guardians shall, in making every rate for the relief of the destitute poor, specify on the face thereof the period for the service of which the rate is estimated to provide, and that when any building liable to assessment under the provisions of the acts for the relief of the destitute poor in Ireland is unoccupied at the time of making any such rate on the electoral division in which such building shall be situate, the Board of Guardians shall in every such case include such building in the said rate, describing it in the column appropriated to the name of the occupier or immediate lessor, as the case may be, as "empty," and such building shall be deemed to be rated to the relief of the poor as fully and effectually as if it had been occupied at the time of the rate made, and the name of the occupier or immediate lessor inserted in the said rate: provided always, that if such building shall continue to be unoccupied during the whole of the period for which the rate was estimated as aforesaid, the rate so made on the said building shall not be recoverable; provided also, that if after the making of the said rate, and before the expiration of the period for which the rate was so estimated as aforesaid, any person or persons shall occupy such building for any portion of such period, the Board of Guardians shall be entitled to recover from the occupier or the immediate lessor, if he be liable to pay the same, a portion only of the said rate proportioned to the time during which the said building shall have been so occupied; and the same shall be recovered from the occupier or immediate lessor, as the case may be, in the same manner as if he had been originally rated for such building, or in default of payment by such occupier, from the subsequent occupier of the premises.

13. From and after the passing of this act, so much of the Act passed in the first and second years of her Majesty, intituled *an Act for the more effectual relief of the destitute poor in Ireland*, as provides that every rate made on each electoral division shall and may, if any collector for the time authorized to collect the County Cess on any part of such electoral division shall be approved of by the Commissioners, and shall give security to the satisfaction of the Commissioners, and shall accept such salary or allowance as shall be approved by the Commissioners for his trouble in that behalf, be levied by such collector, who shall, so far as relates to the collection of such rate, be deemed a paid officer of the union within which such electoral division shall be situate, shall be and the same is hereby repealed; and from and after the passing of this act it shall and may be lawful for the guardians of any union, subject to the approval of the Commissioners, to appoint from time to time such and so many persons as they may deem expedient to collect and levy the rates so made on the several electoral divisions.

14. Nothing herein-before contained regarding the rating of premises or the collection of rates shall apply to premises situate within the district for the collection of poor rates as defined by the act passed in the session held in the twelfth and thirteenth years of the reign of her Majesty, intituled *an Act to provide for the collection of rates in the City of Dublin*.

15. No ratepayer shall be entitled to vote in the election of guardians, either in person or by proxy, in respect of any property not in his actual occupation, or to give any vote in addition to the vote or votes to which he would be entitled as an occupier paying rent equal to the net annual value of the property in his actual occupation, unless he or his proxy shall, one month at the least previous to the day on which he shall claim to vote, have given to the guar-

dians, or to some person acting as returning officer, a statement in writing of the name and address of such ratepayer, and the description and local situation of the property in respect of which he claims to vote, specifying, in cities, towns, and their suburbs having streets and other roadways, the name of the street or roadway, and the number of the house or tenement, if any, and the parish in which the property is situate, and in other places the barony, parish, and townland, so that the property may be ascertained and identified with reasonable certainty, together with the nature of the interest of the ratepayer therein, and its net annual value over and above all rents payable by him, and the amount of rent payable to him, and the names of the tenants or occupiers by whom poor-rates have been deducted from such rent; and no such proxy shall be entitled to claim to vote unless such proxy shall have given to the guardians, or some person acting as returning officer, one month at the least previous to the day on which he shall claim to vote, the original or an attested copy of the writing appointing such proxy, and every such claim to vote, whether by the ratepayer or his proxy, shall be executed in the presence of a justice of the peace.

16. No claim of a ratepayer to vote in the election of guardians, either in person or by proxy, in respect of any property not in his actual occupation, or to give a vote or votes in addition to the vote or votes to which he would be entitled as an occupier paying rent equal to the net annual value of the property in his occupation, shall continue in force beyond the period of five years from the date on which he or his proxy shall have given such statement as aforesaid: provided that every appointment of a proxy may be revoked at any time; provided, also, that no person shall be entitled to vote as proxy for more than twenty owners of property in any one electoral division or ward unless he be a steward, bailiff, land agent, or collector of rents for the owners of property for whom he may be appointed to vote.

17. " And whereas doubts have been entertained whether owners or immediate lessors of property who are rated under the provisions of the act of the sixth and seventh years of her Majesty, chapter ninety-two, sections one and four, or under the provisions of the act of the twelfth and thirteenth years of her Majesty, chapter ninety-one, section sixty-three, or under the provisions of the act of the twelfth and thirteenth years of her Majesty, chapter one hundred and four, section ten, are entitled to vote as ratepayers in respect of property for which they are so rated: " be it enacted, that it shall be lawful for owners or immediate lessors who are so rated as aforesaid to vote, in person or by proxy, in the election of guardians in the respect of the property or rent for which they are so rated, in the same manner as occupiers paying no rent or paying rent less than the net annual value of the rateable property, as the case may be; provided that every such owner or immediate lessor or his proxy shall have lodged a statement in the manner hereinbefore provided with reference to persons claiming to vote in respect of property not in their actual occupation.

18. No person receiving rent shall be entitled to vote as aforesaid in respect thereof for any greater amount of rent than the annual value of the property out of which such claim arises, according to the valuation of the same in the survey or valuation of rateable hereditaments for the time being in force in the union.

19. " Whereas it is provided by the said recited act, that no occupier paying rent to any landlord shall be entitled to vote under the provisions of the said act unless he shall have paid all the poor-rates previously made and assessed upon him, except such as shall have been made or become due within the six calendar months immediately preceding such voting; and it is expedient to extend the said provision: " be it enacted, that no occupier rated to the poor-rate shall be entitled to vote in that capacity unless he shall have paid all the poor-rates previously made and assessed upon him, except such as shall have been made or become due within six calendar months immediately preceding such voting; and no owner or imme-

diste lessor who is rated under the provisions of the act of the sixth and seventh years of her Majesty, chapter ninety-two, sections one and four, or the act of the twelfth and thirteenth years of her Majesty, chapter ninety-one, section sixty-three, or the act of the twelfth and thirteenth years of her Majesty, chapter one hundred and four, section ten, and this act, shall be entitled to vote in respect of the property for which he is so rated, unless he shall have paid all the rates made and assessed on him in respect of such property, except such as shall have been made or become due within six calendar months immediately preceding such voting.

20. From and after the passing of this act, in the event of any one person being elected a guardian by the ratepayers of two or more electoral divisions, electoral districts, or wards, as the case may be, he shall forthwith notify to the returning officer for which of such electoral divisions, electoral districts, or wards, as the case may be, he will choose to act as guardian, which notification shall be transmitted to the commissioners by the returning officer of such union; and the commissioners shall thereupon take order for a further election of guardian in the other of such divisions, districts, or wards, as the case may be.

21. No solicitor who is a member of any board of guardians shall act professionally as solicitor either for or against the board of guardians of which he is a member; and every solicitor so acting shall forfeit the sum of one hundred pounds, with full costs of suit, to any person who shall sue for the same by action of debt in any of her Majesty's courts of record in *Dublin*.

22. No paid officer engaged in the administration of the laws for the relief of the poor, or under the Act for the better Distribution, Support, and Management of Medical Charities in *Ireland*, nor any person who, having been such paid officer, shall have been dismissed within five years previously from such office, shall be capable of serving as a guardian; and no person receiving any fixed salary or emolument from the poor-rates in any union shall be capable of serving as a guardian in such union.

23. 'And whereas no legal provision exists for the burial of the bodies of unknown persons who have been drowned and cast ashore in *Ireland*, or who have otherwise perished and been found dead: 'be it enacted, that the guardians of each union in *Ireland* shall provide for the burial of the dead body of every such person dying or found dead within such union whose family or connections shall not be known, and whose body shall not be claimed by any person for the purpose of burial, and shall charge the expenses of such burial on the poor-rates of the union: provided that the relieving officer of the union, with the sanction of the guardian or one of the guardians of the electoral division in which such person shall be found dead, shall proceed without delay in the burial of such dead body, giving notice to the guardians of his proceedings therein, and of the expenses incurred by him, as soon thereafter as may be practicable in each case, such expense in each case not to exceed seven shillings and sixpence.

24. When, at the expiration of the year of office of the guardians of the poor, no nomination of a guardian or guardians for any electoral division shall have been made, the guardian or guardians of any such electoral division shall remain in office for the ensuing year, and have power to exercise all the functions of guardians of the poor, as if duly re-elected.

25. 'Whereas, under provisions of an act passed in the second year of the reign of her Majesty, chapter one, the commissioners are empowered to constitute certain cities, boroughs, and town electoral divisions into wards for the election of guardians: 'be it enacted, that when the commissioners shall have divided any electoral division into wards as aforesaid, every ratepayer who, under the last rate made in any union, shall have paid or contributed, or be liable to pay or contribute, rate in respect of property in any ward, shall have a vote or votes for the election of guardians in such ward according to the scale of votes fixed by the act of the first and second years of *Victoria*, ter fifty-six;

26: 'And, whereas the provisions of an act of the tenth and eleventh years of her Majesty, chapter ninety, relating to the constitution and appointment of commissioners for administering the laws for the relief of the poor in *Ireland*, secretaries, inspectors, and other officers, were continued from time to time, and by an act passed in the twenty-third and twenty-fourth years of her Majesty, chapter one hundred and forty-eight, such provisions were further continued until the twenty-third day of *July*, one thousand eight hundred and sixty-one, and thenceforth until the end of the present session of Parliament; and it is expedient that the commission for administering the law for the relief of the poor in *Ireland*, as constituted under the said act and an act of the fourteenth and fifteenth years of the reign of her Majesty, chapter sixty-eight, should be further continued for a limited time: 'therefore, the commissioners appointed by her Majesty, or to be appointed by her Majesty, her heirs and successors, under the authority of the said last-mentioned acts or either of them, together with every person by the said acts or either of them constituted by virtue of his office such commissioner, and every inspector, and other officer and person appointed or to be appointed by the commissioners under the provisions of the said recited acts now in force, shall, unless he shall previously resign or be removed, or otherwise cease to hold his office, be empowered to hold his office and exercise the powers thereof, under the said last-mentioned acts or either of them, until the twenty-third day of *July*, one thousand eight hundred and sixty-three, and thenceforth until the end of the then next session of Parliament; and until the expiration of the said period it shall be lawful for her Majesty, her heirs and successors, from time to time, at pleasure, to remove the commissioner or commissioners for the time being appointed by her Majesty, or to be appointed by her Majesty, her heirs and successors, under the said acts or either of them, and upon every vacancy in the office of the commissioner or commissioners so appointed or to be appointed, either by removal, death, resignation, or otherwise, to appoint, as in the said acts or either of them is described, some other fit person to the said office.

CAP. LXXXIV.

An Act to continue the Duties of Excise on Sugar made in the United Kingdom. and to amend the Laws relating to the Duties of Excise. [7th August, 1863.]

Sec. 1. *Excise duties on British sugar continued until 1st July, 1863.*

2. 23 & 24 Vict. c. 114, not to affect any other duties than the excise duties on spirits.

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the commons of the United Kingdom of *Great Britain and Ireland*, in Parliament assembled, towards raising the necessary supplies for defraying your Majesty's public expenses and making an addition to the public revenue, have freely and voluntarily resolved to give and grant to your Majesty the duties herein-after mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of same, as follows:—

1. The duties of excise on sugar made in the United Kingdom, specified in Schedule (B.) of the act passed in the twentieth and twenty-first years of her Majesty's reign, chapter sixty-one, shall be continued, and be levied and charged until the first day of *July*, one thousand eight hundred and sixty-three.

2. 'And whereas an act was passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, to reduce into one act and to amend the excise regulations relating to the distilling, rectifying, and dealing in spirits; and by the said act certain acts and parts of acts specified in Schedule (C.) thereto annexed were repealed, and doubts may arise whether by such repeal other duties than those of excise

on spirits and the regulations for charging and collecting the same may not have been prejudiced or affected contrary to the true intent and meaning of the said last-recited act: Be it enacted and declared, That nothing in the said last-recited act or the said schedule contained shall be construed, deemed, or taken to have repealed or affected any duties of excise in force at the time of the passing of the same act, or the regulations for charging or collecting the same, except as to the duties of excise on spirits, and all such duties and regulations in force as aforesaid, except as aforesaid, are hereby declared to have remained and shall continue to be and remain in full force and effect, and the said duties to have been and to be lawfully charged and chargeable in like manner as they would have been if the said last-recited act had not been passed, unless or until the same have been or shall be otherwise expressly repealed.

CAP. LXXXV.

An Act to facilitate the Transmission of Moveable Property in Scotland. [7th August, 1862.]

CAP. LXXXVI.

An Act to amend the Law relating to Commissions of Lunacy and the Proceedings under the same, and to provide more effectually for the visiting of Lunatics, and for other purposes. [7th August, 1862.]

CAP. LXXXVII.

An Act to consolidate and amend the Laws relating to Industrial and Provident Societies. [7th August, 1862.]

15 & 16 Vict. c. 31. 17 & 18 Vict. c. 25. 19 & 20 Vict. c. 40.

Sec. 1. *Recited acts repealed.*

2. *As to societies registered under recited acts.*

3. *Constitution of societies under this act.*

4. *Rules.*

5. *Registration of society.*

6. *Certificate to invest all property in society now held in trust for society.*

7. *Copy of rules to be delivered on demand.*

8. *No society to be registered by same name as that of any existing society.*

9. *Members interests limited to £200.*

10. *Publication of name by a society.*

11. *Penalties on non-publication of name, &c.*

12. *Every society to have a registered office. Penalty on default.*

13. *Notice of situation of registered office.*

14. *Signature and effect of rules.*

15. *Application of Friendly Societies Acts to this act.*

16. *Power to member to nominate persons into whose name his interest may be transferred at his death.*

17. *As to the winding-up of societies.*

18. *Dissolution of society not to prevent winding-up of its affairs.*

19. *Provisions of Joint Stock Companies Acts to apply.*

20. *Liability of present and past members of society.*

21. *Society may be constituted under Companies Acts.*

22. *Members may inspect books.*

23. *Sheriff's jurisdiction in Scotland.*

24. *Annual returns to be prepared as registrar may direct.*

25. *Recovery of penalties.*

26. *Short title.*

Whereas by the Industrial and Provident Societies Act, 1852, it is enacted, that it shall be lawful for any number of persons to establish a society under the provisions thereof and of the therein-recited act, for the purpose of raising by voluntary subscriptions of the members thereof a fund for attaining any purpose or object for the time being authorized by the laws in force with respect to friendly societies or by the said recited act, by carrying on or exercising in common any labour, trade, or handicraft, or several labours, trades, or handicrafts, except the work-

ing of mines, minerals, or quarries beyond the limits of the United Kingdom of Great Britain and Ireland, and also except the business of banking, whether in the said United Kingdom or elsewhere; and that the said act shall apply to all societies already established for any of the purposes herein mentioned, so soon as they shall conform to the provisions hereof: And whereas by an act passed in the seventeenth and eighteenth years of her present Majesty, chapter twenty-five, various provisions were made for the better enabling legal proceedings to be carried on in any matter concerning the societies formed under the said act of 1852: And whereas the last-mentioned act was amended by an act passed in the first session of the nineteenth and twentieth years of her present Majesty, chapter forty: and whereas various societies have been formed and are now carrying on business under the provisions of the said recited acts, and it is desirable to consolidate and amend the laws relating to such societies: Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. The Industrial and Provident Societies Act, 1852, and the said recited acts for the amendment thereof, are hereby repealed from the passing of this act.

2. All societies registered under the Industrial and Provident Societies Act, 1852, shall be entitled to obtain a certificate of registration on application to the registrar of friendly societies, and for which certificate no fee shall be payable to the registrar.

3. Any number of persons, not being less than seven, may establish a society under this act for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail, except the working of mines and quarries, and except the business of banking, and of applying the profits for any purposes allowed by the Friendly Societies Acts, or otherwise permitted by law.

4. The rules of every such society shall contain provisions in respect of the several matters mentioned in the schedule annexed to this act.

5. Two copies of the rules shall be forwarded to the registrar of friendly societies of England, Scotland, or Ireland, according to the place where the office of the society is situate, and shall be dealt with by him in the manner provided by the Friendly Societies Act, 1855: and he shall thereupon give his certificate of registration, and such certificate shall in all cases be conclusive evidence that the society has been duly registered, and thereupon the members of such society shall become a body corporate, by the name therein described, having a perpetual succession and a common seal, with power to hold lands and buildings, with limited liability.

6. The certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society; and all legal proceedings then pending by or against any such trustee or other officer on account of the society may be prosecuted by or against the society in its registered name without abatement.

7. A copy of the rules shall be delivered by the society to every person, on demand, on payment of a sum not exceeding one shilling.

8. No society shall be registered under a name identical with that by which any other existing society has been registered, or so nearly resembling such name as to be likely to deceive the members or the public, and the word "limited" shall be the last word in the name of every society registered under this act.

9. No member shall be entitled, in any society registered under this act, to hold or claim any interest exceeding the sum of two hundred pounds.

10. Every society registered under this act shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the society is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in le-

gible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such society, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the society.

11. If any society under this act does not paint or affix, and keep painted or affixed, its name in manner directed by this act, it shall be liable to a penalty not exceeding five pounds, for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and if any officer of such society or any person on its behalf uses any seal purporting to be a seal of the society whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of such society, or signs or authorizes to be signed on behalf of such society any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the society, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the society.

12. Every society under this act shall have a registered office to which all communications and notices may be addressed. If any society registered under this act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.

13. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: Until such notice is given the society shall not be deemed to have complied with the provisions of this act.

14. The rules of every society registered under this act shall bind the society, and the members thereof, to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such rules contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to such rules subject to the provisions of this act; and all monies payable by any member to the society in pursuance of such rules shall be deemed to be a debt due from such member to the society.

15. The provisions of the Friendly Societies Acts shall apply to societies registered under this act in the following particulars;

- Exemption from stamp duties and income tax:
- Settlement of disputes by arbitration or justices:
- Compensation to members unjustly excluded:
- Power of justices or county courts in case of fraud:
- Jurisdiction of the registrar.

16. The provisions of the Friendly Societies Acts, 1854, whereby a member of any society registered thereunder is allowed to nominate any persons to whom his investment in such society shall be paid, shall extend, in the case of societies registered under this act, to allow any member thereof to nominate any persons into whose name his interest in such society at his decease shall be transferred: Provided nevertheless, that any such society may, in lieu of making such transfer, elect, to pay to any persons so nominated the full value of such interest.

17. Any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding up shall be the county court of the district in which the office of the society is situated.

18. In case of the dissolution of any such society, such society shall nevertheless be considered as subsisting, and

be in all respects subject to the provisions of this act, so long and so far as any matters relating to the same remain unsettled, to the intent that such society may do all things necessary to the winding up of the concerns thereof, and that it may be sued and sue, under the provisions of this act, in respect of all matters relating to such society.

19. The provisions of the Joint Stock Companies Acts as to bills of exchange and the admissibility of the register of shares in evidence shall apply to all societies registered under this act.

20. In the event of a society registered under this act being wound up, every present and past member of such society shall be liable to contribute to the assets of the society to an amount sufficient for payment of the debts and liabilities of the society, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say,)

- (1.) No past member shall be liable to contribute to the assets of the society if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up;
- (2.) No past member shall be liable to contribute in respect of any debt or liability of the society contracted after the time at which he ceased to be a member;
- (3.) No past member shall be liable to contribute to the assets of the society unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in order to satisfy all just demands upon such society;
- (4.) No contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a past or present member;

21. Any society registered under this act may be constituted a company under the Companies Acts, by conforming to the provisions set forth in such act, and thereupon shall cease to retain its registration under this act.

22. Every person or member having an interest in the funds of any society registered under this act may inspect the books and the names of the members at all reasonable hours at the office of the society.

23. The sheriff in Scotland shall within his county have the like jurisdiction as is hereby given to the judge of the county court in any matter arising under this act.

24. A general statement of the funds and effects of any society registered under this act shall be transmitted to the registrar once in every year, and shall exhibit fully the assets and liabilities of the society, and shall be prepared and made out within such period, and in such form, and shall comprise such particulars as the registrar shall from time to time require; and the registrar shall have authority to require such evidence as he may think expedient of all matters required to be done, and of all documents required to be transmitted to him under this act; and every member of or any depositor in any such society shall be entitled to receive, on application to the treasurer or secretary of that society, a copy of such statement, without making any payment for the same.

25. All penalties imposed by this act, or by the rules of any society registered under this act, may be recovered in a summary manner before two justices, as directed by an act passed in the eleventh and twelfth years of the reign of her present Majesty Queen Victoria, chapter forty-three, intitled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders*.

26. This act may be cited as "The Industrial and Provident Societies Act, 1862."

SCHEDULE of Matters to be provided for in the Rules.

1. Object and name, and place of office of the society, which must in all cases be registered as one of limited liability.

2. Terms of admission of members.
3. Mode of holding meetings and right of voting, and of making or altering rules.
4. Determination whether the shares shall be transferable, and in case it be determined that the shares shall be transferable, provision for the form of transfer and registration of shares and for the consent of the committee of management and confirmation by the general meeting of the society; and in case shares shall not be transferable, provision for paying to members balance due to them on withdrawing from the society.
5. Provision for the audit of accounts.
6. Power to invest part of capital in another society; provided that no such investment be made in any other society not registered under this act, or the Joint Stock Companies Act, as a society or company with limited liability.
7. Power and mode of withdrawing from the society, and provisions for the claims of executors, administrators, or assigns of members.
8. Mode of application of profits.
9. Appointment of managers and other officers, and their respective powers and remuneration.

CAP. LXXXVIII.

An Act to amend the Law relating to the fraudulent marking of Merchandise. [7th August, 1862.]

CAP. LXXXIX.

An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations. [7th August, 1862.]

Sec. 1. *Short title.*

2. *Commencement of act.*
3. *Definition of insurance company.*
4. *Prohibition of partnerships exceeding certain number.*
5. *Division of act.*
6. *Mode of forming company.*
7. *Mode of limiting liability of members.*
8. *Memorandum of association of a company limited by shares.*
9. *Memorandum of association of a company limited by guarantee.*
10. *Memorandum of association of an unlimited company.*
11. *Stamp, signature, and effect of memorandum of association.*
12. *Power of certain companies to alter memorandum of association.*
13. *Power of companies to change name.*
14. *Regulations to be prescribed by articles of association.*
15. *Application of table A.*
16. *Stamp, signature, and effect of articles of association.*
17. *Registration of memorandum of association and articles of association, with fees as in table B.*
18. *Effect of registration.*
19. *Copies of memorandum and articles to be given to members.*
20. *Prohibition against identity of names in companies.*
21. *Prohibition against certain companies holding land.*
22. *Nature of interest in company.*
23. *Definition of "member."*
24. *Transfer by personal representative.*
25. *Register of members.*
26. *Annual list of members.*
27. *Penalty on company, &c., not keeping a proper register.*
28. *Company to give notice of consolidation or of conversion of capital into stock.*
29. *Effect of conversion of shares into stock.*
30. *Entry of trusts on register.*
31. *Certificate of shares or stock.*
32. *Inspection of register.*

33. *Power to close register.*
34. *Notice of increase of capital and of members to be given to registrar.*
35. *Remedy for improper entry or omission of entry in register.*
36. *Notice to registrar of rectification of register.*
37. *Register to be evidence.*
38. *Liability of present and past members of company.*
39. *Registered office of company.*
40. *Notice of situation of registered office.*
41. *Publication of name by a limited company.*
42. *Penalties on non-publication of name.*
43. *Register of mortgages.*
44. *Certain companies to publish statement entered in schedule.*
45. *List of directors to be sent to registrar.*
46. *Penalty on company not keeping register of directors.*
47. *Promissory notes and bills of exchange.*
48. *Prohibition against carrying on business with less than seven members.*
49. *General meeting of company.*
50. *Power to alter regulations by special resolution.*
51. *Definition of special resolution.*
52. *Provision where no regulations as to meetings.*
53. *Registry of special resolutions.*
54. *Copies of special resolutions.*
55. *Execution of deeds abroad.*
56. *Examination of affairs of company by inspectors.*
57. *Application for inspection to be supported by evidence.*
58. *Inspection of books.*
59. *Result of examination how dealt with.*
60. *Power of company to appoint inspectors.*
61. *Report of inspectors to be evidence.*
62. *Service of notices on company.*
63. *Rules as to notices by letter.*
64. *Authentication of notices of company.*
65. *Recovery of penalties.*
66. *Application of penalties.*
67. *Evidence of proceedings at meetings.*
68. *Jurisdiction of vice-warden of stannaries.*
69. *Provision as to costs in actions brought by certain limited companies.*
70. *Declaration in action against members.*
71. *Board of Trade may alter forms in schedule.*
72. *Power for companies to refer matters to arbitration.*
73. *Provisions of 22 & 23 Vict. c. 59, to apply.*
74. *Meaning of contributory.*
75. *Nature of liability of contributory.*
76. *Contributories in case of death.*
77. *Contributories in case of bankruptcy.*
78. *Contributories in case of marriage.*
79. *Circumstances under which company may be wound up by court.*
80. *Company when deemed unable to pay its debts.*
81. *Definition of "the court."*
82. *Application for winding up to be made by petition.*
83. *Power of court.*
84. *Commencement of winding up.*
85. *Court may grant injunction.*
86. *Course to be pursued by court on hearing petition.*
87. *Actions and suits to be stayed after order for winding up.*
88. *Copy of order to be forwarded to registrar.*
89. *Power of court to stay proceedings.*
90. *Effect of order on share capital of company limited by guarantee.*
91. *Court may have regard to wishes of creditors or contributories.*
92. *Appointment of official liquidator.*
93. *Resignations, removals, filling up vacancies, and compensation.*
94. *Style and duties of official liquidator.*
95. *Powers of official liquidator.*
96. *Discretion of official liquidator.*
97. *Appointment of solicitor to official liquidator.*

98. Collection and application of assets.
99. Provision as to representative contributories.
100. Power of court to require delivery of property.
101. Power of court to order payment of debts by contributory.
102. Power of court to make calls.
103. Power of court to order payment into bank.
104. Regulation of account with court.
105. Provision in case of representative contributory not paying monies ordered.
106. Order conclusive evidence.
107. Court may exclude creditors not proving in certain time.
108. Proceedings in the court of the vice-warden of the stannaries on proof of debts.
109. Court to adjust rights of contributories.
110. Court to order costs.
111. Dissolution of company.
112. Registrar to make minute of dissolution.
113. Penalty on not reporting dissolution of company.
114. Petition to be *lis pendens*.
115. Power of court to summon persons before it suspected of having property of company.
116. Special provisions as to court of vice-warden of the Stannaries.
117. Examination of parties by court.
118. Power to arrest contributory about to abscond, or to remove or conceal any of his property.
119. Powers of court cumulative.
120. Power to enforce orders.
121. Power to order contributories in Scotland to pay calls.
122. Order made in England to be enforced in Ireland and Scotland.
123. Mode of dealing with orders to be enforced by other courts.
124. Appeals from orders.
125. Judicial notices to be taken of signature of officers.
126. Special commissioners for receiving evidence.
127. Court may order the examination of persons in Scotland.
128. Affidavits, &c. may be sworn in Ireland, Scotland, or the colonies before any competent court or person.
129. Circumstances under which company may be wound up voluntarily.
130. Commencement of voluntary winding up.
131. Effect of voluntary winding up on status of company.
132. Notice of resolution to wind up voluntarily.
133. Consequences of voluntary winding up.
134. Effect of winding-up on share capital of company limited by guarantee.
135. Power of company to delegate authority to appoint liquidators.
136. Arrangement when binding on creditors.
137. Power of creditor or contributory to appeal.
138. Power for liquidators or contributories in voluntary winding-up to apply to court.
139. Power of liquidator to call general meeting.
140. Power to fill up vacancy in liquidators.
141. Power of court to appoint liquidators.
142. Liquidators on conclusion of winding up to make up an account.
143. Liquidators to report meeting to registrar.
144. Costs of voluntary liquidation.
145. Saving of rights of creditors.
146. Power of court to adopt proceedings of voluntary winding up.
147. Power of court on application, to direct winding up, subject to supervision.
148. Petition for winding up, subject to supervision.
149. Court may have regard to wishes of creditors.
150. Power to court to appoint additional liquidators in winding up subject to supervision.
151. Effect of order of court for winding up subject to supervision.
152. Appointment in certain cases of voluntary liquidators to office of official liquidators.
153. Dispositions after the commencement of the winding up avoided.
154. The books of the company to be evidence.
155. As to disposal of books, accounts, and documents of the company.
156. Inspection of books.
157. Power of assignee to sue.
158. Debts of all descriptions to be proved.
159. General scheme of liquidation may be sanctioned.
160. Power to compromise.
161. Power for liquidators to accept shares, &c., as a consideration for sale of property of company.
162. Mode of determining price.
163. Certain attachments, sequestrations, and executions to be void.
164. Fraudulent preference.
165. Power of court to assess damages against delinquent directors and officers.
166. Penalty on falsification of books.
167. Prosecution of delinquent directors in the case of winding up by court.
168. Prosecution of delinquent directors, &c., in case of voluntary winding up.
169. Penalty of perjury.
170. Power of Lord Chancellor of Great Britain to make rules.
171. Power of Court of Session in Scotland to make rules.
172. Power to make rules in stannaries court.
173. Power of Lord Chancellor of Ireland to make rules.
174. Constitution of registration office.
175. Definition of Joint Stock Companies Acts.
176. Application of act to companies formed under Joint Stock Companies Acts.
177. Application of act to companies registered under Joint Stock Companies Act.
178. Mode of transferring shares.
179. Regulations as to registration of existing companies.
180. Companies capable of being registered.
181. Definition of joint stock company.
182. Proviso as to banking company.
183. Requisitions for registration by companies.
184. Requisitions for registration by existing company not being a joint stock company.
185. Power for existing company to register amount of stock instead of shares.
186. Authentication of statements of existing companies.
187. Registrar may require evidence as to nature of company.
188. On registration of banking company with limited liability notices to be given to customers.
189. Exemption of certain companies from payment of fees.
190. Power to company to change name.
191. Certificate of registration of existing companies.
192. Certificate to be evidence of compliance with act.
193. Transfer of property to company.
194. Registration under this act not to affect obligations incurred previously.
195. Continuation of existing actions and suits.
196. Effect of registration under act.
197. Power of court to restrain further proceedings.
198. Order for winding up company.
199. Winding up of unregistered companies.
200. Who to be deemed a contributory in the event of company being wound up.
201. Power of court to restrain further proceedings.
202. Effect of order for winding up company.
203. Provision in case of unregistered company.
204. Provisions in this part of act cumulative.
205. Repeal of acts.
206. Saving clause as to repeal.
207. Saving of existing proceedings for winding up.
208. Saving of conveyance deeds.

209. *Compulsory registration of certain companies.*
 210. *Penalty on company not registering.* 21 Vict. c. 14, s. 28.
 211. *Temporary power for companies to change registered office.*
 212. *Restrictions on issue of certificate.*
Existing companies to have the powers of suing and being sued.
Power to form banking partnerships of ten persons.

'Whereas it is expedient that the laws relating to the incorporation, regulation, and winding-up of trading Companies and other associations should be consolidated and amended.' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This act may be cited for all purposes as "The Companies Act, 1862."

2. This act, with the exception of such temporary enactment as is hereinafter declared to come into operation immediately, shall not come into operation until the second day of *November*, one thousand eight hundred and sixty-two, and the time at which it so comes into operation is hereinafter referred to as the commencement of this act.

3. For the purposes of this act a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company.

4. No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this act, for the purposes of carrying on the business of banking, unless it is registered as a company under this act, or is formed in pursuance of some other act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this act, or is formed in pursuance of some other act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries.

5. This act is divided into nine parts, relating to the following subject matters:—

The first part—to the constitution and incorporation of companies and associations under this act.

The second part—to the distribution of the capital and liability of members of companies and associations under this act.

The third part—to the management and administration of companies and associations under this act.

The fourth part—to the winding-up of companies and associations under this act.

The fifth part—to the registration office.

The sixth part—to application of this act to companies registered under the Joint Stock Companies Acts.

The seventh part—to companies authorized to register under this act.

The eighth part—to application of this act to unregistered companies.

The ninth part—to repeal of acts, and temporary provisions.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of Association.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the require-

tions of this act in respect of registration, form an incorporated company, with or without limited liability.

7. The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things; that is to say,

- (1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name.
- (2.) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate.
- (3.) The objects for which the proposed company is to be established.
- (4.) A declaration that the liability of the members is limited.
- (5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount.

Subject to the following regulations:

- (1.) That no subscriber shall take less than one share.
- (2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

9. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things, that is to say:—

- (1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name.
- (2.) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate.
- (3.) The objects for which the proposed company is to be established.
- (4.) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

10. Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association shall contain the following things, that is to say,

- (1.) The name of the proposed company.
- (2.) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate.
- (3.) The objects for which the proposed company is to be established.

11. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in *Scotland* as well as in *England* and *Ireland*: it shall, when registered, bind the company and the members thereof to the same extent as if each member had

subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner herein-after mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is herein-after provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.

13. Any company under this act, with the sanction of a special resolution of the company passed in manner herein-after mentioned, and with the approval of the Board of Trade testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name, and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

Articles of Association.

14. The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. The article shall be expressed in separate paragraphs, numbered arithmetically: they may adopt all or any of the provisions contained in the table marked A. in the first schedule hereto. They shall, in the case of a company whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration. In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

15. In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in *Scotland* as well as in *England* and *Ireland*: when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his

heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all monies payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be in the nature of a specialty debt.

General Provisions.

17. The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies herein-after mentioned, who shall retain and register the same. There shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct. All fees paid to the said registrar in pursuance of this act shall be paid into the receipt of her Majesty's Exchequer, and be carried to the account of the Consolidated Fund of the United Kingdom of *Great Britain* and *Ireland*.

18. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is herein-after mentioned: a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with.

19. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one shilling or such less sum as may be prescribed by the company for each copy; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding one pound.

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name, and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal pro-

ceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

21. No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.

PART II.

DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Distribution of Capital.

22. The shares or other interest of any member in a company under this act shall be personal estate, capable of being transferred in manner provided by the regulations of the company, and shall not be of the nature of real estate, and each share shall, in the case of a company having a capital divided into shares, be distinguished by its appropriate number.

23. The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members herein-after mentioned; and every other person who has agreed to become a member of a company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

24. Any transfer of the share or other interest of a deceased member of a company under this act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer.

25. Every company under this act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:

- (1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: And of the amount paid or agreed to be considered as paid on the shares of each member:
- (2.) The date at which the name of any person was entered in the register as a member:
- (3.) The date at which any person ceased to be a member:

And any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty.

26. Every company under this act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:

- (1.) The amount of the capital of the company, and the number of shares into which it is divided:
- (2.) The number of shares taken from the commence-

ment of the company up to the date of the summary:

- (3.) The amount of calls made on each share:
- (4.) The total amount of calls received:
- (5.) The total amount of calls unpaid:
- (6.) The total amount of shares forfeited:
- (7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies.

27. If any company under this act, and having a capital divided into shares, makes default in complying with the provisions of this act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

28. Every company under this act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, shall give notice to the registrar of joint stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted.

29. Where any company under this act, and having a capital divided into shares, has converted any portion of its capital into stock, and given notice of such conversion to the registrar, all the provisions of this act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the register of members hereby required to be kept by the company, and the list of members to be forwarded to the registrar, shall show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

30. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this act and registered in *England or Ireland*.

31. A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified.

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned: Except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied: If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in *England and Ireland*, any judge sitting in chambers, or the vice-warden of the stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

33. Any company under this act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

34. Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorized, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members: If such notice is not given within the period aforesaid the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England or Ireland*, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained: The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

36. Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the court shall, by its order, direct that due notice of such rectification be given to the registrar.

37. The register of members shall be *prima facie* evidence of any matters by this act directed or authorized to be inserted therein.

Liability of members.

38. In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights

of the contributories amongst themselves, with the qualifications following; (that is to say,)

- (1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up:
- (2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:
- (3.) No past member shall be liable to contribute to the assets of the company unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act:
- (4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:
- (5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association:
- (6.) Nothing in this act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract:
- (7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves.

PART III.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Provisions for protection of Creditors.

39. Every company under this act shall have a registered office to which all communications and notices may be addressed: if any company under this act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.

40. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: until such notice is given the company shall not be deemed to have complied with the provisions of this act with respect to having a registered office.

41. Every limited company under this act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

42. If any limited company under this act does not paint or affix, and keep painted or affixed, its name in manner directed by this act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name,

and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

43. Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding fifty pounds: the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in *England and Ireland*, any judge sitting in chambers, or the vice-warden of the stannaries in the case of companies, subject to his jurisdiction, may by order compel an immediate inspection of the register.

44. Every limited banking company and every insurance company, and deposit, provident, or benefit society under this act shall, before it commences business, and also on the first *Monday* in *February* and the first *Monday* in *August* in every year during which it carries on business, make a statement in the form marked D, in the first schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty:

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

45. Every company under this act, and not having a capital divided into shares, shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and shall send to the registrar of joint stock companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors or managers.

46. If any company under this act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy

of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director or manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company.

48. If any company under this act carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member.

Provisions for protection of Members.

49. A general meeting of every company under this act shall be held once at the least in every year.

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked A, in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed. At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: notice of any meeting shall, for the purposes of this section, be deemed to be duly given, and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company: in computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

52. In default of any regulations as to voting every member shall have one vote, and in default of any regulations as to summoning general meetings a meeting shall

be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the table marked A, in the first schedule hereto, and in default of any regulations as to the persons to summon meetings five members shall be competent to summon the same, and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside.

53. A copy of any special resolution that is passed by any company under this act shall be printed and forwarded to the registrar of joint stock companies, and be recorded by him: if such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

54. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution: where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling, or such less sum as the company may direct: and if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

55. Any company under this act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company.

56. The board of trade may appoint one or more competent inspectors to examine into the affairs of any company under this act, and to report thereon, in such a manner as the board may direct, upon the applications following; that is to say.

- (1.) In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued.
- (2.) In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued.
- (3.) In the case of any company not having a capital divided into shares upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

57. The application shall be supported by such evidence as the board of trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the board of trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

58. It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power: any inspector may examine upon oath the officers and agents of

the company in relation to its business, and may administer such oath accordingly: if any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence.

59. Upon the conclusion of the examination the inspectors shall report their opinion to the board of trade: such report shall be written or printed, as the board of trade directs: a copy shall be forwarded by the board of trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them: all expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the board of trade shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do.

60. Any company under this act may by special resolution appoint inspectors for the purpose of examining into the affairs of the company: the inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the board of trade, with this exception, that, instead of making their report to the board of trade, they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the board of trade.

61. A copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Notices.

62. Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office.

63. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office.

64. Any summons, notice, order, or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorised officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Legal Proceedings.

65. All offences under this act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen Victoria, chapter forty-three, intituled *An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*, or any act amending the same; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the act passed in the session of Parliament holden in the seventeenth and eighteenth years of the reign of her Majesty Queen Victoria, chapter one hundred and four, intituled *An Act to amend and consolidate the Acts relating to Merchant Shipping*, or any act amending the same, as regards offences in Scotland

against that act, not being offences by that act described as Felonies or Misdemeanors; and as to *Ireland*, in manner directed by the act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, chapter ninety-three, intituled *An Act to consolidate and amend the Acts regulating the proceedings of Petty Sessions and the duties of Justices of the Peace out of Quarter Sessions in Ireland*, or any act amending the same.

66. The justices or sheriff imposing any penalty under this act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and, subject to such direction, all penalties shall be paid into the receipt of her Majesty's exchequer, in such manner as the Treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications.

68. In the case of companies under this act, and engaged in working mines within and subject to the jurisdiction of the stannaries, the court of the vice-warden of the stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, which it now possesses by custom, usage, or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this act and with the constitution of companies as prescribed or required by this act; and for the purpose of giving fuller effect to such jurisdiction in all actions, suits, or legal proceedings instituted in the said court, in causes or matters whereof the court has cognizance, all process issuing out of the same, and all orders, rules, demands, notices, warrants, and summonses required or authorised by the practice of the court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager, or servant thereof, may be served in any part of *England* without any special order of the vice-warden for that purpose, or by such special order may be served in any part of the United Kingdom of *Great Britain and Ireland*, or in the adjacent islands, parcel of the dominions of the crown, on such terms and conditions as the court shall think fit; and all decrees, orders, and judgments of the said court made or pronounced in such causes or matters may be enforced in the same manner in which decrees, orders, and judgments of the court may now by law be enforced, whether within or beyond the local limits of the stannaries; and the seal of the said court, and the signature of the registrar thereof, shall be judicially noticed by all other courts and judges in *England*, and shall require no other proof than the production thereof: the registrar of the said court, or the assistant-registrar, in making sales under any decree or order of the court shall be entitled to the same privilege of selling by auction or competition without a licence, and without being liable to duty, as a judge of the

Court of Chancery is entitled to in pursuance of the acts in that behalf.

69. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

70. In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due, whereby an action or suit hath accrued to the company.

Alteration of forms.

71. The forms set forth in the second schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the Board of trade may from time to time make such alterations in the tables and forms contained in the first schedule hereto, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last mentioned forms, as it deems requisite: Any such table or form, when altered, shall be published in the *London Gazette*, and upon such publication being made such table or form shall have the same force as if it were included in the schedule to this act, but no alteration made by the Board of Trade in the table marked A. contained in the first schedule shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table.

Arbitrations.

72. Any company under this act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway Companies arbitration Act, 1859," any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies.

73. All the provisions of "The Railway Companies Arbitration Act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this act; and in the construction of such provisions "the companies" shall be deemed to include companies authorized by this act to refer disputes to arbitration.

PART IV.

WINDING UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Preliminary.

74. The term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up: It shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

75. The liability of any person to contribute to the assets of a company under this act in the event of the same being wound up, shall be deemed to create a debt (in *England and Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such

liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made.

76. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly.

77. If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any monies due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up; and for the purposes of this section any person who may have taken the benefit of any act for the relief of insolvent debtors before the eleventh day of October, one thousand eight hundred and sixty-one, shall be deemed to have become bankrupt.

78. If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly.

Winding up by court.

79. A company under this act may be wound up by the court as hereinafter defined, under the following circumstances: (that is to say,)

- (1.) Whenever the company has passed a special resolution requiring the company to be wound up by the court;
- (2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year;
- (3.) Whenever the members are reduced in number to less than seven;
- (4.) Whenever the company is unable to pay its debts;
- (5.) Whenever the court is of opinion that it is just and equitable that the company should be wound up;

80. A company under this act shall be deemed to be unable to pay its debts,

- (1.) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor;
- (2.) Whenever, in *England* and *Ireland*, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part;
- (3.) Whenever, in *Scotland*, the inducible of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made;
- (4.) Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts.

81. The expression "the court," as used in this part of

this act, shall mean the following authorities; (that is to say,)

In the case of a company engaged in working any mine within and subject to the jurisdiction of the stannaries,—the court of the vice-warden of the stannaries, unless the vice-warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case "the court" shall mean the High Court of Chancery:

In the case of a company registered in *England* that is not engaged in working any such mine as aforesaid,—the High Court of Chancery:

In the case of a company registered in *Ireland*, the Court of Chancery in *Ireland*:

In all cases of companies registered in *Scotland*, the Court of Session in either division thereof:

Provided that where the Court of Chancery in *England* or *Ireland* makes an order for winding up a company under this act, it may, if it thinks fit, direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon such last-mentioned Court of Bankruptcy shall, for the purposes of winding up the company, be deemed to be "the court" within the meaning of the act, and shall have for the purposes of such winding up all the powers of the High Court of Chancery, or of the Court of Chancery in *Ireland*, as the case may require.

82. Any application to the court for the winding up of a company under this act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately, and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

83. Any judge of the High Court of Chancery may do in chambers any act which the court is hereby authorized to do; and the vice-warden of the stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in *England*; and all orders made thereupon shall have the same force and effect as if they had been made by the vice-warden sitting at *Truro* or elsewhere within the jurisdiction of the court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the vice-warden by like process and in like manner as at the hearing of any cause or matter at the usual sitting of the said court; and the registrar of the court may, subject to exception or appeal to the vice-warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding up as he is now used to do and exercise in a suit on the equity side of the said court.

84. A winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

85. The court may, at any time after the presentation of a petition for winding up a company under this act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit; the court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company.

86. Upon hearing the petition the court may dismiss the same with or without costs, may adjourn the hearing

conditionally or unconditionally, and may make any interim order, or any other order that it deems just.

87. When an order has been made for winding up a company under this act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court, and subject to such terms as the court may impose.

88. When an order has been made for winding up a company under this act, a copy of such order shall forthwith be forwarded by the company to the registrar of joint stock companies, who shall make a minute thereof in his books relating to the company.

89. The court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit.

90. When an order has been made for winding up a company limited by guarantee and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a debt (in *England and Ireland* of the nature of a specialty) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the court.

91. The court may, as to all matters relating to the winding up have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company.

Official Liquidators.

92. For the purpose of conducting the proceedings in winding up a company, and assisting the court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators; and the court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators; in all cases if more persons than one are appointed to the office of official liquidator, the court shall declare whether any act hereby required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons. The court may also determine whether any and what security is to be given by any official liquidator on his appointment; if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the court.

93. Any official liquidator may resign or be removed by the court on due cause shown: And any vacancy in the office of an official liquidator appointed by the court shall be filled by the court: There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the court may direct; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportion as the court directs.

94. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names; he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in re-

ference to the winding up of the company as may be imposed by the court.

95. The official liquidator shall have power, with the sanction of the court, to do the following things:

To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company:

To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same:

To sell the real and personal and heritable and moveable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels:

To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors:

To draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money: and the drawing, accepting, making, or endorsing of every such bill of exchange or promissory note as aforesaid on behalf of the company shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or endorsed by or on behalf of such company in the course of carrying on the business thereof:

To take out if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or from his estate and which act cannot be conveniently done in the name of the company; and in all cases where he takes out letters of administration, or otherwise use his official name for obtaining payment of any monies due from a contributory, such monies shall for the purpose of enabling him to take out such letters or recover such monies, be deemed to be due to the official liquidator himself:

To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

96. The court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court, and where an official liquidator is provisionally appointed may limit and restrict his powers by the order appointing him.

97. The official liquidator may, with the sanction of the court, appoint a solicitor or law agent to assist him in the performance of his duties.

Ordinary Powers of Court.

98. As soon as may be after making an order for winding up the company, the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities.

99. In settling the list of contributories the court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others: it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless

such heirs or devisees may be added as and when the court thinks fit.

100. The court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled.

101. The court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any monies due from him or from the estate of the person whom he represents to the company, exclusive of any monies which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the court in pursuance of this part of this act; and it may, in making such order when the company is not limited, allow to such contributory by way of set-off any monies due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any monies due to him as a member of the company in respect of any dividend or profit.

Provided that when all the creditors of any company whether limited or unlimited are paid in full, any monies due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls.

102. The court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

103. The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced in the same manner as if it had directed payment to the official liquidator.

104. All monies, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound up by the court, shall be subject to such order and regulation for the keeping of the account of such monies and other effects, and for the payment and delivery in, or investment and payment and delivery out of the same as the court may direct.

105. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereof of the monies due.

106. Any order made by the court in pursuance of this act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the monies, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken

against the real estate of any deceased contributory, in which case such order shall only be *primâ facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

107. The court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved.

108. If in the course of proving the debts and claims of creditors in the court of the vice-warden of the stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the court to be open to question, the court shall have power, subject to appeal as hereinafter provided, to adjudicate upon it, and for that purpose the said court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the court or to produce documents before the court; and the court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by a creditor on any property of the company in respect of such debt, and to make declarations of right, binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on such inquiry, the vice-warden shall have power, if he thinks fit, to direct and settle any action or issue to be tried either on the common law side of his court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issue shall be conclusive of the facts found, unless the judge who tried it makes known to the vice-warden that he was not satisfied with the finding, or unless it appears to the vice-warden that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

109. The court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto.

110. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the court thinks just.

111. When the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly.

112. Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

113. If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

114. Any petition for winding up a company by the court under this act shall constitute a *lis pendens* within the terms of the act passed in the session holden in the second and third years of the reign of her present Majesty, chapter eleven, and intituled *An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy*, provided the same is duly registered in manner required by such act concerning suits in equity.

Extraordinary Powers of Court.

115. The court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or

supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause such person to be apprehended, and brought before the court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up to determine all questions relating to such lien.

116. If, after an order for winding up in the court of the vice-warden of the stannaries, it appears that any person claims property in, or any lien, legal or equitable, upon any of the machinery, materials, ores, or effects on the mine or on premises occupied by the company in connection with the mine, or to which the company was, at the time of the order, *primâ jaciis* entitled, it shall be lawful for the vice-warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the act passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two; and any action or issue directed upon such interpleader may, if the vice-warden think fit, be tried in his court or at the assizes or the sittings in *London or Middlesex*, before a judge of one of the superior courts, in the manner and on the terms and conditions hereinbefore provided in the case of disputed debts and claims of creditors.

117. The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.

118. The court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the court may order.

119. Any powers by this act conferred on the court shall be deemed to be in addition to and not in restriction of any other powers subsisting, either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory or debtor, or his estate, and such proceedings may be instituted accordingly.

Enforcement of and Appeal from Orders.

120. All orders made by the Court of Chancery in *England or Ireland* under this act may be enforced in the same manner in which orders of such Court of Chancery made in any suit pending therein may be enforced, and for the purposes of this part of this act the court of the vice-warden of the stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in *England* has in relation to matters within the jurisdiction of such court, and for the last-mentioned purposes the jurisdiction of the vice-warden of the stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in *England*.

121. Where an order, interlocutor, or decree has been

made in *Scotland* for winding up a company by the court, it shall be competent to the court in *Scotland* during session, and to the lord ordinary on the bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds *per centum per annum*, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignment, unless with special leave of the court or lord ordinary.

122. Any order made by the court in *England* for or in the course of the winding up of a company under this act shall be enforced in *Scotland and Ireland* in the courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in *Scotland or Ireland*, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the court in *Scotland* for or in the course of the winding up of a company shall be enforced in *England and Ireland*, and orders made by the court in *Ireland* for or in the course of winding up a company shall be enforced in *England and Scotland* by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction.

123. Where any order, interlocutor, or decree made by one court is required to be enforced by another court, as hereinbefore provided, an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned court shall take such steps in the matter as may be requisite, for enforcing such order, interlocutor, or decree, in the same manner as if it were the order, interlocutor, or decree of the court enforcing the same.

124. Rehearings of and appeals from any order or decision made or given in the matter of the winding up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the court appealed from, unless such time is extended by the court of appeal: provided that it shall be lawful for the lord warden of the stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding up to the Court of Appeal in Chancery, which court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents, and papers as the lord warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the lord warden specified in the Act of Parliament passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two, and any order so made by the Court

of Appeal in Chancery shall be final, without any further appeal.

125. In all proceedings under this part of this act, all courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in *England* or in *Ireland*, or of the Court of Session in *Scotland* or of the registrar of the court of the vice-warden of the stannaries, and also of the official seal or stamp of the several offices of the courts of Chancery or Bankruptcy in *England* or *Ireland*, or of the Court of Session in *Scotland*, or of the court of the vice-warden of the stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the act, or any official copy thereof.

126. The commissioners of the Court of Bankruptcy and the judges of the county courts in *England* who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in *Ireland*, and the sheriffs of counties in *Scotland*, shall be commissioners for the purpose of taking evidence under this act in cases where any company is wound up in any part of the United Kingdom, and it shall be lawful for the court to refer the whole or any part of the examination of any witnesses under this act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the court that made the order or decree for winding up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses which he might lawfully exercise as a commissioner of the Court of Bankruptcy, judge of a county court, commissioner of bankrupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, as the court which made the order for winding up the company has; and the examination so taken shall be returned or reported to such last-mentioned court in such manner as it directs.

127. The court may direct the examination in *Scotland* of any person for the time being in *Scotland*, whether a contributory of the company or not, in regard to the estate, dealings, or affairs of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory, and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the court, and shall transmit with such report the books, papers, deeds, or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of *Scotland*; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appoint-

ment from the Court of Session and as witnesses and havers are entitled to in the like cases according to the law and practice of *Scotland*: if any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the court, and suspend the examination of such witness until such objection has been disposed of by the court.

128. Any affidavit, affirmation, or declaration required to be sworn or made, under the provisions or for the purposes of this part of this act, may be lawfully sworn or made in *Great Britain* or *Ireland*, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations, or before any of her Majesty's consuls or vice-consuls, in any foreign parts out of her Majesty's dominions, and all courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of this part of this act.

Voluntary winding up of Company.

129. A company under this act may be wound up voluntarily,

- (1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- (2.) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily;
- (3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same:

For the purposes of this act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined.

130. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising such winding up.

131. Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding up shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up.

132. Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisement as respects companies registered in *England* in the *London Gazette*, as respects companies registered in *Scotland* in the *Edinburgh Gazette*, and as respects companies registered in *Ireland* in the *Dublin Gazette*.

133. The following consequences shall ensue upon the voluntary winding up of a company:

- (1.) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company:
- (2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property:
- (3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him:
- (4.) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him:
- (5.) Upon the appointment of liquidators all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers.
- (6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them, as may be determined at the time of their appointment, or in default of such determination by any number not less than two:
- (7.) The liquidators may, without the sanction of the court, exercise all powers by this act given to the official liquidator:
- (8.) The liquidators may exercise the powers hereinbefore given to the court of settling the list of contributories of the company, and any list so settled shall be *prima facie* evidence of the liability of the persons named therein to be contributories:
- (9.) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same:
- (10.) The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves.

134. Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators.

135. A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution, delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised; and any act done by the creditors, in pursuance of such delegated power, shall have the same effect as if it had been done by the company.

136. Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three fourths in

number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

137. Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the court against such arrangement, and the court may thereupon, as it thinks just, amend, vary, or confirm the same.

138. Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the court in *England, Ireland, or Scotland*, or to the lord ordinary on the bills in *Scotland* in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court; and the court or lord ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the court thinks fit, or it may make such other order, interlocutor, or decree on such application as the court thinks just.

139. Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding-up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or extraordinary resolution, or for any other purposes they think fit; and in the event of the winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

140. If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement they may have entered into with their creditors, fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the company, be determined by the court.

141. If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the court may, on the application of a contributory, appoint a liquidator or liquidators: The court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up.

142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators: The meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in *England* in the *London Gazette*, and as respects companies registered in *Scotland* in the *Edinburgh Gazette*, and as respects companies registered in *Ireland* in the *Dublin Gazette*.

143. The liquidator shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved: If the liquidators make default in making such return to the registrar

they shall incur a penalty not exceeding five pounds for every day during which such default continues.

144. All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.

145. The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the court, if the court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up.

146. Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the court, the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding up.

Winding up subject to the Supervision of the Court.

147. When a resolution has been passed by a company to wind up voluntarily, the court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally upon such terms and subject to such conditions as the court thinks just.

148. A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the court, shall, for the purpose of giving jurisdiction to the court over suits and actions, be deemed to be a petition for winding up the company by the court.

149. The court may, in determining whether a company is to be wound up altogether by the court or subject to the supervision of the court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held, and regulated in such manner as the court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: In the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company.

150. Where any order is made by the court for a winding up subject to the supervision of the court, the court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company: The court may from time to time remove any liquidators so appointed by the court, and fill up any vacancy occasioned by such removal, or by death or resignation.

151. Where an order is made for a winding up subject to the supervision of the court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the court, exercise all their powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the court for a winding up, subject to the supervision of the court, shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the court for winding up the company by the court, and shall confer full authority on the court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company alto-

gether by the court, and in the construction of the provisions whereby the court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up, subject to the supervision of the court.

152. Where an order has been made for the winding up of a company subject to the supervision of the court, and such order is afterwards superseded by an order directing the company to be wound up compulsorily, the court may in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators, or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators.

Supplemental Provisions.

153. Where any company is being wound up by the court or subject to the supervision of the court all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up and the order for winding up, shall, unless the court otherwise orders, be void.

154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

155. Where any company has been wound up under this act and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way; that is to say, where the company has been wound up by or subject to the supervision of the court, in such way as the court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or anyone to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be traced forthcoming to any party or parties claiming to be interested therein.

156. Where an order has been made for winding up a company by the court, or subject to the supervision of the court, the court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the order of the court, but not further or otherwise.

157. Any person to whom any thing in action belonging to the company is assigned, in pursuance of this act, may bring or defend any action or suit relating to such thing in action in his own name.

158. In the event of any company being wound up under this act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

159. The liquidators may, with the sanction of the court, where the company is being wound up by the court or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable.

160. The liquidators may, with the sanction of the

court, where the company is wound up by the court or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person, apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities.

161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer: that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: no special resolution shall be deemed invalid for the purposes of this section by reason that it has passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the court, such resolution shall not be of any validity unless it is sanctioned by the court.

162. The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of "The Companies Clauses Consolidation Act, 1845," with respect to the settlement of disputes by arbitration, shall be incorporated with this act; and in the construction of such provisions this act shall be deemed to be the special act, and "the company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

163. Where any company is being wound up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.

164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the court or subject to the supervision of the court, and a resolution for winding up the company shall, in the case of a voluntary winding up, be deemed to correspond with the act of bankruptcy in the case of an individual trader; and any conveyance or assignment made by any company formed under this act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

165. Where, in the course of the winding up of any company under this act, it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust, as the court thinks just.

166. If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

167. Where any order is made for winding up a company by the court or subject to the supervision of the court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

169. If any person, upon any examination upon oath or affirmation authorised under this act, or in any affidavit, deposition, or solemn affirmation in or about the winding up of any company under this act, or otherwise in or about any matter arising under this act, wilfully or corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

Power of Courts to make Rules.

170. In *England* the Lord Chancellor of *Great Britain*, with the advice and consent of the Master of the Rolls, and any one of the vice-chancellors for the time being, or with the advice and consent of any two of the vice-chancellors, may, as often as circumstances require, make such rules concerning the mode of proceeding to be had for winding up a company in the Court of Chancery as may from time to time seem necessary, but until such rules are made the general practice of the Court of Chancery, including the practice hitherto in use in winding up companies, shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company.

171. In *Scotland* the Court of Session may make such rules concerning the mode of winding up as may be necessary by Act of Sederunt; but, until such rules are made, the general practice of the Court of Session in suits pending in such court shall, so far as the same is applicable, and not inconsistent with this act, apply to all proceedings for winding up a company, and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate.

172. The vice-warden of the stannaries may from time to time, with the consent provided for by section twenty-three of the act of the eighteenth of *Victoria*, chapter thirty-two, make rules for carrying into effect the powers conferred by this act upon the court of the vice-warden, but, subject to such rules, the general practice of the said court and of the registrar's office in the said court, including the present practice of the said court in winding up companies, may be applied to all proceedings under this act; the said vice-warden may likewise, with the same consent, make from time to time rules for specifying the fees to be taken in his said court in proceedings under this act; and any rules so made shall be of the same force as if they had been enacted in the body of this act; and the fees paid in respect of proceeding taken under this act, including fees taken under "The Joint Stock Companies Act, 1858," in the matter of winding up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the court, as the lord warden of the stannaries shall from time to time, on the application of the vice-warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund apart from the ordinary fees of the court arising from other business, to await such direction and order of the lord warden herein, and to accumulate by investment in Government securities until the whole shall have been so appropriated.

173. In *Ireland* the Lord Chancellor of *Ireland* may, as respects the winding up of companies in *Ireland*, with the advice and consent of the Master of the Rolls in *Ireland*, exercise the same power of making rules as is by this act hereinbefore given to the Lord Chancellor of *Great Britain*; but until such rules are made, the general practice of the Court of Chancery in *Ireland*, including the practice hitherto in use in *Ireland* in winding up companies, shall, so far as the same is applicable, and not inconsistent with this act, apply to all proceedings for winding up a company.

PART V.

REGISTRATION OFFICE.

174. The registration of companies under this act shall be conducted as follows; (that is to say,)

- (1.) The Board of Trade may from time to time appoint such registrars, assistant registrars, clerks, and servants as they may think necessary for the registration of companies under this act, and remove them at pleasure:
- (2.) The Board of Trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid:
- (3.) The Board of Trade may from time to time determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office, and that no company shall be registered except at an office within that part of the United Kingdom in which by the memorandum of Association the registered office of the company is declared to be established; and the board may require that the registrar's office of the court of the vice-warden of the stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the court:
- (4.) The Board of Trade may from time to time direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies:
- (5.) Every person may inspect the documents kept by the registrar of joint stock companies; and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar; and there shall be paid for such certificate of incorporation, certified copy, or extract such fees as the Board of Trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or in *Scotland* for each sheet of two hundred words:
- (6.) The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration of joint stock companies shall, during the pleasure of the Board of Trade, hold the offices and receive the salaries hitherto held and received by them, but they shall in the execution of their duties conform to any regulations that may be issued by the Board of Trade:
- (7.) There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint stock companies such salary as the Board of Trade may, with the sanction of the Commissioners of the Treasury, direct:
- (8.) Whenever any act is herein directed to be done to or by the registrar of joint stock companies, such act shall, until the Board of Trade otherwise directs, be done in *England* to or by the existing registrar of joint stock companies or in his absence to or by such person as the Board of Trade may, for the time being, authorize; in *Scotland* to or by the existing registrar of joint stock companies in *Scotland*; and in *Ireland* to or by the existing assistant registrar of joint stock companies for *Ireland*, or by such person as the Board of Trade may for the time being authorize in *Scotland* or *Ireland* in the absence of the registrar; but in the event of the Board of Trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers and

at such place or places with reference to the local situation of the registered offices of the companies to be registered as the Board of Trade may appoint.

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT STOCK COMPANIES ACTS.

175. The expression "Joint Stock Companies Acts" as used in this act shall mean "The Joint Stock Companies Act, 1856," "The Joint Stock Companies Acts, 1856, 1857," "The Joint Stock Banking Companies Act, 1857," and "The Act to enable Joint Stock Banking Companies to be formed on the Principle of Limited Liability," or any one or more of such acts, as the case may require; but shall not include the act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, and intitled *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies*.

176. Subject as hereinafter mentioned, this act, with the exception of table A. in the first schedule, shall apply to companies formed and registered under the said Joint Stock Companies Acts or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this act as a company limited by shares, and in the case of a company other than a limited company, as if such company had been formed and registered as an unlimited company under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts or any of them, and the power of altering regulations by special resolution given by this act shall, in the case of any company formed and registered under the said Joint Stock Companies Acts or any of them, extend to altering any provisions contained in the table marked B. annexed to "The Joint Stock Companies Act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares notwithstanding such regulations are contained in the memorandum of association.

177. This act shall apply to companies registered but not formed under the said Joint Stock Companies Acts or any of them in the same manner as it is hereinafter declared to apply to companies registered but not formed under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts or any of them.

178. Any company registered under the said Joint Stock Company's Acts or any of them may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

PART VII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT.

179. The following regulations shall be observed with respect to the registration of companies under this part of this act; (that is to say,)

- (1. No company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company as hereinafter defined, shall register under this act in pursuance of this part thereof:
- (2.) No company having the liability of its members limited by Act of Parliament or by letters patent shall register under this act, in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee:
- (3.) No company that is not a joint stock company as hereinafter defined, shall in pursuance of this

part of this act register under this act as a company limited by shares:

- (4.) No company shall register under this act in pursuance of this part thereof unless an assent to its so registering is given by a majority of such of its members as may be present, personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose:
- (5.) Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting:
- (6.) Where a company is about to register as a company limited by guarantee the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount:

In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

180. With the above exceptions, and subject to the foregoing regulations, every company existing at the time of the commencement of this act, including any company registered under the said Joint Stock Companies Act, consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

181. For the purposes of this part of this act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint stock company shall be deemed to be a company having a permanent paid up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons; and such company when registered with limited liability under this act shall be deemed to be a company limited by shares.

182. No banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof, and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company.

183. Previously to the registration in pursuance of this part of this act of any joint stock company there shall be delivered to the registrar the following documents; that is to say,

- (1.) A list showing the names, addresses, and occupations of all persons who on a day named in such

list, and not being more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such persons respectively, distinguishing, in cases where such shares are numbered, each share by its number;

- (2.) A copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of co-partnery, cost book regulations, or other instrument constituting or regulating the company;
- (3.) If any such joint stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars; that is to say,

The nominal capital of the company and the number of shares into which it is divided:

The number of shares taken and the amount paid on each share:

The name of the company, with the addition of the word "limited" as the last word thereof:

With the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

184. Previously to the registration in pursuance of this part of this act of any company not being a joint stock company there shall be delivered to the registrar a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company, also a copy of any Act of Parliament, letters patent, deed of settlement, contract of co-partnery, cost book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee.

185. Where a joint stock company authorised to register under this act has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

186. The lists of members and directors and any other particulars relating to the company hereby required to be delivered to the registrar shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the act passed in the sixth year of the reign of his late Majesty King William the Fourth, chapter sixty-two.

187. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint stock company as hereinbefore defined.

188. Every banking company existing at the date of the passing of this act which registers itself as a limited company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company, and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company; and in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certi-

ficate of registration with limited liability shall have no operation.

189. No fees shall be charged in respect of the registration in pursuance of this part of this act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other Act of Parliament or by letters patent.

190. Any company authorised by this part of this act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name, by adding thereto the word "limited."

191. Upon compliance with the requisitions in this part of this act contained with respect to registration, and on payment of such fees, if any, as are payable under the tables marked B. and C. in the first schedule hereto, the registrar shall certify under his hand that the company so applying for registration is incorporated as a company under this act, and, in the case of a limited company, that it is limited, and thereupon such company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in *Scotland* so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under Act of Parliament.

192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this act have been complied with, and that the company is authorised to be registered under this act as a limited or unlimited company, as the case may be, and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this act.

193. All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this act, shall on registration pass to and vest in the company as incorporated under this act for all the estate and interest of the company therein.

194. The registration in pursuance of this part of this act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration.

195. All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company.

196. When a company is registered under this act in pursuance of this part thereof, all provisions contained in any Act of Parliament, deed of settlement, contract of co-partnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this act shall apply to such company and the members, contributories, and creditors thereof, in the same manner

in all respects as if it had been formed under this act, subject to the provisions following, that is to say,

- (1) That table A. in the first schedule to this act shall not, unless adopted by special resolution, apply to any company registered under this act in pursuance of this part thereof:
- (2.) That the provisions of this act relating to the numbering of shares shall not apply to any joint stock company whose shares are not numbered:
- (3.) That no company shall have power to alter any provision contained in any Act of Parliament relating to the company:
- (4.) That no company shall have power, without the sanction of the board of trade, to alter any provision contained in any letters patent relating to the company:
- (5.) That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death, bankruptcy, or insolvency of any such contributory as last aforesaid, or marriage of any such contributory, being a female, the provisions hereinbefore contained with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply:
- (6.) That nothing herein contained shall authorize any company to alter any such provisions contained in any deed of settlement, contract of copartnership, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had originally been formed under this act, have been contained in the memorandum of association, and are not authorized to be altered by this act:

But nothing herein contained shall derogate from any power of altering its constitutions or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any Act of Parliament, deed of settlement, contract of copartnership, letters patent, or other instrument constituting or regulating the company.

197. The court may, at any time after the presentation of a petition for winding up a company registered in pursuance of this part of this act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company as well as against the company as hereinbefore provided, upon such terms as the court thinks fit.

198. Where an order has been made for winding up a company registered in pursuance of this part of the act, in addition to the provisions hereinbefore contained, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

199. Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this act, and hereinafter included under the term unregistered company, may be wound up under this act, and all the provisions of this act with respect to winding up shall apply to such company, with the following exceptions and additions:

- (1.) An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company:
- (2.) No unregistered company shall be wound up under this act voluntarily or subject to the supervision of the court:
- (3.) The circumstances under which an unregistered company may be wound up are as follows; (that is to say,)
 - (a.) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
 - (b.) Whenever the company is unable to pay its debts;
 - (c.) Whenever the court is of opinion that it is just and equitable that the company should be wound up:
- (4.) An unregistered company shall, for the purposes of this act, be deemed to be unable to pay its debts:
 - (a.) Whenever a creditor to whom the company is indebted at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor:
 - (b.) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in

such manner as the court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

- (c.) Whenever, in *England or Ireland* execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity instituted by such creditor against the company, or any member thereof as such, or against any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied:
- (d.) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the court of the vice-warden:
- (e.) Whenever, in *Scotland*, the inducible of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made;
- (f.) Whenever it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts.

200. In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, and every such contributory shall be liable to contribute to the assets of the company in the course of the winding up all sums due from him in respect of any such liability as aforesaid; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions herein-before contained with respect to the personal representatives, heirs, and devisees of a deceased contributory, and to the assignees of a bankrupt or insolvent contributory, and to the husband of married contributories, shall apply.

201. The court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as herein-before provided, upon such terms as the court thinks fit.

202. Where an order has been made for winding up an unregistered company in addition to the provisions herein-before contained in the case of companies formed under this act, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

203. If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the order made for winding up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may

belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the court directs, bring or defend any actions, suits, or other legal proceeding relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding up the company and recovering the property thereof.

204. The provisions made by this part of the act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions herein-before contained with respect to winding up companies by the court, and the court or official liquidator may, in addition to anything contained in this part of the act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this act, and then only to the extent provided by this part of this act.

PART IX.

REPEAL OF ACTS, AND TEMPORARY PROVISIONS.

205. After the commencement of this act there shall be repealed the several acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said act as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed.

206. No repeal hereby enacted shall affect,

- (1.) Anything duly done under any acts hereby repealed:
- (2.) The incorporation of any company registered under any act hereby repealed:
- (3.) Any right or privilege acquired or liability incurred under any act hereby repealed:
- (4.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any act hereby repealed:
- (b.) Table B. in the schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same applies to any company existing at the time of the commencement of this act.

207. Where previously to the commencement of this act an order has been made for winding up a company under any acts or act hereby repealed, or a resolution has been passed for winding up a company voluntarily, such company shall be wound up in the same manner and with the same incidents as if this act were not passed, and for the purposes of such winding up such repealed acts or act shall be deemed to remain in full force.

208. Where previously to the commencement of this act any conveyance, mortgage, or other deed has been made in pursuance of any act hereby repealed, such deed shall be of the same force as if this act had not passed, and for the purposes of such deed such repealed act shall be deemed to remain in full force.

209. Every insurance company completely registered under the act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies*, shall on or before the second day of November, one thousand eight hundred and sixty-two, and every other company required by any act hereby repealed to register under the said Joint Stock Companies Acts, or one of such acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this act, register itself as a company under this act, in manner and subject to the re-

212: The Board of Trade shall not issue their certifi-

I, A.B., of _____ in consideration of the sum

- of pounds paid to me by C.D. the share [or shares] numbered standing in my name in the books of the company, to hold unto the said C.D., his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said C.D., do hereby agree to take the said share [or shares] subject to the same conditions. As witness our hands, the day of .
- (10.) The company may decline to register any transfer of shares made by a member who is indebted to them.
- (11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

- (12.) The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his share.
- (13.) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company.
- (14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.
- (15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.
- (16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member.

Forfeiture of Shares.

- (17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such nonpayment.
- (18.) The notice shall name a further day, on or before which such call, and all interest and expenses that have accrued by reason of such nonpayment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that in the event of nonpayment at or before the time and at the place appointed the shares in respect of which such call was made will be liable to be forfeited.
- (19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.
- (20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit.
- (21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.
- (22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of Shares into Stock.

- (23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid up shares into stock.
- (24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interest, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit.
- (25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

Increase in Capital.

- (26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.
- (27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.
- (28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on nonpayment of calls, or otherwise, as if it had been part of the original capital.

General Meetings.

- (29.) The first general meeting shall be held at such time, not being more than six months after the registration of the company, and at such place, as the directors may determine.
- (30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.
- (31.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.
- (32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting.
- (33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.
- (34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meetings.

- (35.) Seven days notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner herein-after mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.
- (36.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance sheets, and the ordinary report of the directors.
- (37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business; and such quorum shall be ascertained as follows; that is to say, if the persons who have taken shares in the company at the time of this meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty.
- (38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: In any other case it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present, it shall be adjourned sine die.
- (39.) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company.
- (40.) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.
- (41.) The chairman may, with the consent of the

meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

- (42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote.

Votes of Members.

- (44.) Every member shall have one vote for every share up to ten: He shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.
- (45.) If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.
- (46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.
- (47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.
- (48.) Votes may be given either personally or by proxy.
- (49.) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: No person shall be appointed a proxy who is not a member of the company.
- (50.) The instrument appointing a proxy shall be deposited at the registered offices of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.
- (51.) Any instrument appointing a proxy shall be in the following form:—

Company Limited.

I of in the county of
being a member of the Company Limited,
and entitled to vote or votes, hereby
appoint of as my proxy, to vote for
me and on my behalf at the [ordinary or extraor-
dinary, as the case may be] general meeting of the
company to be held on the day of
and at any adjournment thereof [or, at any meeting
of the company that may be held in the year J].

As witness my hand, this day of
signed by the said in the
presence of

Directors.

- (52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (53.) Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors.
- (54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

Powers of Directors.

- (55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulations made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.
- (56.) The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of Directors.

- (57.) The office of director shall be vacated,—
If he holds any other office or place of profit under the company;
If he becomes bankrupt or insolvent;
If he is concerned in or participates in the profits of any contract with the company;
But the above rules shall be subject to the following exceptions: That no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted.

Rotation of Directors.

- (58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.
- (59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot; In every subsequent year the one-third or other nearest number who have been longest in office shall retire.
- (60.) A retiring director shall be re-eligible.
- (61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.
- (62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as

have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

- (63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.
- (64.) Any casual vacancy occurring in the Board of Directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.
- (65.) The company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead: The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Proceedings of Directors.

- (66.) The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business; questions arising at any meeting shall be decided by a majority of votes: In case of an equality of votes the chairman shall have a second or casting vote: A director may at any time summon a meeting of the directors.
- (67.) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.
- (68.) The directors may delegate any of their powers to committees consisting of such member or members, of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.
- (69.) A committee may elect a chairman of their meetings: If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.
- (70.) A committee may meet and adjourn as they think proper: Questions arising at any meeting shall be determined by a majority of votes of the members present; and in case of an equality of votes the chairman shall have a second or casting vote.
- (71.) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends.

- (72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.
- (73.) No dividend shall be payable except out of the profits arising from the business of the company.
- (74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends,

or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

- (75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.
- (76.) Notice of any dividend that may have been declared shall be given to each member in manner herein-after mentioned; and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the company.
- (77.) No dividend shall bear interest as against the company.

Accounts.

- (78.) The directors shall cause true accounts to be kept, of the stock in trade of the company; of the sums of money received and expended by the company, and the matter in respect of which such receipts and expenditure takes place; and, of the credits and liabilities of the company: The books of account shall be kept at the registered office of the company, and subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business.
- (79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.
- (80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, 'distinguishing the expenses of the establishment, salaries, and other like matters: Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.
- (81.) A balance sheet shall be made out in every year, and laid before the company in general meeting, and such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.
- (82.) A printed copy of such balance sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are herein-after directed to be served.

Audit.

- (83.) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained, by one or more auditor or auditors.
- (84.) The first auditors shall be appointed by the directors: subsequent auditors shall be appointed by the company in general meeting.

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

- (86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.
- (87.) The election of auditors shall be made by the company at their ordinary meeting in each year.
- (88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.
- (89.) Any auditor shall be re-eligible on his quitting office.
- (90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.
- (91.) If no election of auditors is made in manner aforesaid the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.
- (92.) Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.
- (93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company: he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.
- (94.) The auditors shall make a report to the members upon the balance sheet and accounts, and on every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

- (95.) A notice may be served by the company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.
- (96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.
- (97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post office.

Dr. BALANCE SHEET of the CAPITAL AND LIABILITIES.				Co. made up to 18 . Or. PROPERTY AND ASSETS.			
I. CAPITAL	Showing :	£	s. d.	III. PRO- PERTY held by the Company.	Showing :	£	s. d.
	1. The number of Shares				7. Immovable Property distinguishing—		
	2. The Amount paid per Share				(a.) Freehold Land :		
	3. If any Arrears of Calls, the Nature of the Ar- rear, and the Names of the Defaulters . .				(b.) " Buildings		
	4. The Particulars of any forfeited Shares . .				(c.) Leasehold "		
II. DEBTS AND LIA- BILITIES of the Com- pany.	Showing :				8. Moveable Property, distinguishing—		
	5. The Amount of Loans on Mortgages or De- benture Bonds. . . .				(d.) Stock in Trade .		
	6. The Amount of Debts owing by the Com- pany, distinguishing—			IV. DEBTS owing to the com- pany.	(e.) Plant		
	(a.) Debts for which Acceptances have been given.				The Costs to be stated with Deductions for Deterioration in Va- lue as charged to the Reserve Fund or Profit and Loss.		
	(b.) Debts to Trades- men for Supplies of Stock in Trade or other Articles.				9. Debts considered good for which the Com- pany hold Bills or other Securities.		
	(c.) Debts for Law Expenses.				10. Debts considered good for which the Com- pany hold no Secu- rity.		
	(d.) Debts for Inter- est on Debentures or on other Loans.				11. Debts considered doubt- ful and bad		
	(e.) Unclaimed Divi- dends.				Any Debt due from a Director or other Officer of the Com- pany to be separately stated.		
	(f.) Debts not enu- merated above			V. CASH AND INVEST- MENTS.	12. Showing : The nature of Invest- ment and Rate of Interest.		
VI. RE- SERVE FUND.	Showing : The Amount set aside from Profits to meet Contingencies.				13. The Amount of Cash, where lodged, and if bearing Interest.		
VII. PRO- FIT AND LOSS.	Showing : The disposable Balance for Payment of Divi- dends, &c.						
CONTIN- GENT LIA- BILITIES.	Claims against the Com- pany not acknowledged as Debts. Monies for which the Company is contin- gently liable.						

TABLE B.

Table of Fees to be paid to the Registrar of Joint Stock Companies by a Company having a Capital divided into Shares.

For registration of a company whose nominal capital does not exceed 2,000 <i>l.</i> , a fee of	£	s.	d.
	-	2	0 0
For registration of a company whose nominal capital exceeds 2,000 <i>l.</i> , the above fee of 2 <i>l.</i> , with the following additional fees, regulated according to the amount of nominal capital ; (that is to say,) -	£	s.	d.
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 2,000 <i>l.</i> , up to 5,000 <i>l.</i>	1	0	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 5,000 <i>l.</i> , up to 100,000 <i>l.</i>	0	5	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 100,000	-	0	1 0

For registration of any increase of capital made after the first registration of the company, the same fees per 1,000*l.*, or part of a 1,000*l.*, as would have been payable if such increased capital had formed part of the original capital at the time of registration.

Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50*l.*, taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.

For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.

For registering any document hereby required or authorized to be registered, other than the memorandum of association - - - 0 5 0

For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of - - - 0 5 0

TABLE C.

Table of Fees to be paid to the Registrar of Joint Stock Companies by a Company not having a Capital divided into Shares.

For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 - - -	£ s. d.
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100. - - -	2 0 0
For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of 5 <i>l.</i> , with an additional of 5 <i>s.</i> for every 50 members or less number than 50 members after the first 100. - - -	5 0 0
For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of - - -	20 0 0
For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase - - -	0 5 0
Provided that no one company shall be liable to pay on the whole a greater fee than 20 <i>l.</i> , in respect of its number of members, taking into account the fee paid on the first registration of the company.	
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.	
For registering any document hereby required or authorized to be registered, other than the memorandum of association - - -	0 5 0
For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of - - -	0 5 0

FORM D.

Form of Statement referred to in Part III. of the Act.

* The capital of the company is - - - , divided into shares of each.

The number of shares issued is - - - .
Calls to the amount of - - - pounds per share have been made, under which the sum of - - - pounds has been received.

The Liabilities of the company on the first day of January (or July) were,—

Debts owing to sundry persons by the company:

- On judgment, £
- On specialty, £
- On notes or bills, £
- On simple contracts, £
- On estimated liabilities, £

The assets of the company on that day were,—

- Government Securities [stating them], £
- Bills of exchange and promissory notes, £
- Cash at the bankers, £
- Other securities, £

SECOND SCHEDULE.

FORM A.

MEMORANDUM of Association of a Company Limited by Shares.

1st. The name of the company is "The Eastern Steam Packet Company Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established

are, "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th. The liability of the members is limited.

5th. The capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
" 1. John Jones of - - - in the County of - - - Merchant,	200
" 2. John Smith of - - - in the County of - - - . . .	25
" 3. Thomas Green of - - - in the County of - - - . . .	30
" 4. John Thompson of - - - in the County of - - - . . .	40
" 5. Caleb White of - - - in the County of - - - . . .	15
" 6. Andrew Brown of - - - in the County of - - - . . .	5
" 7. Cæsar White of - - - in the County of - - - . . .	10
Total Shares taken - - -	325

Dated 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute-street, Clerkenwell, Middlesex.

FORM B.

MEMORANDUM and ARTICLES of Association of a Company limited by Guarantee, and not having a Capital divided into Shares.

Memorandum of Association.

1st. The name of the company is "The mutual London Marine Association Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the mutual insurance of ships belonging to members of the company, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be acquired not exceeding ten pounds.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Name, Address, and Descriptions of Subscribers.

" 1. John Jones of - - - in the County of - - - merchant.	
" 2. John Smith of - - - in the County of - - -	
" 3. Thomas Green of - - - in the County of - - -	
" 4. John Thompson of - - - in the County of - - -	
" 5. Caleb White of - - - in the County of - - -	
" 6. Andrew Brown of - - - in the County of - - -	
" 7. Cæsar White of - - - in the County of - - -	

Dated the 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute-street, Clerkenwell, Middlesex.

* If the company has no capital divided into shares the portion of the statement relating to capital and shares must be omitted.

ARTICLES of ASSOCIATION to accompany preceding MEMORANDUM of ASSOCIATION.

- (1.) The company for the purpose of registration, is declared to consist of five hundred members.
- (2.) The directors herein-after mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of Members.

- (3.) Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations herein-after contained.

General Meetings.

- (4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the company, and at such place, as the directors may determine.
- (5.) Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.
- (6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.
- (7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.
- (8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.
- (9.) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other five members, may themselves convene a meeting.

Proceedings at General Meetings.

- (10.) Seven days notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner herein-after mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.
- (11.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance sheets, and the ordinary report of the directors.
- (12.) No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of such business; and such quorum shall be ascertained as follows; that is to say, if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.
- (13.) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened upon the requisition of the members, shall be dissolved: In any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned sine die.

- (14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.
- (15.) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.
- (16.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.
- (17.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (18.) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of Members.

- (19.) Every member shall have one vote and no more.
- (20.) If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.
- (21.) No member shall be entitled to vote at any meeting unless all monies due from him to the company have been paid.
- (22.) Votes may be given either personally or by proxies: A proxy shall be appointed in writing under the hand of the appointor, or if such appointor is a corporation, under its common seal.
- (23.) No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.
- (24.) Any instrument appointing a proxy shall be in the following form:—

Company Limited.

I of in the county of being
a member of the company limited, hereby
appoint of as my proxy, to vote
for me and on my behalf at the [ordinary or extra-
ordinary, as the case may be] general meeting of the
company to be held on the day of ,
and at any adjournment thereof to be held on the
day of next [or, at any meeting
of the company that may be held in the year .]
As witness my hand, this day of .
Signed by the said in the presence
of .

Directors.

- (25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (26.) Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this act be deemed to be directors.

Powers of Directors.

- (27.) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of Directors.

- (28.) The directors shall be elected annually by the company in general meeting.

Business of Company.

[Here insert Rules as to Mode in which Business of Insurance is to be conducted]
Accounts.

- (29.) The accounts of the company shall be audited by a committee of five members, to be called the audit committee.
- (30.) The first audit committee shall be nominated by the directors out of the body of members.
- (31.) Subsequent audit committees shall be nominated by the members at the ordinary general meeting in each year.
- (32.) The audit committee shall be supplied with a copy of the balance sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.
- (33.) The audit committee shall have a list delivered to them of all books kept by the company, and they shall at all reasonable times have access to the books and accounts of the company: They may, at the expense of the company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the company.
- (34.) The audit committee shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether in their opinion the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations of the company, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanation or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting.

Notices.

- (35.) A notice may be served by the Company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.
- (36.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed, and put into the post office.

Winding up.

- (37.) The company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the Companies Act, 1862, is passed, requiring the company to be wound up voluntarily.

Names, Addresses, and Descriptions of Subscribers.

- "1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Caesar White of in the county of

Dated the 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM C.

MEMORANDUM AND ARTICLES OF ASSOCIATION of a Company Limited by Guarantee, and having a capital divided into Shares.

Memorandum of Association.

1st. The name of the Company is "The Highland Hotel Company Limited."

2nd. The registered office of the company will be situated in Scotland.

3rd. The objects for which the company is established are "the facilitating travelling in the Highlands of Scotland, by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding twenty pounds.

W^{ts}, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

- "1. John Jones of in the county of merchant.
"2. John Smith of in the county of
"3. Thomas Green of in the county of
"4. John Thompson of in the county of
"5. Caleb White of in the county of
"6. Andrew Brown of in the county of
"7. Caesar White of in the county of

Dated the 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of Association to accompany preceding Memorandum of Association.

1. The capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

W^{ts}, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
"1. John Jones of	in the	county of	200
"2. John Smith of	in the	county of	25
"3. Thomas Green of	in the	county of	30
"4. John Thompson of	in the	county of	40
"5. Caleb White of	in the	county of	15
"6. Andrew Brown of	in the	county of	5
"7. Caesar White of	in the	county of	10
Total Shares taken			325

Dated the 22nd day of November, 1861.

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM D.

**MEMORANDUM and ARTICLES of ASSOCIATION of an Un-
limited Company, having a Capital divided into Shares.**

Memorandum of Association.

1st. The name of the Company is "The Patent Stereotype Company."

2nd. The registered office of the company will be situated in England.

3rd. The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates, of which method John Smith, of London, is the sole patentee."

WE, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

- | | | |
|-----------------------|------------------|-----------|
| " 1. John Jones of | in the county of | merchant. |
| " 2. John Smith of | in the county of | |
| " 3. Thomas Green of | in the county of | |
| " 4. John Thompson of | in the county of | |
| " 5. Caleb White of | in the county of | |
| " 6. Andrew Brown of | in the county of | |
| " 7. Abel Brown of | in the county of | |

Dated 22nd day of November, 1861.

Witness to the above signatures.

A.B. No. 20 Bond street, Middlesex.

Articles of Association to accompany the preceding Memorandum of Association.

Capital of the company.

The capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.

Application of table A.

All the articles of table A. shall be deemed to be incorporated with these articles, and to apply to the company.

Wx, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by Subscribers.
" 1. John Jones of county of in the merchant.	1
" 2. John Smith of county of in the	5
" 3. Thomas Green of county of in the	2
" 4. John Thompson of county of in the	2
" 5. Caleb White of county of in the	3
" 6. Andrew Brown of county of in the	4
" 7. Abel Brown of county of in the	1
Total shares taken	18

Dated the 22nd day of November, 1861.

Witness to the above signatures, .

A.B. No. 20 Bond-street, Middlesex.

FORM E, as required by the Second Part of the Act.

SUMMARY OF CAPITAL AND SHARES of the
COMPANY, made up to the day
of of year

Nominal capital £ divided into shares of £ each.

Number of shares taken up to the day of

There has been called up on each share £

Total amount of calls received £

Total amount of calls unpaid £

List of persons holding shares in the _____ Company on
the _____ day of _____ and of persons who have
held shares thereon at any time during the year im-
mediately preceding the said _____ day of _____.
showing their names and addresses, and an account
of the shares so held.

[illegible]

FORM F.

LICENCE TO HOLD LANDS.

The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations hereby license the Association, limited, to hold the lands hereunder described [insert description of lands]. The conditions of this licence are [insert conditions, if any].

THIRD SCHEDULE.

FIRST PART.

21 & 22 Geo. 3, c. 46. (Parliament of Ireland.) An Act to promote trade and manufactures by regulating and encouraging partnerships.

7 & 8 Vict. c. 110. An act for the registration, incorporation, and regulation of joint stock companies.

7 & 8 Vict. c. 111. An act for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements.

7 & 8 Vict. c. 113. An act to regulate joint stock banks in England.

8 & 9 Vict. c. 93. An act for facilitating the winding up the affairs of joint stock companies in Ireland unable to meet their pecuniary engagements.

9 & 10 Vict. c. 28. An act to facilitate the dissolution of certain railway companies.

9 & 10 Vict. c. 75. An act to regulate joint stock banks in Scotland and Ireland.

10 & 11 Vict. c. 78. An act to amend an act for the registration, incorporation, and regulation of joint stock companies.

11 & 12 Vict. c. 45. An act to amend the acts for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements, and also to facilitate the dissolution and winding up of joint stock companies and other partnerships.

12 & 13 Vict. c. 108. An act to amend the joint stock companies winding up act, 1848.

19 & 20 Vict. c. 47. An act for the incorporation and regulation of joint stock companies and other associations.

20 & 21 Vict. c. 14. An act to amend the joint stock companies act, 1856.

20 & 21 Vict. c. 49. An act to amend the law relating to banking companies.

20 & 21 Vict. c. 78. An act to amend the act seven and eight Victoria, chapter one hundred and eleven, for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements, and also the joint stock companies winding up acts, 1848 and 1849.

20 & 21 Vict. c. 80. An act to amend the joint stock companies act, 1856.

21 & 22 Vict. c. 60. An act to amend the joint stock companies acts, 1856, and 1857, and the joint stock banking companies act, 1857.

21 & 22 Vict. c. 91. An act to enable joint stock banking companies to be formed on the principle of limited liability.

SECOND PART.

7 & 8 Vict. c. 113, s. 47.

Every company of more than six persons established on the 6th day of May one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such copartnership as the nominal plaintiff, petitioner, or defendant on behalf of such copartnership; and all judgments, decrees, and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England exceeding the distance of sixty-five miles from London, under the provisions of an act passed in the seventh year of the reign of King George the Fourth, chapter forty-six, intituled "An act for the better regulating copartnerships of certain bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled "An act for establishing an agreement with the Governor and Company of the Bank of England for advancing the sum of three millions towards the supply for the service of the year one thousand eight hundred," as relates to the same," provided that such first-mentioned company shall make out and deliver from time to time to the commissioners of stamps and taxes the several accounts or returns required by the last-mentioned act, and all the provisions of the last-recited act as to such account or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last recited act.

20 & 21 Vict. c. 49, part of Section XII.

Notwithstanding anything contained in any act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, and intituled "An act to regulate joint stock banks in England," or in any other act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of this act have carried on such business.

CAP. XC.

An Act for rectifying a clerical error in the Act of the present Session, Chapter Forty, with respect to the *African Slave Trade Treaty*. [7th August, 1862.]

CAP. XCI.

An Act to incorporate the General Council of Medical Education and Registration of the United Kingdom, and for other Purposes. [7th August, 1862.]

CAP. XCII.

An Act to limit the Time for proceeding to Elections in Counties and Boroughs in *Ireland*.

[7th August, 1862]

1 G. IV., c. 11, s. 5.

- Sec. 1. *Elections in Counties to be not later than twelfth nor sooner than the sixth day after proclamation.*
 2. *9 & 10 Vic., c. 30, repealed. Elections in Cities, &c., to be within six days after receipt of writ or precept, giving three clear days' notice.*
 3. *Sheriff to be Returning Officer in Boroughs where the office of Returning Officer shall be vacant.*
 4. *Writs, &c., to be conformable to this Act.*

'Whereas, by the Fifth Section of the Act of the First George the Fourth, Chapter Eleven, it is provided that, immediately after the receipt of the writ for making an election for any county in *Ireland*, the sheriff of such county shall endorse thereon the date of receiving the same, and that such sheriff shall, within two days after the receipt of such writ, cause proclamation of the time and place of holding such election to be made at the place where the ensuing election ought by law to be holden, between the hours of ten of the clock of the forenoon and two of the clock in the afternoon, and that the said sheriff on the same day shall cause to be affixed on the doors of the county court house public notice, signed by himself, of a special county court to be there holden for the purpose of such election only, and which shall be holden on some day (*Sunday, Christmas Day, and Good Friday* excepted) not later from the day of making such proclamation and affixing such notice than the sixteenth day, nor sooner than the tenth day: And whereas it is expedient to limit the time for proceeding to such elections: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act any such special county court for the purpose of the election of a member or members to serve in Parliament for any county in *Ireland* shall be holden on any day (*Sunday, Christmas Day, and Good Friday* excepted) not later from the day of making such proclamation than the twelfth day, nor sooner than the sixth day; provided that this section shall not apply to the election for any county of a city or of a town.

2. From and after the passing of this Act the Act of the Ninth and Tenth Victoria, Chapter Thirty, defining the notice of elections of members to serve in Parliament for cities, towns, or boroughs in *Ireland*, shall be, and the same is hereby, repealed; and in every city or town in *Ireland*, being a county of itself, and in every borough in *Ireland*, returning or contributing to return a member or members to serve in Parliament, the sheriff or other officer to whom the duty of giving such notice belongs shall proceed to election within six days after the receipt of the writ or precept, giving three clear days notice at least of the day appointed for the election, exclusive of the day of proclamation and the day of election.

3. Every writ for making any election of a member or members to serve in Parliament for any city, town, or borough in *Ireland*, shall be directed to the returning officer of the said city, town, or borough, or his deputy, and in their absence to the sheriff of the county in which the said city, town, or borough is situate; and in all cases whatever whenever there shall be, either from temporary vacancy or from some other cause, no person duly qualified in any such city, town, or borough to perform the duties of a returning officer for the same, the sheriff of the county in which such city, town, or borough is situate shall be

charged with the execution of the said writ, and shall execute the same and in all respects perform the duties of and incidental to the office of returning officer: Provided always that it shall not be lawful for the said sheriff to receive or execute the writ except when there shall be no person within the said city, town, or borough legally qualified and competent as returning officer to execute the same.

4. All writs for the election of any member or members to serve in Parliament for any county, city, town, or borough in *Ireland* issued after the commencement of this Act, and all mandates, precepts, instruments, proceedings, and notices consequent upon such writs, shall be, and the same are hereby, authorised to be framed and expressed in such manner and form as may be necessary for carrying the provisions of this Act into effect.

CAP. XCIII.

An Act for embanking the North Side of the River *Thames* from *Westminster Bridge* to *Blackfriars Bridge*, and for making new Streets in and near thereto. [7th August, 1862.]

CAP. XCIV.

An Act to authorise the Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners. [7th August, 1862.]

CAP. XCV.

An Act to amend the Law relating to Polling Places in the Boroughs of *New Shoreham*, *Cricklade*, *Aylesbury*, and *East Retford*. [7th August, 1862.]

CAP. XCVI.

An Act to render tenable during good Behaviour the office of the Officer of the Court of Common Pleas by whom the Certificates of Acknowledgment of Deeds of married Women are filed of Record. [7th August, 1862.]

CAP. XCVII.

An Act to regulate and amend the Law respecting the Salmon Fisheries of *Scotland*. [7th August, 1862.]

CAP. XCVIII.

An Act for the Amendment of an Act of the Session of the Twenty-third and Twenty-fourth Years of the Reign of Her present Majesty, Chapter One hundred and thirty-nine, intituled *An Act to amend the Law concerning the making, keeping, and Carriage of Gunpowder and Compositions of an explosive Nature, and concerning the Manufacture, Sale, and Use of Fireworks*, and of an Act amending the last-mentioned Act. [7th August, 1862.]

23 & 24 Vict., c. 139.

Sec. 1. Extension of sects. 25 & 27 of principal Act to other explosive compositions.

2. Divisional magistrates of police to exercise licensing powers within the *Dublin* police district.

3. Short title of Principal Act.

‘Whereas by an act of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter one hundred and thirty-nine, intituled *An Act to amend the Law concerning the making, keeping, and Carriage of Gunpowder and Compositions of an explosive Nature, and concerning the Manufacture, Sale, and Use of Fireworks*, and herein-after referred to as the Principal Act, divers regulations are made with respect to the manufacture and keeping of gunpowder, and with respect to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other

preparation or composition of an explosive nature: and whereas by the twenty-fifth section of the Principal Act provisions are made with respect to the issue of warrants to search, and with respect to searching for gunpowder, and by the twenty-seventh section of the same act special powers are given to the conservators of the River *Thames* of appointing searchers for gunpowder within their jurisdiction: and whereas it is expedient to extend the said sections to loaded percussion caps, ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The twenty-fifth and twenty-seventh sections of the Principal Act shall be construed and applied as if the word gunpowder therein mentioned included loaded percussion caps, ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature.

2. ‘Whereas by an act for amending the Principal Act passed in the session holden in the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter one hundred and thirty, it is provided that all powers of granting licences by the Principal Act given to justices of the peace at their general quarter sessions shall be transferred to and vested in the justices in petty sessions assembled: and whereas within the police district of *Dublin* metropolis the powers usually exercised by justices of the peace in petty sessions are exercised by any two or more divisional magistrates of police; and it is expedient to amend the said act of the twenty-fourth and twenty-fifth of *Victoria*, chapter one hundred and thirty, in manner herein-after mentioned;’ be it enacted, That the powers of licensing vested in manner aforesaid in the justices in petty sessions assembled may, within the police district of *Dublin* metropolis, be exercised by any two or more divisional magistrates of police; and that it shall be lawful for the said divisional magistrates of police, or any two or more of them, with the sanction of the Lord Lieutenant of *Ireland*, to regulate the mode in which applications for licences under the said act are to be made, and to make a scale of fees to be charged in respect of such licences.

3. The Principal Act may be cited for all purposes as “The Gunpowder Act, 1860,” and this act shall be construed as one with the Principal Act, and may be cited for all purposes as the “The Gunpowder Act Amendment Act, 1862.”

CAP. XCIX.

An Act to amend the Bankruptcy Act (1861). [7th August, 1862.]

CAP. C.

An Act to authorise Improvement Commissioners acting as Burial Boards to mortgage certain Rates for the Purposes of the Burial Acts. [7th August, 1862.]

CAP. CI.

An Act to make more effectual Provision for regulating the Police of Towns and populous Places in *Scotland*, and for lighting, cleansing, paving, draining, supplying Water to and improving the same, and also for promoting the Public Health thereof. [7th August, 1862.]

CAP. CII.

An Act to amend the Metropolis Local Management Acts. [7th August, 1862.]

CAP. CIII.

An Act to amend the Law relating to Parochial Assessments in *England*. [7th August, 1862.]

CAP. CIV.

An Act for the Discontinuance of the Queen's Prison, and Removal of the Prisoners to *Whitecross-street Prison*.
[7th August, 1862.]

CAP. CV.

An Act to transfer the Roads and Bridges under the Management of the Commissioners of Highland Roads and Bridges to the several Counties in which the same are situate, and to provide for other Matters relating thereto.
[7th August, 1862.]

CAP. CVI.

An Act to amend the Law relating to the Appointment of County Surveyors in *Ireland*.
[7th August, 1862.]

Sec. 1. *Part of Sec. 39 of 6 & 7 W. IV., c. 116, and of Sec. 7 of 7 & 8 Vic., c. 106, repealed.*

2. *Persons desirous to act as Surveyors under 6 & 7 W. IV., c. 116, or as District Surveyors under 7 & 8 Vic., c. 106, to be examined by the Civil Service Commissioners.*

3. *Persons certified under Acts 7 & 8 Vic., c. 106, and 6 & 7 W. IV., c. 116, eligible for County or District Surveyors.*

4. *Commencement of Act.*

'Whereas it is expedient to amend the Law relating to the appointment of county surveyors in *Ireland*:' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. So much of Section Thirty-nine of the Act of the Sixth and Seventh Years of King William the Fourth, Chapter One hundred and sixteen, and so much of Section Seven of the Act of the Seventh and Eighth Years of her Majesty, Chapter One hundred and six, as respectively provide that the Lord Lieutenant shall appoint a board of three civil or military engineers to examine and certify the qualifications of all persons desirous to act as surveyors under the provisions of the said first-recited act, or as district surveyors for the county of *Dublin* under the provisions of the said second-recited act, shall be, and the same is hereby, repealed.

2. The qualifications of all persons desirous to act as surveyors under the provisions of the said first-recited act, or as district surveyors for the county of *Dublin*, under the provisions of the said second-recited act, shall be examined into and certified by the Civil Service Commissioners for the time being appointed by her Majesty in council; and whenever a vacancy shall occur in any of such offices an examination of all persons desirous to fill the same shall be held at such time in *Dublin* as the said commissioners shall appoint, of which examination due notice shall be given, and one of the persons who shall be certified by the said commissioners shall be appointed to the vacant office of surveyor by the Lord Lieutenant or other chief governor or governors of *Ireland*, subject to the approval of the Grand Jury of such county, or to the vacant office of district surveyor for the county of *Dublin* by the Grand Jury of the said county, according as such vacancies shall occur.

3. The persons who were duly certified by the board of examiners under the Act of the Seventh and Eighth Years of *Victoria*, Chapter One hundred and six, in the year one thousand eight hundred and fifty-six, and who were further certified by the board of examiners to the Lord Lieutenant as duly qualified under the Act of the Sixth and Seventh years of William the Fourth, chapter one hundred and sixteen, shall continue to be deemed and taken as eligible for the appointment of county surveyor or district surveyor, as the case may be, without further examination, and may be lawfully appointed to such offices, anything in this act to the contrary notwithstanding.

4. This act shall commence and take effect on and after the first day of *October*, one thousand eight hundred and sixty-two.

CAP. CVII.

An Act to give greater facilities for summoning Persons to serve on Juries, and for other purposes relating thereto.
[7th August, 1862.]

CAP. CVIII.

An Act to confirm certain Sales, Exchanges, Partitions, and Enfranchisements by Trustees and others.
[7th August, 1862.]

CAP. CIX.

An Act to continue the Corrupt Practices Prevention Act (1854).
[7th August, 1862.]
17 & 18 Vic., c. 102. 21 & 22 Vic., c. 87. 24 & 25 Vic., c. 122.

Sec. 1. *Duration of Act.*

'Whereas an act was passed in the session holden in the Seventeenth and Eighteenth years of her Majesty, chapter one hundred and two, "to consolidate and amend the Laws relating to Bribery, Treating, and undue Influence at Elections of Members of Parliament;" and such act was amended by an act of the session holden in the Twenty-first and Twenty-second years of her Majesty, chapter eighty-seven: And whereas the said first mentioned act, as so amended, has, by an act of the session holden in the Twenty-fourth and Twenty-fifth years of her Majesty, chapter one hundred and twenty-two, been continued until the first day of *September*, one thousand eight hundred and sixty-two, and it is expedient that it should be further continued:' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The said first-mentioned act, as amended by the said act of the Twenty-first and Twenty-second years of her Majesty, shall continue in force until the first day of *September*, one thousand eight hundred and sixty-three, and to the end of the then next session in Parliament.

CAP. CX.

An Act to enable Boards of Guardians of certain Unions to obtain temporary Aid to meet the extraordinary Demands for Relief therein.
[7th August, 1862.]

CAP. CXI.

An Act to amend the Law relating to Lunatics.
[7th August, 1862.]

CAP. CXII.

An Act for establishing the Jurisdiction of the Charity Commissioners in certain cases.
[7th August, 1862.]

CAP. CXIII.

An Act to amend the Law relating to the Removal of poor Persons from *England* to *Scotland*, and from *Scotland* to *England* and *Ireland*.
[7th August, 1862.]

Sec. 1. *Warrant of removal to Scotland to be signed by two justices or a magistrate, and to England or Ireland by the sheriff or two justices.*

2. *Warrant to contain name and age of every person to be removed, and other particulars. Proviso.*

3. *Copy of warrant to be sent to parish to which removal is to be made.*

4. *Warrants shall order poor persons to be conveyed to the place mentioned in the warrant.*

5. *Relieving officers and inspectors of poor to receive*

poor persons named in warrant under penalty of £10.

6. *Parochial boards and guardians may forward the pauper to the place of destination and recover the costs.*
7. *Persons not to be removed as deck passengers during the winter.*
8. *Part of 8 & 9 Vict., c. 83, repealed.*
9. *Construction of this Act.*

'Whereas it is expedient that better means should be provided for the safe conveyance to the place of their destination in *England, Ireland, or Scotland* of poor persons who may be removed in pursuance of the acts passed in the eighth and ninth years of the reign of her present Majesty, chapter eighty-three, and chapter one hundred and seventeen, and in the tenth and eleventh years of the reign of her present Majesty, chapter thirty-three: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. No application for a warrant ordering the removal from any place in *England to Scotland, or in Scotland to England or Ireland, of any poor person who shall have become chargeable in such place shall be heard and determined in England, except by two or more justices in petty sessions assembled, or by a stipendiary magistrate or metropolitan police magistrate sitting in his court; and in Scotland, except by the sheriff or any two justices of the peace of the county in which the parish is situated to which such poor person may have become chargeable, which justices or magistrate, and sheriff or justice (as the case may be) shall see such poor person, or the person who is the head of the family proposed to be removed, and shall be satisfied that every person who is proposed to be removed by the warrant is in such a state of health as not to be liable to suffer bodily or mental injury by the removal.*

2. Such warrant of removal shall be granted in *England* only on the application of the relieving officer, or other officer of the guardians of the Union or parish, and in *Scotland* only on the application of the inspector of the poor of the parish or combination, or other officer appointed by the parochial board of such parish or combination, where such poor person shall have become chargeable, and shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in *Scotland or England or Ireland, (as the case may be,)* where the justices or magistrate, or sheriff or justices, shall find such person to have been born, or to have last resided for the space of five years in the case of a poor person to be removed to *Scotland, and three years in the case of a poor person to be removed to England or Ireland, and a statement of such examination having been made as to the state of health of every person ordered to be removed as aforesaid; and such warrant shall be addressed to the party applying for the same, and in the case of a removal to Scotland, to the parochial board or inspector of the poor of the parish or combination to which such poor person is to be removed, and in the case of a removal to England or Ireland (as the case may be), to the guardians of the union or parish to which such person is to be removed, and a copy shall be given by and at the cost of the person applying for such warrant to the person or the head of the family about to be removed by virtue of it: Provided that in the case of any native of *England, Ireland, or Scotland* where the justices or magistrate, or sheriff or justices, (as the case may be,) shall not be able to ascertain, upon the evidence before them, the place of birth or of such continued residence as aforesaid, they shall order the pauper to be removed to the port or union or parish in *England or Ireland (as the case may be), or port or parish in Scotland, which shall, in the judgment of such justices or magistrate, or sheriff or justices, (as the case may be,)* under the circumstances of the case be most expedient.*

3. The person obtaining the warrant shall, at least twelve hours before the removal, send a copy of it by post

to the inspector of the poor of the parish or combination in *Scotland, and to the clerk of the board of guardians of the union or parish in England or Ireland (as the case may be), to which such poor person shall be ordered to be removed, and also a copy of the depositions taken in the case, if the same shall, at any time within three months from the date of the warrant, be required by any such board of guardians or parochial board.*

4. Such warrant shall order the removal of the poor person to be made to the place mentioned therein as aforesaid, and shall order the persons charged with the execution thereof to cause such poor person with his family (if any) to be safely conveyed to such place in *England, Ireland, or Scotland (as the case may be), to be delivered in the case of a removal to Scotland, to the inspector of the poor of the parish or combination, and in the case of a removal to England or Ireland at the workhouse of such place or of the union or parish containing the port or place nearest to the place mentioned in the warrant as the place of the pauper's ultimate destination.*

5. The master of the workhouse of the union or parish in *England or Ireland, and the inspector of the poor of the parish or combination in Scotland, to which (as the case may be) such warrant is addressed, shall be bound to receive delivery of the poor person named in such warrant, under a penalty of ten pounds for each case of refusal, which person may be recovered by the person applying for such warrant by an action in any county court in England, or court of quarter sessions in Ireland, or sheriff court in Scotland, or other competent court having jurisdiction in the place where such master or inspector is resident at the time when such action is brought.*

6. If by reason of default of the guardians, inspector of the poor, or other person having charge of such warrant, or otherwise, the poor person named therein shall not be removed to the place of ultimate destination, the guardians of the union or parish in *England or Ireland, or parochial board of the parish or combination in Scotland, (as the case may be,)* to which he has been removed, may, if they think fit, cause the pauper to be removed forthwith to the place mentioned in the warrant, and shall be entitled to be reimbursed the costs incurred in such removal by the guardians or parochial board (as the case may be), or other person on whose application the warrant was obtained, such costs being the actual expense incurred in and about the conveyance and maintenance of each person so removed, which costs may, if not paid on demand, be recovered by an action in any county court in *England or Ireland, or sheriff court in Scotland, or other competent court having jurisdiction in the place from whence the removal shall have taken place.*

7. It shall be unlawful to remove any woman, or any child under the age of fourteen as a deck passenger in any vessel from *England to Scotland, or from Scotland to England or Ireland, during the period from the first of October to the thirty-first of March following; and no regulation of any sheriff, magistrate, or justices authorizing such removal shall be henceforth legal.*

8. Section seventy-seven of the act eighth and ninth *Victoria, chapter eighty-three, in so far as inconsistent with the provisions of this act is hereby repealed.*

9. Except so far as this act shall alter the provisions of the said acts, this act shall be construed as part of the same.

CAP. CXIV.

An Act for the Prevention of Poaching.

[7th August, 1862.]

Sec. 1. *Interpretation of terms.*

2. *Powers to constables to search persons without warrant in certain cases.*

3. *Recovery of penalties.*

4. *Provisions of 11 & 12 Vict., c. 43, extended to this Act.*

5. *No conviction shall be quashed for want of form or removed by certiorari.*

6. *Power of appeal.*

Whereas it is expedient that the laws now in force for the better detection and prevention of poaching should be amended: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The word "game" in this act shall for all the purposes of this act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and the words "justice" and "justices" in this act shall, unless otherwise provided for, mean respectively a justice and justices of the peace respectively of or for the county, riding, division, liberty, city, borough, or place in which any game, gun, part of gun, net, snare, or engine after mentioned shall be found.

2. It shall be lawful for any constable or peace officer in any county, borough, or place in *Great Britain* and *Ireland* in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided in the eighteenth and nineteenth of her present Majesty, chapter one hundred and twenty-six, section nine, as far as regards *England* and *Ireland*, and before a sheriff or any two justices of the peace in *Scotland*; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the

amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place: and no person who, by direction of a justice in writing, shall sell any game so seized shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized.

3. Any penalty under this act shall be recovered and enforced in *England* in the same manner as penalties under the act first and second *William* the Fourth, chapter thirty-two, and in *Scotland* under the act second and third *William* the Fourth, chapter sixty-eight, and in *Ireland* under the Petty Sessions, *Ireland*, Act, 1851, when not otherwise directed in this act.

4. The powers and provisions of the act of the eleventh and twelfth years of her present Majesty, chapter forty-three, shall extend and apply to this act, and to all proceedings, matters, and things to be taken, had, and done, and to all persons to be proceeded against or taking proceedings under this act.

5. No conviction or order made under this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

6. Any person who shall think himself aggrieved by any such summary conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction for the county, riding, division, or borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall, within three days, enter into a recognizance, or bond of caution in *Scotland*, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and the court at such sessions shall hear and determine the matter of appeal, and shall make such order therein, with or without costs, to either party, as to the court shall seem fit, and shall, if necessary, issue process for enforcing such judgment.

A TABLE OF THE PUBLIC GENERAL STATUTES

PASSED IN THE

FOURTH SESSION OF THE EIGHTEENTH PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

25 & 26 VICT. RIA.

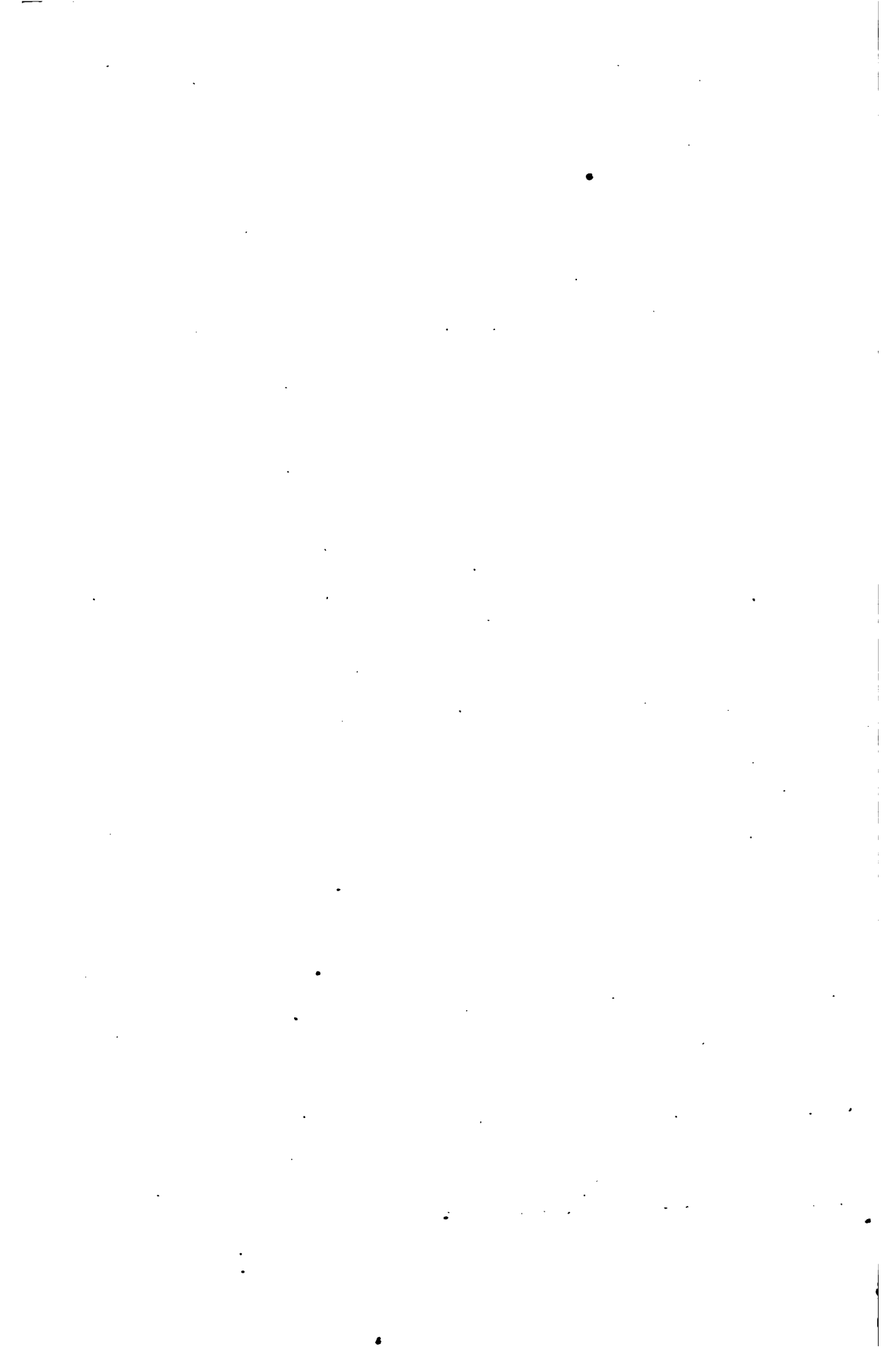
Chap.	Relating to	Chap.	Relating to
I.—An act to apply the sum of nine hundred and seventy-three thousand seven hundred and forty-seven pounds out of the consolidated fund to the service of the year ending the the thirty-first day of <i>March</i> one thousand eight hundred and sixty-two.		XI.—An act to explain an act, intituled "an act for the better government of her Majesty's <i>Australian colonies</i> ."	U K
II.—An act to apply the sum of eighteen millions out of the consolidated fund to the service of the year one thousand eight hundred and sixty-two.	U K	XII.—An act for the protection of inventions and designs exhibited at the International Exhibition of Industry and Art for the year one thousand eight hundred and sixty-two.	U K
III.—An act to amend an act, intituled "an act to amend the law relating to supply exchequer bills, and to charge the same on the consolidated fund;" and to repeal all provisions by which authority is given to the commissioners of her Majesty's treasury to fund exchequer bills.	U K	XIII.—An act for raising the sum of one million of pounds by exchequer bonds for the service of the year one thousand eight hundred and sixty-two.	U K
IV.—An act to enable her Majesty to issue commissions to the officers of her Majesty's land forces and royal marines, and to adjutants and quartermasters of her militia and volunteer forces, without affixing her royal sign manual thereto.	U K	XIV.—An act to extend to the <i>Isle of Man</i> the provisions of the act eighteenth and nineteenth <i>Victoria</i> , chapter ninety, as to the payment of costs to and by the crown.	U K
V.—An act for punishing mutiny and desertion, and for the better payment of the army and their quarters.	U K	XV.—An act to define the powers of the president and fellows of the King and Queen's College of Physicians in <i>Ireland</i> with respect to the election of its fellows.	I
VI.—An act for the regulation of her Majesty's royal marine forces while on shore.	U K	XVI.—An act for extinguishing certain rights of way through the Netley hospital estate in the parish of <i>Hound</i> in the county of <i>Southampton</i> .	E
VII.—An act to provide for the registration and transfer of <i>India</i> stocks at the bank of <i>Ireland</i> , and for the mutual transfer of such stocks from and to the banks of <i>England</i> and <i>Ireland</i> respectively.	U K	XVII.—An act to extend the time for making enrolments under the act passed in the last session of parliament, intituled "an act to amend the law relating to the conveyance of land for charitable uses," and to explain and amend the said act.	E
VIII.—An act to prevent the employment of women and children during the night in certain operations connected with bleaching by the open air process.	U K	XVIII.—An act to amend the law as to the whipping of juvenile and other offenders.	G B & I
IX.—An act to enable the trustees of Sir John Soane's museum to send works of art to the International Exhibition, 1862.	U K	XIX.—An act to amend the general pier and harbour act, 1861.	G B & I
X.—An act for continuing for a further limited time, and for extending the operation of orders made under "the industrial schools act, 1861," and "the industrial schools (<i>Scotland</i>) act, 1861."	E & S	XX.—An act respecting the issue of writs of habeas corpus out of <i>England</i> into her Majesty's possessions abroad.	U K
		XXI.—An act to amend the law relating to the transfer of stocks and annuities transferable at the bank of <i>Ireland</i> .	I
		XXII.—An act to continue certain duties of customs and inland revenues for the service of her Majesty, and to grant, alter, and repeal certain other duties.	G B & I
		XXIII.—An act to amend "the summary procedure on bills of exchange (<i>Ireland</i>) act, 1861."	I

Chap.	Relating to	Chap.	Relating to
XXIV—An act to continue the peace preservation (<i>Ireland</i>) Act, 1856, as amended by the act of the twenty-third and twenty-fourth years of <i>Victoria</i> , chapter one hundred and thirty-eight.		XL—An act to carry into effect the treaty between her Majesty and the United States of <i>America</i> for the suppression of the <i>African</i> slave trade.	U K
XXV—An act to confirm certain provisional orders under the local government act, 1858, relating to the districts of <i>Hanley, Stroud, Ilfracombe, Longton, Haliyar, Ipswich, and Sandown</i> .		XLI—An act for amending "the rifle volunteer grounds act, 1860."	G B
XXVI—An act to extend the power of making statutes possessed by the university of <i>Oxford</i> , and to make further provision for the administration of justice in the court of the chancellor of the said university.		XLII—An act to regulate the procedure in the High Court of Chancery and the Court of Chancery of the county palatine of <i>Lancaster</i> .	E
XXVII—An act to authorize payments for a further period out of the revenues of <i>India</i> in respect of the retiring pay, pensions, and other expenses of that nature of her Majesty's <i>British</i> forces serving in <i>India</i> .	U K	XLIII—An act to provide for the education and maintenance of pauper children in certain schools and institutions.	E
XXVIII—An act to alter and amend the universities (<i>Scotland</i>) act in so far as relates to the bequest of the late Doctor Alexander Murray in the university of <i>Aberdeen</i> .	S	XLIV—An act to amend the law relating to the giving of aid to discharged prisoners.	E
XXIX—An act to amend and enlarge the acts for the improvement of landed property in <i>Ireland</i> .	I	XLV—An act to amend " <i>The West Indian</i> im- cumbered estates acts, 1854 and 1858."	U K
XXX—An act to amend an act of the last session for authorising advances of money out of consolidated fund for carrying on public works and fisheries for employment of the poor, and for facilitating the construction and improvement of harbours, and for other purposes.	G B & I	XLVI—An act for the better regulation in certain cases of the procedure in the High Court of Chancery in <i>Ireland</i> .	I
XXXI—An act to apply the sum of ten millions out of the consolidated fund to the service of the year one thousand eight hundred and sixty-two.	U K	XLVII—An act to authorize the inclosure of certain lands in pursuance of a report of the inclosure commissioners for <i>England</i> and <i>Wales</i> .	E
XXXII—An act to continue the act of the second and third years of <i>Victoria</i> , chapter seventy-four, for preventing the administering of unlawful oaths in <i>Ireland</i> , as amended by an act of the eleventh and twelfth years of <i>Victoria</i> .	I	XLVIII—An act respecting the establishment and government of provinces in <i>New Zealand</i> , and to enable the legislature of <i>New Zealand</i> to repeal the seventy-third section of an act, intituled an act to grant a representative constitution to the colony of <i>New Zealand</i> .	U K
XXXIII—An act for vesting in her Majesty's principal secretary of state for the war department the lands of the Royal Military College at <i>Sandhurst</i> , and for completing certain exchanges of lands now or late of the said College.	E	XLIX—An act to authorize the completion, after his Royal Highness <i>Albert Edward</i> Prince of <i>Wales</i> shall attain the age of twenty-one years, of arrangements commenced during his minority, under the provisions of an act passed in the session of parliament held in the seventh and eighth years of the reign of her Majesty Queen <i>Victoria</i> , intituled an act to enable the council of his Royal Highness <i>Albert Edward</i> Prince of <i>Wales</i> to sell and exchange lands and enfranchise copyholds parcel of the possessions of the duchy of <i>Cornwall</i> , to purchase other lands; and for other purposes.	I
XXXIV—An act for the discontinuance of <i>Portsdown</i> fair in the county of <i>Southampton</i> .	E	L—An act to amend certain provisions of the acts of the twenty-fourth and twenty-fifth years of her Majesty, chapters ninety-six, ninety-seven, ninety-nine, and one hundred, respectively, relating to summary jurisdiction in <i>Ireland</i> .	I
XXXV—An act to amend the acts for the regulation of public houses in <i>Scotland</i> .	S	LI—An act for confirming, with amendments, certain provisional orders made by the Board of Trade under the general pier and harbour act, 1861, amendment act, relating to <i>Carrickfergus, Deal, Oban, Saint Ives, Tbermory, and Hastings</i> .	G B & I
XXXVI—An act to appropriate certain portions of land lying between high and low water mark, situate in the parishes of <i>Shoebury</i> and <i>Wakering</i> in the county of <i>Essex</i> , as ranges for the use and practice of artillery.	E	LII—An act to amend an act of the twenty-fourth and twenty-fifth years of the reign of her Majesty, to prevent the future grant by copy of court roll and certain leases of lands and hereditaments in <i>England</i> belonging to ecclesiastical benefices.	E
XXXVII—An act to remove doubts concerning, and to amend the law relating to, the private estates of her Majesty, her heirs and successors.	G B & I	LIII—An act to facilitate the proof of title to, and the conveyance of, real estate.	E
XXXVIII—An act to amend the laws relating to the sale of spirits.	G B & I	LIV—An act to make further provision respecting lunacy in <i>Scotland</i> .	S
XXXIX—An act for enabling the commissioners of her Majesty's treasury to make arrangements with the <i>Red Sea</i> and <i>India</i> Telegraph Company.	U K	LV—An act for the settlement of a loan due from the island of <i>Jamaica</i> to the imperial government.	U K

Chap.	Relating to	Chap.	Relating to
LVI.—An act to confirm certain provisional orders made under an act of the fifteenth year of her present Majesty, to facilitate arrangements for the relief of turnpike trusts.	E	LXXV.—An act to revive and continue an act for amending the laws relating to savings banks in <i>Ireland</i> .	I
LVII.—An act to authorize the sale of her Majesty's bakehouse in <i>Peascod-street, Windsor</i> , and the application of the proceeds in the purchase of land or buildings to be held with <i>Windsor Castle</i> .	E	LXXVI.—An act to amend "the weights and measures (<i>Ireland</i>) act, 1860;" to abolish local and customary denominations of weight, and to regulate the mode of weighing articles sold in <i>Ireland</i> .	I
LVIII.—An act to make further provision with respect to the raising of money for erecting and improving parochial buildings in <i>Scotland</i> .	S	LXXVII.—An act to suspend the making of lists and the ballots for the militia of the United Kingdom.	U K
LIX.—An act to render owners of dogs in <i>Ireland</i> liable for injuries to sheep.	I	LXXVIII.—An act for providing a further sum towards defraying the expenses of constructing fortifications for the protection of the royal arsenals and dockyards and the ports of <i>Dover</i> and <i>Portland</i> , and of creating a central arsenal.	G B & I
LX.—An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively.	G B & I	LXXIX.—An act to amend the law relating to coal mines.	G B
LXI.—An act for the better management of highways in <i>England</i> .	E	LXXX.—An act to defray the charge of the pay, clothing, and contingent and other expenses of the disembodied militia in <i>Great Britain</i> and <i>Ireland</i> , to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quartermasters, surgeons, assistant-surgeons, and surgeons' mates of the militia, and to authorize the employment of the non-commissioned officers.	G B & I
LXII.—An act to amend the law relating to the duration of contested elections for counties in <i>Ireland</i> , and for establishing additional places for taking the poll thereat.	I	LXXXI.—An act to make perpetual an act to amend the procedure and powers of the Court for Divorce and Matrimonial Causes.	E
LXIII.—An act to amend "the merchant shipping act, 1854," "the merchant shipping act amendment act, 1855," and "the customs consolidation act, 1853."	U K	LXXXII.—An act for the more economical recovery of poor rates and other local rates and taxes.	E
LXIV.—An act for the better protection of her Majesty's naval and victualling stores.	U K	LXXXIII.—An act to amend the laws in force for the relief of the destitute poor in <i>Ireland</i> , and to continue the powers of the commissioners.	
LXV.—An act for the more speedy trial of certain homicides committed by persons subject to the mutiny act.	E & I	LXXXIV.—An act to continue the duties of excise on sugar made in the United Kingdom, and to amend the laws relating to the duties of excise.	G B & I
LXVI.—An act for the safe-keeping of petroleum.	G B & I	LXXXV.—An act to facilitate the transmission of moveable property in <i>Scotland</i> .	S
LXVII.—An act for obtaining a declaration of title.	E	LXXXVI.—An act to amend the law relating to commissions of lunacy and the proceedings under the same, and to provide more effectually for the visiting of lunatics, and for other purposes.	G B & I
LXVIII.—An act for amending the law relating to copyright in works of the fine arts, and for repressing the commission of fraud in the production and sale of such works.	G B & I	LXXXVII.—An act to consolidate and amend the laws relating to industrial and provident societies.	G B & I
LXIX.—An act for transferring from the admiralty to the board of trade certain powers and duties relative to harbours and navigation under local and other acts; and for other purposes.	G B & I	LXXXVIII.—An act to amend the law relating to the fraudulent marking of merchandise.	G B & I
LXX.—An act for giving effect to a convention between her Majesty and the King of <i>Denmark</i> for the mutual surrender of criminals.	U K	LXXXIX.—An act for the incorporation, regulation, and winding-up of trading companies and other associations.	G B & I
LXXI.—An act to apply a sum out of the consolidated fund and the surplus of ways and means to the service of the year one thousand eight hundred and sixty-two, and to appropriate the supplies granted in this session of parliament.	U K	XC.—An act for rectifying a clerical error in the act of the present session, chapter forty, with respect to the <i>African</i> slave trade treaty.	U K
LXXII.—An act to continue certain turnpike acts in <i>Great Britain</i> .	G B	XCI.—An act to incorporate the general council of medical education and registration of the United Kingdom, and for other purposes.	G B & I
LXXIII.—An act for continuing the copyhold, inclosure, and tithe commission, and entitling the commissioners to superannuation allowance.	E	XCII.—An act to limit the time for proceeding to elections in counties and boroughs in <i>Ireland</i> .	I
LXXIV.—An act to enable the commissioners of her Majesty's works to acquire additional land for the purpose of the "public offices extension act of 1859," by way of exchange for land already acquired but not wanted for the purposes of the said act.	E		

Chap.	Relating to	Chap.	Relating to
XCIII—An act for embanking the north side of the river <i>Thames</i> from <i>Westminster bridge</i> to <i>Blackfriar's bridge</i> , and for making new streets in and near thereto.		CII—An act to amend the metropolis local management acts.	E
XCIV—An act to authorize the inclosure of certain lands in pursuance of a certain report of the inclosure commissioners.	E	CIII—An act to amend the law relating to parochial assessments in <i>England</i> .	E
XCV—An act to amend the law relating to polling places in the boroughs of <i>New Shoreham</i> , <i>Cricklade Aylesbury</i> , and <i>East Retford</i> .	E	CIV—An act for the discontinuance of the Queen's prison, and removal of the prisoners to <i>Whitecross-street</i> prison.	E
XCVI—An act to render tenable during good behaviour the office of the officer of the Court of Common Pleas by whom the certificates of acknowledgment of deeds of married women are filed of record.	E	CV—An act to transfer the roads and bridges under the management of the commissioners of highland roads and bridges to the several counties in which the same are situate, and to provide for other matters relating thereto,	S
XCVII—An act to regulate and amend the law respecting the salmon fisheries of <i>Scotland</i> .	S	CVI—An act to amend the law relating to the appointment of county surveyors in <i>Ireland</i> .	I
XCVIII—An act for the amendment of an act of the session of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter one hundred and thirty-nine, intituled an act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks, and of an act amending the last-mentioned act.	G B & I	CVII—An act to give greater facilities for summoning persons to serve on juries, and for other purposes relating thereto.	E
XCIX—An act to amend the bankruptcy act (1861).	E	CVIII—An act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	E
C—An act to authorize improvement commissioners acting as burial boards to mortgage certain rates for the purposes of the burial acts.	E	CIX—An act to continue the corrupt practices prevention act (1854).	G B & I
CI—An act to make more effectual provision for regulating the police of towns and populous places in <i>Scotland</i> , and for lighting, cleansing, paving, draining, supplying water to and improving the same, and also for promoting the public health thereof.	S	CX—An act to enable boards of guardians of certain unions to obtain temporary aid to meet the extraordinary demands for relief therein.	E
		XI—An act to amend the law relating to lunatics.	E
		CXII—An act for establishing the jurisdiction of the charity commissioners in certain cases.	E
		CXIII—An act to amend the law relating to the removal of poor persons from <i>England</i> to <i>Scotland</i> , and from <i>Scotland</i> to <i>England</i> and <i>Ireland</i> .	G B & I
		CXIV—An act for the revention of poaching.	G B & I







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